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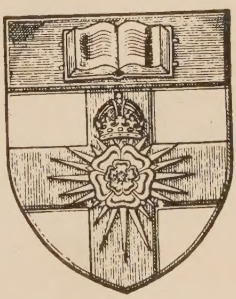

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ERRATA

Page 437: *David Widdicombe* appeared with Alexander Thompson Q.C. and Henry Keith for the appellants in *Arbuckle Smith & Co. Ltd.* v. *Greenock Corporation.*

Page 745: *Eric Myers* appeared with Stephen Chapman Q.C. in *Burton* v. *West Suffolk County Council.*

THE
WEEKLY LAW REPORTS
Volume II

Containing those cases which are intended to be included in The Law Reports.

[PROBATE, ETC., DIVISION.]

FILDES (FORMERLY SIMKIN) *v.* SIMKIN.

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Oct. 5, 6.

Lord Merriman P. and Phillimore J.

Husband and Wife — Maintenance — Justices — Revocation of order — Earliest date from which revocation can take effect—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 5 (*c*)—*Magistrates' Courts Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 76.

A husband whose wife had obtained a maintenance order against him, arranged for payments under the order to be made to an officer of the court for the wife's use, as provided by section 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895.[1] The husband continued these payments after the wife had divorced him and remarried. On her remarriage, the wife ceased to collect the payments, which accumulated in the hands of the court officer. The husband eventually applied under section 53 of the Magistrates' Courts Act, 1952, for the maintenance order to be revoked. The justices revoked the order, and took the view that the sums paid to the court officer since the wife's remarriage should be returned to the husband:—

Held, that the powers conferred on justices by section 76 of the Magistrates' Courts Act, 1952,[2] when revoking a maintenance order, to remit any sum due under the order do not include a power to order such remission to take effect from a date earlier than the date

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 5 (as amended by the Married Women (Maintenance) Act, 1949, s. 1 (1)): "The court "of summary jurisdiction to which "any application under this Act is "made may make an order or orders "containing all or any of the pro- "visions following, viz.:—. . . (*c*) A "provision that the husband shall "pay to the applicant personally, or "for her use, to any officer of the "court or third person on her behalf, "such weekly sum not exceeding five "pounds as the court shall . . . con- "sider reasonable."

[2] Magistrates' Courts Act, 1952, s. 76: "On the hearing of a com- "plaint for the enforcement, revoca- "tion, revival, variation or discharge "of an affiliation order or an order "enforceable as an affiliation order, "the court may remit the whole or "any part of the sum due under the "order."

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of the complaint applying for revocation. Accordingly, the justices had power to remit to the husband any sum due and unpaid on the date of his complaint, but no power to remit sums already paid.

APPEAL from Bolton justices.

A husband whose wife had obtained a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, continued to make payments under the order to an officer of the court, after the wife had obtained a decree absolute of divorce and had, unknown to the husband, remarried. The wife ceased to collect any money from the officer of the court after the date of her remarriage. After about £219 had accumulated in the hands of the collecting officer, he learned of the divorce and of the wife's remarriage. He thereupon paid out to the wife the sum of £78, the amount paid in for the period up to the date of her remarriage, but retained the balance of £141, the sum paid in for the period after the remarriage. The husband made a complaint to the justices that the order be revoked as from the date of the remarriage. The justices made an order in the terms asked for by the husband, the effect of which was that the sum of £141 would have been repayable to him. The wife appealed.

J. G. K. Sheldon for the wife.

The husband was not represented.

The following cases cited in argument were not referred to in the judgments: *Ruther* v. *Ruther* [3]; *Outerbridge* v. *Outerbridge*.[4]

LORD MERRIMAN P. This is an appeal by a wife from a decision of the Bolton borough justices, who on May 22, 1959, discharged a maintenance order dated February 22, 1952, requiring the husband to pay the sum of £3 per week. The ground on which the order was discharged was that the wife had not merely been divorced, but had remarried in November, 1957.

About the propriety of the order of discharge no question arises at all, but it is upon the curious situation reached by the operation of the order thus discharged that the present point arises.

The husband, taking advantage of section 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895, the Act which is the foundation of the magistrates' jurisdiction, had paid, not to the applicant personally but for her use to an officer of the court, the weekly sum which had been ordered in February, 1952. The fact that she had obtained a divorce against him cannot have escaped the notice of the husband, because he must presumably have been served with the proceedings, and there is no suggestion to the contrary. But apparently nobody knew about the remarriage in 1957 until about £219 had accumulated in the hands of the officer of the court. Attention was drawn to this matter and the officer sent for the wife, in order that he might find out why she

[3] [1903] 2 K.B. 270.

[4] [1927] 1 K.B. 368; 43 T.L.R. 33.

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was not collecting the money, as she had used to do fortnightly. He then learned, as I understand, for the first time, not only that she had been divorced but also that she had remarried. The result was that he decided to pay over that part of the accumulated money, amounting to £78, which had been paid in before the date of the remarriage, but he kept in suspense the balance, about £141. This is really the sum and substance of the dispute in this case, for the husband, in his complaint to the magistrates' court for revocation of the original order, complained that it should be revoked as from the date of the remarriage in November, 1957. He does not in terms ask for the money to be paid out to him, but the magistrates have taken it that that is the proper effect of his complaint, and the question is whether they had any right to act on the basis that he should be allowed to have the money back.

I must first point out that we have not had the advantage of the husband's presence, or of any argument on his behalf. The case first came on on June 23, 1959, when we adjourned it so that the husband, who is in Ecuador, might come if he were minded to do so; there was a suggestion that he might be here in October. It turns out that he is not here. He has written a letter very similar to a letter he wrote on the previous occasion. Of course he would be glad to have this money, but I gather that he is content to leave that to the court. His real desire is not so much to be heard on that topic as on some fancied claim for defamation of character which has arisen out of his going to Ecuador, as I understand it to be alleged, rightly or wrongly, with some money belonging to the wife. It is manifest that such a matter has no relevance to this appeal. We could not possibly entertain any such question in connection with the issue which it falls to us to determine. We therefore think that no good purpose would be served by adjourning the case till next June, which now appears to be the earliest date when he is likely to be in this country, but that we ought to deal with the matter on the material before us, and with the assistance of a very admirable statement of the facts and the reasons for their decision by the magistrates.

The magistrates set out the dates of the marriage, which was in May, 1943, of the original order which, as I have already said, was made on February 22, 1952, of the decree nisi, which was pronounced on November 27, 1953 (presumably on the ground of desertion, this having been the ground of the order), and of the making absolute of that decree on January 12, 1954. There follows a recital of the facts; of the collection by the officer of the court; that the wife ceased to call to collect the money after June 4, 1957; that early in 1959 she was asked to call at the court to discuss the matter, which she did; and then the fact of her remarriage on November 30, 1957.

The husband was represented before the magistrates by a solicitor, as was also the wife. The wife's solicitor submitted

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that there was no jurisdiction to discharge the order retrospectively. At this point I think it is desirable that one should look at the exact wording of the husband's complaint. The complaint was that the order of February, 1952, be set aside, the complainant alleging that since the making of the said order the wife had obtained a decree absolute of divorce and had remarried on November 30, 1957; "wherefore," the complaint goes on, "he "intends to apply to the court to discharge the said order as and "from November 30, 1957."

There is, of course, all the difference in the world between the remarriage as a ground for discharging the order prospectively and accepting the date of the remarriage as the date from which the order should be discharged. The two things are in different hemispheres, and the question really is whether the husband had any right to ask the magistrates' court to do what, in effect, they have done, namely, to discharge the order as from November 30, 1957. I have already referred to the decree of divorce, which was made absolute at the beginning of 1954. It is well settled by *Bragg* v. *Bragg* [1] and a string of cases in this court, and finally in the Court of Appeal, which upheld the propriety of that decision, that divorce per se does not avoid an order in a magistrates' court under the married women's code, if I may so call it. It requires no order of that court, who may, at their discretion, make an order varying or discharging the original order on the ground of the divorce, having considered all the circumstances of the case. I need only add that the Divorce Court itself constantly acts upon that basis, and instead of inviting or compelling the parties to go through the procedure necessary, for example, to obtain custody of the children, or maintenance for the wife, or for the wife and children of whom she has the custody, it relies, and encourages the parties to rely, on an existing magistrates' court order. The manifest convenience of that practice has often been alluded to. It saves expense, and certainly in past years afforded much better facilities for enforcement than were available if the matter were brought into the High Court.

I need say no more about that, but it does lead to this reflection. The magistrates have, in effect, acted on what they thought would be better justice (and it is an argument not at all without common sense) to return this money to the husband. Prima facie, it sounds an extremely sensible thing to do. But even so, when we are talking about justice and equity, one has to remember that there is an old maxim that it is only to the vigilant, not to those who go to sleep, that equity lends its assistance. This man went very firmly to sleep in connection with the divorce. He may not have been entitled as of right to get the order set aside, but it would have been a ground on which, if he had chosen to do so, he could have brought the matter before the court. He did nothing, and he continued to do nothing.

[1] [1925] P. 20; 41 T.L.R. 8.

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although he must have known, if he knew anything at all about divorce, that the making of a decree absolute would entitle the wife to remarry. But he has just gone on, in Ecuador, or wherever he happened to be, in blissful unconcern with the constant payments, through his bank or otherwise, to this wife who had remarried.

So there is something to be said about the equitable aspect of this matter, even though it might be thought that in common decency, the wife, although under no legal obligation to communicate with the court, would have let her former husband have a postcard to say that she was now remarried and was being supported by a new husband. However, she did not, and we must, therefore, decide this matter on principle.

I know of no authority which enables a magistrates' court to ante-date an order earlier than the date of the complaint. That they are not bound by the date of the hearing, but can date the operation of the order as from the date of the complaint is, I think, perfectly well established, and I do not propose to cite any authorities for that. But when one looks at the Act of 1895 itself, it seems to me to be of the essence of section 5 that the orders are prospective. Let us examine the things the magistrates have power to do under section 5. First of all, they may make a separation order by providing that the applicant "be no longer "bound to cohabit with her husband"; this is plainly prospective. They may provide that the legal custody of any children while under the age of 16 be committed to the applicant; that, again, is plainly prospective. Then there is the provision to which I have already referred, "that the husband shall pay to the applicant "personally, or for her use, to any officer of the court . . . such "weekly sum not exceeding £2"—the original limit—"as the "court shall, having regard to the means both of the husband "and wife, consider reasonable." Then follows a provision relating to costs.

There is nowhere any indication that an order made on any of the grounds which are set out in section 4, as amended, can be made to operate retrospectively from the date when such ground first arose. On the contrary, I think it is as plain as anything can be that the order, whatever form it takes, is a prospective order, and, as I have ventured to suggest in the course of the argument, it is, as far as I know, unheard of to say that because a husband deserted his wife, say, on January 1, an order made on January 1 of the succeeding year could be dated back to the date of the desertion. It really is not necessary to follow out the very curious consequences which would result from any such order. To mention only one, it would ipso facto create arrears for 12 months which never became arrears when they were not paid from time to time as those months slipped by. I cannot believe that there is any such power.

There remains to be considered the ground on which the

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magistrates thought that they had jurisdiction. Founding themselves upon section 76 of the Magistrates' Courts Act, 1952 [His Lordship read section 76], the magistrates held that this sum of £141 is an amount due under the order, and can therefore be remitted. I do not take that view. I think that this section, which is one of a small group of sections numbered 74 to 76 under the heading "Arrears under affiliation order, etc.," refers to the remission of sums due and unpaid, and I cannot find any sort of reference in these sections to sums which have in fact been paid, under the authority of section 5 (*c*) of the Act of 1895, to the court officer on behalf of the wife.

In my opinion, sensible as it may appear to be, this order for the repayment, or for the ante-dating of the revocation and consequent repayment, of the sum of £141 is misconceived, and this appeal must, to that extent, be allowed.

There is a case in the High Court to which I have not referred, about which my brother knows, and to which I hope he will refer, which tends in the same direction.

PHILLIMORE J. I agree, and since we are differing from the justices, I would add a few words of my own.

It is clear, and the justices have made it clear in paragraph 8 of their reasons, that in taking the course they did they were swayed by their opinion of the merits. I confess to some sympathy with them in that view. In seeking to remit the amounts which this husband was liable to pay under the order which the wife had obtained against him, the amounts in question being sums paid to the collecting officer since her remarriage, they sought to found themselves on section 76 of the Magistrates' Courts Act, 1952, and, as Lord Merriman P. has pointed out, their power under that section was to remit the whole or any part of the sum due under the order.

If it had been intended that magistrates' power to remit should be retrospective, and should extend back beyond the date of any complaint brought by the party seeking remission, then that is something which must have been made clear beyond any possibility of dispute in the wording of the statute. In the absence of such wording, it would be quite wrong, in my opinion, for us to put any interpretation on that section which would give it retrospective effect. There is no indication that Parliament intended that the magistrates should have any such power. The sums with which they were dealing, totalling £141, were sums which had been paid under their own order to the collecting officer of the court prior to the date of the husband's complaint.

In my judgment, under section 76 they had power as from the date of that complaint to remit any sum which was then due, that is to say, any sum which was accruing due under the order, but they had no power whatever to remit sums which had in fact been paid. It is, I think, clear, that under the provisions of section 5 (*c*) of the Summary Jurisdiction (Married Women) Act,

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1895, payment to the collecting officer was equivalent to payment to the wife. He received it for her use and on her behalf.

In taking the view I have expressed I am fortified by observing that this court in *Smyth* v. *Smyth*,[2] when discharging at the instance of a husband an order for maintenance in favour of a wife, discharged it as from the date of the complaint, and I think, too, that some assistance is to be derived from the parallel jurisdiction in the Divorce Court, as illustrated by *Style* v. *Style and Keiller*.[3] That was a case in which the husband was seeking a settlement of his wife's property under section 24 (1) of the Matrimonial Causes Act, 1950, a section which is worded in very wide terms, and the Court of Appeal, in dealing with the question of the settlement, were asked to determine from what date it would be effective. Singleton J., after reciting the section, stated the practice as follows[4]: "The section "appears to me to give to the injured husband a right to "ask the court to order such settlement as it thinks reasonable "to be made of the property, or any part thereof, for the benefit "of the innocent party. If application is not made until some "considerable time after the decree absolute has been granted, "I do not think that the court should order a settlement which "would have the effect of securing income as from the date of "the decree absolute. On the other hand, I cannot think that "it is right to say, as Mr. Laskey submitted, that if application "has been made by the injured party and thereafter the hearing "of the application is held up for one reason or another—perhaps "for years—the court has no power to deal with the period which "elapses between the notice of application and the execution of "the settlement. The rights of the injured party, the petitioner, "might be entirely defeated if that were so; he might be "dead before the litigation ended, or before a settlement was "executed." And then this is the sentence I have particularly in mind: "Once notice of application is given to the wife, the "court ought to regard that as done which ought to have been "done, if and when the court comes to a conclusion that the "settlement ought to have been ordered. It is only thus that "the section can be made effective, and given its true meaning. "In those circumstances, I feel that it is right that the court "should say that the order should apply as from February 1, "1951; that is, the date on which notice of application was given "to the wife's solicitors."

That case, of course, is dealing with a different statute and a different section, but at the same time, as a statement of the principle to be applied it is, I think, of some assistance.

For these reasons, I agree that the justices' order, in so far as they sought to remit the moneys due prior to the date of the husband's complaint, should be reversed.

[2] [1956] P. 427; [1956] 3 W.L.R. 210; [1956] 2 All E.R. 476.

[3] [1954] P. 209; [1954] 2 W.L.R. 306; [1954] 1 All E.R. 442.

[4] [1954] P. 209, 218.

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LORD MERRIMAN P. The result, then, is that the appeal will be allowed to the extent only that the order has been ante-dated to the date of the remarriage. The order will stand in so far as it revokes or discharges the original order. The magistrates dated it from May 22, 1959, which was the date of the hearing. Our judgment is that it should have been ante-dated to May 12, 1959, which is the date of the complaint. But, in fact, nothing turns on those 10 days, because the money which is the subject of the dispute was already, and had long since been, in the court. There is no change in the monetary situation between those dates. Breaking it up in terms of the notice of appeal, so that there may be no misapprehension about it, there is no disturbance of the finding that the order should be discharged, but only of the finding that the sum should be remitted as from November 30, 1957. There will be no order as to costs.

Appeal allowed in part.

Solicitors: *Woodcock, Ryland & Co. for Russell & Russell, Bolton.*

[CHANCERY DIVISION.]

1959
Nov. 19, 20.

Wynn-Parry J.

STYLO SHOES LTD. *v.* PRICES TAILORS LTD.

[1959 S. 2174.]

Landlord and Tenant—Act of 1927*—Notice to quit—Service of notice—Limited company tenants of business premises—Removal by company to new registered office—Notice determining tenancy sent by post to old address—Letter containing notice redirected and received by company—Whether valid service—"Place of abode"—"Person"* *Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 23 (1), 25 (1)*—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1), 66.

Statute—Construction—Service of document by post—Meaning of "place of abode" and "person"—Limited company—Landlord and Tenant Act, 1927, *s.* 23 (1).

A company incorporated under the Companies Act, 1929, were the tenants of business premises in Manchester for a term of 21 years from November 1, 1938. At the date of the lease the tenants' registered office and principal place of business were in Huddersfield, but on February 2, 1957, they transferred them to Leeds, at the same time sending notice of the change to their customers and to the landlords of the Manchester premises. They also instructed the Huddersfield postmaster to redirect all their correspondence to the Leeds address. On November 25, 1958, the landlords sent to the tenants at the Huddersfield address a registered letter in which was enclosed a notice under section 25 of the Landlord and Tenant Act, 1954, to determine the tenancy on December 2, 1958, which letter was received by the tenants at their Leeds address after it had been redirected by the Huddersfield postmaster. On a summons by the

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tenants for a declaration that the landlords' notice of November 25, 1958, having been sent through the post in a registered letter to their secretary at a place not being their principal office nor their last known place of abode nor their registered office was not duly served on them pursuant to section 66 (4) of the Landlord and Tenant Act, 1954, and section 23 (1) of the Landlord and Tenant Act, 1927 [1]:—

Held, (1) that the word "person" in section 23 (1) of the Act of 1927 was wide enough to include a limited company which was intended by the Act to have the benefits thereby conferred, and to be subject to the obligations thereby imposed, on a tenant, and the provisions of that subsection applied.

(2) That there had been a valid service of the notice under section 23 (1). The purpose of the section was to ensure that a notice was given and actually received, and its requirements were satisfied if a letter containing the notice was delivered to and in fact received by the person to whom the notice was given; in the case of a limited company "place of abode" meant "place of "business"; while so far as the second mode of service was concerned the act of sending a letter through the ordinary post was equivalent to "leaving it . . . at his last known place of abode"; and that, therefore, since the letter was in fact delivered and received, the landlords' failure to specify the correct address did not invalidate the service under the section.

Sharpley v. *Manby* [1942] 1 K.B. 217; [1942] 58 T.L.R. 91; [1942] 1 All E.R. 66 applied.

Held, further, that section 23 (1) was permissive as to mode of service, and the modes set out therein were not exhaustive, and that, as the clear intention of the legislature that the notice should be received by the person intended to receive it had been achieved, it was immaterial that the letter had reached the tenants by way of their old address.

Tennant v. *London County Council* (1957) 55 L.G.R. 421 applied.

ADJOURNED SUMMONS.

The following statement of facts is taken substantially from the judgment of Wynn-Parry J.

[1] Landlord and Tenant Act, 1927, s. 23 (1): "Any notice, request, "demand or other instrument under "this Act shall be in writing and "may be served on the person on "whom it is to be served either personally, or by leaving it for him at "his last known place of abode in "England or Wales, or by sending "it through the post in a registered "letter addressed to him there, or, "in the case of a local or public "authority or a statutory or a public "utility company, to the secretary or "other proper officer at the principal "office of such authority or company, "and in the case of a notice to a "landlord, the person on whom it is "to be served shall include any agent "of the landlord duly authorised in "that behalf."

S. 25 (1): ". . . 'statutory com- "'pany' means any company con- "stituted by or under an Act of "Parliament to construct, work or "carry on any gas, water, electricity, "tramway, hydraulic power, dock, "canal or railway undertaking. . . ."

Landlord and Tenant Act, 1954, s. 24 (1): "A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions of "this Part of this Act; and, subject "to the provisions of section 29 of "this Act, a tenant under such a "tenancy may apply to the court for "a new tenancy. . . ."

S. 25 (1): "The landlord may "terminate a tenancy to which this "Part of this Act applies by notice "given to the tenant in the prescribed "form . . ."

S. 66 (4): "Section 23 of the "Landlord and Tenant Act, 1927 "(which relates to the service of "notices), shall apply for the purposes "of this Act."

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A company incorporated under the Companies Act, 1929, Stylo Shoes Ltd. (hereinafter called "the tenants"), previously called the Stylo Boot Company Ltd., were tenants of premises at 41, Market Street, Manchester, for a term of 21 years from November 1, 1938, under a lease dated October 11, 1938.

At the date when the lease was granted, the tenants' registered office and principal place of business was 15/17, Chancery Lane, Huddersfield. On February 2, 1957, they transferred their registered office and principal office and place of business from Huddersfield to Conway Road, Harehills Lane, Leeds. They took the precaution on that occasion of sending out circulars not only to their customers but also to the landlords, Prices Tailors Ltd., giving notice that they had changed their registered office and principal place of business to Conway Road, Harehills Lane, Leeds, and the court drew that inference from the form of circular sent out. On March 4, 1957, and annually thereafter, the tenants gave a written direction to the postmaster of Huddersfield directing him to readdress all correspondence to their new address at Conway Road, Harehills Lane, Leeds.

On November 25, 1958, the landlords addressed to the tenants at their old address at Huddersfield a registered letter enclosing a notice pursuant to section 25 of the Landlord and Tenant Act, 1954, to determine the tenancy on November 2, 1959. Nothing turned on the form of the notice which was enclosed with that letter. As a result of the directions which had been given to the postmaster at Huddersfield, the letter was in fact received by the tenants at their Leeds address on December 2, 1958.

Following on the receipt of that letter, on January 2, 1959, the tenants wrote two letters, or caused two letters to be written by their solicitors, to the landlords. The first read: "Our clients, "the Stylo Boot Company Ltd., have handed us a notice of "termination of tenancy from you to them in respect of the above "property dated November 25, 1958. We hereby give you notice "that our clients will not be willing to give up possession of the "premises on the date specified in the notice." That paragraph amounted to the counter-notice contemplated by the Act. The letter continued: "Our clients do not admit the validity of the "notice served and this reply thereto is given without prejudice "to any contention that our clients may hereafter raise respecting "the validity of the notice." The second letter the tenants' solicitors wrote to the landlords read: "Our clients, the Stylo "Boot Company Ltd., have handed us your notice requiring "information," and the information required by the statute was then given.

On March 16, 1959, the tenants issued an application in the Manchester County Court seeking a new tenancy, paragraph 4 of which referred to the date, November 25, 1958, of the giving of the notice. It was then realised that the Manchester County Court had no jurisdiction to deal with the matter, because of the amount of the rateable value of the premises, and the tenants

took the necessary step by way of application to have the matter transferred to the High Court. They then took an appointment before the master on June 16, 1959, asking for directions as to filing evidence. The evidence was not filed and on July 15 the landlords restored the summons for hearing on July 28, 1959. On July 30, 1959, the tenants took out this originating summons raising for the first time in specific terms the reasons which they sought to advance for saying that the notice was not a valid notice.

By the summons they asked, inter alia, for a declaration that the notice, purporting to be a notice by the landlords, as landlords of the premises, to the tenants as tenants thereof, the tenants being a company regulated by the Companies Act, 1948, to determine the tenants' tenancy thereof on November 2, 1959, and sent through the post in a registered letter addressed to the tenants' secretary at a place not being the tenants' principal office—and here there was added by amendment by leave of the court during the hearing, the words "nor their last known place of abode nor "their registered office"—was not duly served on the tenants pursuant to section 66 (4) of the Landlord and Tenant Act, 1954, and section 23 (1) of the Landlord and Tenant Act, 1927.

A. E. Holdsworth for the tenants.
J. T. Plume for the landlords.

The following cases not referred to in the judgment were cited in argument: *Bolsom (Sidney) Investment Co. Ltd.* v. *Karmios (E.) & Co. Ltd.*[2]; *In re the Estate of Park, decd.*[3]; *Rex* v. *Braithwaite*[4]; *In re Follick (J. and M.) Ltd.*[5]; *Ex parte Portingell*[6]; *Reg.* v. *Deputies of Freemen of Leicester.*[7]

WYNN-PARRY J. stated the facts substantially as set out above and continued: Under the provisions of the Landlord and Tenant Act, 1954, the validity or otherwise of the service of the requisite notice is to be determined by reference to section 23 of the Landlord and Tenant Act, 1927. [His Lordship read that section and continued:] The first observation which I would make is that there are four ways of effecting service: first, on the person on whom it is to be served personally; secondly, by leaving it for him at his last known place of abode in England or Wales; thirdly, by sending it through the post in a registered letter addressed to him there—that is at his last known place of abode in England or Wales—and the fourth, which is a special case, refers to the case of a local or public authority or a statutory or a public utility company.

[2] [1956] 1 Q.B. 529; [1956] 1 All E.R. 536.
[3] [1954] P. 89; [1953] 2 All E.R. 1411.
[4] [1918] 2 K.B. 319; 34 T.L.R. 406.
[5] (1907) 97 L.T. 645; 52 S.J. 13.
[6] [1892] 1 Q.B. 15; [1891] 8 T.L.R. 40.
[7] (1850) 15 Q.B. 671.

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I think that I can dispose of the fourth case by reference to section 25, the definition section in the Act of 1927. It has been urged that I am not bound by the definition of "statutory "company" in section 25 (1) because all that is done so far as regards section 66 of the Landlord and Tenant Act, 1954, with its provisions as to notice, is to make section 23 of the Landlord and Tenant Act, 1927, apply for the purposes of the later Act. But the phrase "statutory company" is not a self-explanatory phrase, and it appears to me that on any question involving an interpretation of section 23 I am necessarily bound to turn for help to the definition section, section 25 of the Act of 1927. There the expression "statutory company" is given a very special meaning. It means "any company constituted by or "under an Act of Parliament to construct, work or carry on any "gas, water, electricity, tramway, hydraulic power, dock, canal "or railway undertaking." It is therefore a definition which effectively excludes this company from falling under the phrase "statutory company" for the purposes of this case. That means that the defendants were left to effect the service otherwise than under the latter part of the section. As the plaintiffs are a company incorporated under the Companies Act, 1929, the first method, namely, personal service, could not be effected. Therefore, one is left with the second and third methods, "by leaving "it for him at his last known place of abode, or by sending it "through the post in a registered letter addressed to him there."

The word "him" is used in both cases, but I entertain for myself no doubt that the word "person" in section 23 (1) is to be taken to be wide enough to include a company incorporated under the Companies Act. A perusal of the Act shows one again and again that, while no express reference is made to a company incorporated under the Companies Act, such an artificial person (and, after all, a company is only an artificial person) is to have the benefits conferred by the Act and be subject to the obligations imposed by the Act on a tenant. Therefore, I regard section 23 (1) as applying to a limited company, and, therefore, it applies to the plaintiffs. In this case the third method was not followed in the sense that, although the defendants sent the notice by registered letter, they did not address the letter to the correct address, namely, Conway Road, Harehills Lane. It is therefore argued that the provisions of the section were not complied with. If that argument was correct, then there is an air of utter unreality about this case, because it is conceded that the letter was in fact received by the plaintiffs on December 2, 1958.

The matter is not free from authority. I was referred to *Sharpley* v. *Manby*.[1] The headnote reads: "A rent audit notice, "stating that an estate rent audit will be held at a certain time "and place, and requesting a tenant then to pay the rent due "from him, is a sufficient notice in writing to the tenant requiring

[1] [1942] 1 K.B. 217; 58 T.L.R. 91; [1942] 1 All E.R. 66.

" him to pay the rent within section 12 (1) (*b*) of the Agricultural " Holdings Act, 1923, and if such a notice is sent to the tenant " by the ordinary non-registered post and is delivered to and " received by him, there is a valid service of the notice on him " under section 53." Section 53 is worth reading because it is for all practical purposes in the same terms as the material part of section 23 (1) of the Landlord and Tenant Act, 1927. It reads: " Any notice . . . under this Act may be served on the person to " whom it is to be given either personally, or by leaving it for " him at his last known place of abode in England, or by sending " it through the post in a registered letter addressed to him " there." The leading judgment in that case was given by MacKinnon L.J. He said in the course of his judgment[2]: " Whether the facts were ever gone into by the arbitrator I do " not know, but the special case seems to assume that the letters " were delivered by ordinary post and received by the tenant. " The whole argument must depend on that assumption, and the " sole question for our decision is whether the tenant can argue " that because the ordinary post and not the registered letter " post was used the notice was not properly served and therefore " was a bad notice. The county court judge appears to have " thought that some assistance was to be derived from a case in " Scotland under a totally different Act, *Department of Agri-* " *culture for Scotland* v. *Goodfellow*.[3] A notice had been served " by ordinary post, but the court was there concerned with a " special provision of the Agricultural Holdings (Scotland) Act, " 1923, which required written notice to be given either in the " same manner as a notice under the Removal Terms (Scotland) " Act, 1886, or in the form and manner prescribed in the Sheriff " Courts (Scotland) Act, 1907. Rule 113 in the first schedule to " the latter Act provided that removal notices ' may be given ' " (1) by a messenger-at-arms; (2) by a sheriff officer, or (3) by " registered letter. It is quite clear that those provisions required " a certain ceremonial service, and if that ceremony had not been " complied with, there had not been service within the require- " ments of the Act. But section 53 of the Act with which we are " now concerned does not require any ceremonial. It provides " that a notice may be served on the person to whom it is to be " given either personally, or by leaving it for him at his last " known place of abode. It adds, as an alternative, that the " person who has to serve the notice may do so by sending it " through the post in a registered letter. If he did that, no doubt, " he would get the additional advantage of being able easily to " prove that he had served the notice, by producing the postal " receipt, but he can serve the notice personally or by leaving it " at the tenant's last known place of abode. It seems to me " impossible to say that under that section, if you use the post, " you can only do so by the medium of a registered letter, and

[2] [1942] 1 K.B. 217, 220.

[3] 1931 S.C. 556.

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" that, if you use the ordinary post, and the letter is delivered " to and received by the person to whom the notice is to be given, " you have not complied with the requirements of the Act. In " the result, I think that the county court judge was wrong in " that part of his decision."

It is to be observed from that reasoning that MacKinnon L.J. was apparently treating the act of sending a letter by ordinary post as equivalent to leaving it for the proposed recipient at his last known place of abode; and it appears to me that that, as I read it, being part of the reasoning running through his decision, is binding upon me, and I am bound to interpret section 23 (1) so far as the second mode of service is concerned as being satisfied if the ordinary post is used. It is true that the last known place of abode was not specified on the letter, but the words of MacKinnon L.J. appear to me to be wide enough to cover that, because he says if you use the ordinary post and the letter is delivered to and received by the person to whom the notice is to be given, you have complied with the requirements of the Act. Here, as a result of the direction to the postmaster at Huddersfield given by the tenants themselves, the letter was in fact, to use the words of MacKinnon L.J., left at the tenant's last known place of abode. I am unable to accept the argument on that basis that the failure to specify the correct address is fatal to the landlords. The vital thing is that the letter was in fact delivered. The whole purpose of section 23 is to see that a notice is given and actually received, and that happened in this case.

I would observe in passing that " place of abode " is the equivalent of " place of business," and that that is so appears from *Morecambe and Heysham Corporation* v. *Warwick*.[4] But there is another point which to my mind is fatal to the tenants in this case. On the reasoning of the members of the Court of Appeal in *Tennant* v. *London County Council*[5] I feel constrained to construe section 23 (1) as being permissive so far as the mode of service is concerned. It is perfectly true, as was pointed out by Mr. Holdsworth, that the requirement that the notice, etc. is to be in writing is imperative—" Any notice, request, demand or " other instrument under this Act shall be in writing "; but then when the subsection goes on to deal with service the permissive verb " may " is used, and that is in clear contradistinction to the imperative " shall." I can see no canon of construction which would entitle me to qualify the nature of the verb " may " by anything that has gone before in the subsection. It follows that, although there are certain modes set out in the subsection, they are not to be regarded as being exhaustive. It therefore appears to me, apart from the reasoning in *Sharpley* v. *Manby*,[6] that I am entitled to say, without praying in aid the second method, that is, leaving it for him at his last known place of abode, that it is sufficient if the letter is sent to and received by

[4] (1958) 56 L.G.R. 283; 9 P. & C.R. 307.

[5] (1957) 55 L.G.R. 421.

[6] [1942] 1 K.B. 217.

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the plaintiffs. That in fact happened, and it matters not to my mind on this particular reasoning that the letter got to Leeds via Huddersfield, because I am now dealing with a method which is *ex hypothesi* outside the section. Clearly what did in fact happen achieved the clear intention of the legislature, namely, that the notice should be received by the person intended to receive it.

On that ground I find against the tenants on this summons.

Another point was adumbrated, namely, that in the circumstances which I recited earlier in this judgment the tenants must be taken to have waived any invalidity in the service of notice. It is not necessary for me to express any decided view on that matter having regard to the view which I have taken under section 23; but in case the matter should go further and in case it should be of any assistance to the Court of Appeal, I will express the view that, on the facts which I have recited, the tenants must be taken to have waived any invalidity, had there been any invalidity, in the service of notice. I think, for myself, on this part of the case that the reasoning of the Court of Appeal in *Tennant* v. *London County Council* [7] applies.

Therefore, for those reasons, I propose to dismiss this summons with costs.

Order accordingly.

Solicitors: *Ward Bowie & Co. for Joseph Wurzal Co., Leeds; Simmons & Simmons.*

K. R. A. H.

[7] 55 L.G.R. 421.

[HOUSE OF LORDS.]

H. L. (E.)*

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Oct. 28;
Nov. 30.

CONTRACT AND TRADING CO. (SOUTHERN) LTD. . . . . APPELLANTS;

AND

BARBEY AND OTHERS . . . . . RESPONDENTS.

Exchange Control—Proceedings for debt not payable without Treasury permission—Implied term of contract—Bill of exchange—Payment outside United Kingdom—Holders of bills resident outside scheduled territories—Treasury consent to payment of bills not obtained—Action on bills in England by holders—Right of foreign creditor to payment—Exchange Control Act, 1947 (10 & 11 *Geo.* 6, *c.* 14), *ss.* 5, 33 (1), *proviso*, *Sched.* 4, *para.* 4.

Debt—Accrual—Time for payment—Debt subject to Treasury consent—Exchange Control Act, 1947.

By section 5 of the Exchange Control Act, 1947: "Except with "the permission of the Treasury, no person shall do any of the

* *Present*: VISCOUNT SIMONDS, LORD GODDARD, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

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"following things in the United Kingdom, that is to say—(*a*) make "any payment to or for the credit of a person resident outside the "scheduled territories; or (*b*) make any payment to or for the "credit of a person resident in the scheduled territories by order "or on behalf of a person resident outside the scheduled territories; "or (*c*) place any sum to the credit of any person resident outside "the scheduled territories. . . ."

By section 33: "(1) It shall be an implied condition in any "contract that, where, by virtue of this Act, the permission or "consent of the Treasury is at the time of the contract required for "the performance of any term thereof, that term shall not be "performed except in so far as the permission or consent is given "or is not required: Provided that this subsection shall not apply "in so far as it is shown to be inconsistent with the intention of "the parties that it should apply, whether by reason of their "having contemplated the performance of that term in despite of "the provisions of this Act or for any other reason. (2) Notwith-"standing anything in the Bills of Exchange Act, 1882, neither "the provisions of this Act, nor any condition, whether express or "to be implied having regard to those provisions, that any payment "shall not be made without the permission of the Treasury under "this Act, shall be deemed to prevent any instrument being a bill "of exchange or promissory note. (3) The provisions of Schedule IV "to this Act shall have effect with respect to legal proceedings, "arbitrations, bankruptcy proceedings, the administration of the "estates of deceased persons, the winding up of companies, and "proceedings under deeds of arrangement or trust deeds for behoof "of creditors."

By paragraph 4 (1) of Schedule IV: "In any proceedings in a "prescribed court and in any arbitration proceedings, a claim for "the recovery of any debt shall not be defeated by reason only of "the debt not being payable without the permission of the Treasury "and of that permission not having been given or having been "revoked. . . ."

The plaintiffs were foreigners, who were the holders in due course of bills of exchange amounting to £8,700, of which the defendants, an English company, were the acceptors. The plaintiffs were resident outside the scheduled territories, and, accordingly, Treasury permission was required by virtue of the Exchange Control Act, 1947, for the payment of the bills by the defendants to the plaintiffs. No such permission was granted. The plaintiffs sued the defendants on the bills of exchange and applied for summary judgment under R.S.C., Ord. 14. Apart from the possible effect of the Act of 1947, the defendants did not dispute their liability on the bills. The defendants contended that the plaintiffs' claim was defeated, not only by the withholding of Treasury consent, but also by the implied term in section 33 (1) of the Act of 1947, and that therefore the plaintiffs could not bring themselves within paragraph 4 of Schedule IV to the Act, which was limited to cases where the parties had excluded the implied term:—

Held (Lord Keith of Avonholm dissenting), that paragraph 4 of Schedule IV was apt to include an obligation arising under a bill of exchange as well as any other monetary obligation. A debt existed even though Treasury permission had not been granted, and it might not be paid without that permission. Accordingly, a debt arising under a bill of exchange was one to which paragraph 4 applied, and a claim for its recovery was not defeated by the fact that permission to pay had not been given (post, p. 20).

The Act does not provide a moratorium for debtors but only

controls the immediate destination of the payments they make. Moneys due under judgments can be paid into court, thus discharging the debtor, and the fund itself still remains out of control of the creditor until consent has been obtained (post, pp. 20, 21, 23).

Cummings v. *London Bullion Co. Ltd.* [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383 applied.

Decision of the Court of Appeal [1959] 2 Q.B. 157; [1959] 2 W.L.R. 568; [1959] 2 All E.R. 145 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R. and Pearce L.J.).

This was an appeal from an order of the Court of Appeal dated March 12, 1959, dismissing an appeal by the appellants, Contract and Trading Co. (Southern) Ltd., from an order of McNair J. made in chambers on February 26, 1959, whereby he dismissed an appeal by the appellants from an order of Master Jacobs dated May 23, 1958. In the action the respondents, Edmond Barbey, Georges Lombard, Richard Pictet, Jean Ernest Bonna, Raymond Barbey, Marcel Odier and Thierry Barbey (carrying on business as Lombard, Odier & Cie.) were plaintiffs and the appellants were defendants. Leave to appeal to the House of Lords was granted by the Court of Appeal on March 12, 1959.

The facts are stated in the opinion of Viscount Simonds.

Patrick O'Connor and *Raymond Kidwell* for the appellant company.

Norman Tapp for the respondents.

No authorities were cited besides that mentioned in their Lordships' opinions.

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS. My Lords, this appeal raises a short but by no means easy question upon the meaning and effect of certain provisions of the Exchange Control Act, 1947.

The facts are not in dispute. The respondents carry on business and are resident at Geneva in Switzerland, a country not within the scheduled territories as defined by the Act that I have mentioned. As holders in due course of three bills of exchange for a total sum of £8,700, of which the appellants were acceptors and which were dishonoured on presentation, they brought the action out of which this appeal arises against the appellants in the Queen's Bench Division, claiming payment of the sum of £8,700. Upon their application under R.S.C., Ord. 14, r. 1, to sign final judgment, the appellants sought leave to defend the action upon the ground (the only ground, as I understand, that was open to them) that the Act afforded them a good defence to the action. It is this question which, having been determined

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adversely to the appellants by the master and the learned judge in chambers and by the Court of Appeal, has now reached your Lordships' House. It has conveniently throughout been treated as a question of law finally to be disposed of upon an interlocutory application, and I see no objection to this course.

The Act, of which the long title is, "An Act to confer powers, "and impose duties and restrictions, in relation to gold, currency, "payments, securities, debts, and the import, export, transfer "and settlement of property, and for purposes connected with "the matters aforesaid," was a far-reaching measure designed for the protection of the national economy. It is with one only of its many aspects that this case is concerned, namely, the making of a payment in the United Kingdom to or for the credit of a person resident outside the scheduled territories, which, as I have already said, do not include Switzerland. For this matter special provision is made by section 5, which falls within Part II of the Act, but there are general provisions covering this and other prohibited transactions to which it will be necessary to refer. The relevant part of section 5 is as follows (I note that per incuriam section 6, not section 5, has been treated in the courts below as the material section, but nothing turns on this). [His Lordship read section 5 and continued:]

It is common ground that Treasury permission for payment of the sum of £8,700 by the appellants to or for the credit of the respondents had not been given, either at the date of presentation of the bills of exchange or at the date of the issue of the writ in the action. Therefore, said the appellants, the bills were not due and payable and no action lay upon them. And this plea they reinforced by reference to section 33 of the Act to which I refer.

That section, which is in Part VI of the Act entitled "Supplemental," provides as follows: [His Lordship read section 33 and continued:] I pause to note that this section shows upon its face that the contractual obligation of payment created by a bill of exchange is a term for the performance of which Treasury permission is required. And I would also observe how attractively simple at this stage is the argument presented by the appellants. Write out, they say, the condition implied by the statute and you get a promise to pay on the due date, or on the date when Treasury permission is given, whichever is the later date. It is on that date and not before it that the bill becomes due and actionable. My Lords, I might, while wondering that the legislature had thought fit to deprive of their apparent rights creditors, whose only fault lay in residence outside the scheduled territories, without making any countervailing provision for their protection, I might, I say, have been compelled to an unwilling acquiescence in this argument if the Act had ended with subsection (2) of section 33. But subsection (3) of the same section and Schedule IV to which it refers, justify and demand a

different interpretation to be put upon section 5 read in conjunction with section 33 (1) and (2).

Schedule IV provides by paragraph 1 that the provisions of Part II of the Act shall apply to sums required to be paid by any judgment or order of any court or by any award, as they apply in relation to other sums, with the implication that such sums are not to be paid except with the permission of the Treasury; by paragraph 2 that nothing in the Act shall be construed as preventing the payment by any person of any sum into any court in the United Kingdom, but that the provisions of Part II should apply to the payment of any sum out of court, whether under an order of the court or otherwise, to or for the credit of any person resident outside the scheduled territories; by paragraph 3 for the making of rules of court in regard to payment into court and other matters. Paragraph 4 is of vital importance. It is as follows: "(1) In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Treasury and of that permission not having been given or having been revoked. (2) No court shall be prescribed for the purpose of this paragraph unless the Treasury are satisfied that adequate provision has been made therefor by rules of court for the purposes specified under the last preceding paragraph" (i.e., inter alia, for payment into court). The High Court of Justice is such a prescribed court. Paragraphs 5 and 6 may also be mentioned, for their provisions, though not directly in point, undoubtedly fit better into the scheme of the Act for which the respondents contend. The former paragraph provides that in any bankruptcy, winding up of any company, or administration of the estate of any deceased person as therein mentioned, a claim for a sum not payable without the permission of the Treasury shall, notwithstanding that the permission has not been given or has been revoked, be admitted as if it had been given and had not been revoked, and paragraph 6 provides that a debt for the payment of which the permission of the Treasury is required shall, if in other respects it complies with the requirements therein mentioned, be allowed to be a good petitioning creditor's debt notwithstanding the said requirement, if and to the extent that the debt can be satisfied either by a payment into court or by a payment to a blocked account. This tenderness being shown to creditors in the cases to which paragraphs 5 and 6 apply, it might well be thought strange if other creditors resident outside scheduled territories were left without remedy or protection.

I turn then to see whether some other meaning cannot be given to the relevant sections. It appears to me, my Lords, that without doing any violence to the language of section 5 and section 33 a meaning can be given to these sections which will harmonise them with the provisions of Schedule IV and make the scheme of the Act consistent and intelligible. I do not doubt

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that paragraph 4 of Schedule IV has material upon which it can operate even if it does not apply to cases covered by section 33 (1). But this does not conclude the matter. For the language of that paragraph "In any proceedings . . . a claim for the recovery of "any debt . . . " is apt to include as well an obligation arising under a bill of exchange as any other monetary obligation, and such an obligation can only be excluded if it is held that there is no "debt" until Treasury permission has been given. But that is just what the paragraph, which must be read with section 33 (1), appears to deny. There is a debt but it must not be paid without permission. It does not for that reason cease to be a debt. It may be said perhaps that it is a debt unlike any other debt, in that it is not payable until some condition is satisfied. But that is what the statute provides and by the very language of paragraph 4 recognises.

I conclude, therefore, without difficulty, that a debt arising under a bill of exchange is a debt to which paragraph 4 applies, and that a claim for its recovery is not to be defeated by the fact that Treasury permission to pay it has not been given. It was a point fairly made by learned counsel for the appellants in their able arguments that there is no provision enabling a debtor in such a case to pay money into court in satisfaction of the debt except in proceedings commenced by his creditor and that, if such proceedings are commenced, he may be mulcted in some costs or at any rate put to some expenditure. This is so, but paragraph 3 and the latter part of paragraph 4 clearly contemplate the payment into court of all debts to which the first part of paragraph 4 applies, and I do not think that a possible gap in the machinery for carrying out the purposes of the Act can alter its plain meaning.

The only previous case in which the construction of this part of the Act has been considered by the courts is *Cummings* v. *London Bullion Co. Ltd.*[1] In that case it was not perhaps necessary for the court to determine the precise question that now arises, but I am happy to find that Somervell L.J. did think fit to consider it and used language with which I am in agreement. "The person," he says,[2] "entitled to the "payment issues a writ. The fact that permission has not been "obtained is not a defence to the action. On the one hand, the "plaintiff can obtain judgment, the money due under the judg-"ment being subject to Part II of the Act and the rules to which "I have referred. The defendant assuming that he is admitting "liability apart from the provisions of the Act can make a pay-"ment into court. The Act is not to be used to enable the "defendant to retain the money in his pocket, but to control its "reaching its destination, namely the plaintiff." I cannot express more succinctly my own views in regard to the present case. The appeal must, in my opinion, be dismissed with costs.

[1] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 385.

[2] [1952] 1 K.B. 327, 334.

LORD GODDARD. My Lords, the question argued in this appeal was, to quote from the printed case lodged by the parties jointly, whether the claim of the respondents, as holders of the bills to which section 33 of the Exchange Control Act, 1947, applies, is defeated by reason of the fact that at the date of the issue of the writ Treasury permission for payment had not been granted. Had section 33 consisted only of its first two subsections, in my opinion the appellants' contention might have prevailed. But by subsection (3) the provisions of Schedule IV to the Act are to have effect with respect to legal proceedings brought in respect of contracts to which the section applies, that is, to contracts where, by virtue of the Act, the permission of the Treasury is, at the time of the contract, required for the performance of any term thereof. There is no provision in the Act prohibiting legal proceedings being brought at any time in respect of such contracts. An allegation that the usance of the bills has been extended by the provisions of the Act is setting up a matter of defence. But paragraph 4 of Schedule IV states in terms that in any proceedings in a prescribed court, and the High Court is such a court, a claim for the recovery of a debt shall not be defeated by reason only of the debt not being payable without Treasury permission. It was argued by the appellants that there was no debt due because a condition must be implied that payment was not to be made until permission had been obtained. No debt can be sued for before the time of payment has arrived, and if the appellants' contention was right, it appears to me that no debt due to a person living outside the scheduled territories to which section 33 applies, could ever give cause of action. The provisions of paragraph 4 would then appear to me to be meaningless. The schedule contains elaborate provisions for the payment into court of the moneys recovered by action, the proceeds of which cannot be paid to creditors until permission is granted, and expressly deprives the person sued from setting up the defence that the implied condition as to Treasury permission postpones the payment.

That the Act does not provide a moratorium for debtors but only controls the immediate destination of the payments they make is also shown, I think, by paragraphs 5 and 6 of the schedule under which these bills could have been admitted to proof had the acceptors become bankrupt, or would have constituted a good petitioning creditor's debt had the debtors committed an available act of bankruptcy.

I am therefore of opinion that the appeal fails.

LORD RADCLIFFE. My Lords, I agree that this appeal must fail. My reason for thinking so is that I regard paragraph 4 (1) of Schedule IV to the Exchange Control Act, 1947, as precluding the only defence which the appellants have raised against the respondents' claim.

This is not to deny that the proposition which the appellants

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have brought to this House is a plausible one, having regard to the way in which section 33 of the Act is expressed. The Act, of course, deals with a much wider range of operations than just payments of money; but within that more limited range its general object, as expressed in sections 5 and 6, is to forbid sterling being paid to or placed at the disposition of a person not resident within the sterling area unless Treasury consent has been first obtained. Section 33 (which incorporates the provisions of Schedule IV) is part of the scheme for implementing this control. It is not plain to me exactly why section 33 (1) was thought to be needed in this context, nor does it explain itself. I think that probably the main reason for its introduction was to protect the general run of obligee from being met with a defence by his obligor to the effect that a contract involving Treasury consent for its performance was void in its inception for impossibility or illegality. However that may be, it seems clear that the condition imported into contracts by section 33 (1) applies to the promise that the acceptor of a bill of exchange makes to its drawer or holder. If so, say the appellants, our obligation to pay to the present holders on due presentation was subject to the condition that we were not to pay if Treasury consent had not then been given: it had not been given: what then are we being sued for by this writ, since we were not in default at the date when it was issued, and no money was at that date payable by us to the respondents?

I am not sure that, if section 33 (1) stood alone, there would be any logical answer to this dilemma, of which the appellants are entitled to make all that they can. I do not find anything in the judgments of the Court of Appeal in *Cummings* v. *London Bullion Co. Ltd.*[3] which resolves it. But then, section 33 (1) does not stand alone: there are the provisions of Schedule IV with regard to " legal proceedings " to be taken account of, and I think that it is possible to see, when those provisions are attended to, that the Act has a definite plan that governs legal proceedings for all debts affected by a condition about Treasury consent, whether express or implied. Before approaching the provisions I think that it is useful to recall that section 33 (1) is not so expressed as to alter " the fixed or determinable future " time " of payment of a bill or to postpone that date to another date. What it imports into the contract is that when the due date of payment arrives performance is not to be called for except so far as Treasury consent is not required.

Schedule IV establishes a scheme for regulating legal proceedings and other legal actions on debts so far as they are affected by the requirements of exchange control. These provisions are not subsidiary to section 33 (1) or other provisions of the Act: they are substantive enactments in their own right. When, therefore, paragraph 4 (1) of this Schedule says: " In any

[3] [1952] 1 K.B. 327.

" proceedings in a prescribed court and in any arbitration pro- " ceedings, a claim for the recovery of any debt shall not be " defeated by reason only of the debt not being payable without " the permission of the Treasury and of that permission not " having been given or having been revoked," I read the words " any debt " as being as extensive in meaning as they appear to be and not as confined to those debts—and no doubt there can be some—which arise from contracts not touched by section 33 (1). The sub-paragraph confers statutory authority to sue on debts if the only obstacle to their payment is lack of Treasury consent. It cannot be denied that there are debts owing on these bills, even though payment to the then holder could not be demanded at the date of the writ. If so, there is nothing in law or statute to prevent the holders presenting them for payment or starting legal proceedings upon their not being honoured. Then paragraph 4 (1) comes into play and expressly deprives the debtor of any ground of defence based upon Treasury consent being required and not forthcoming, which would otherwise protect him if section 33 (1) stood alone without Schedule IV.

Such a liberty conceded to the creditor would, indeed, be a very odd result but for the other provisions of this schedule, since the judgment would give him an independent right to payment of sterling which it is the purpose of the Act to allow only with consent. But this is all taken care of by paragraphs 1 to 3 of the same schedule. Judgments for payment of money are subjected to similar conditions requiring Treasury consent before payment: in effect, the hand of control is shifted from the contract to the right arising under the judgment. Moneys due under judgments or orders can be paid into court, thus discharging the debtor, and the fund itself still remains out of the control of the creditor until consent has been obtained. All this explains why it is only in a " prescribed court," that is to say, a court which is found to have made satisfactory rules for payment of judgment sums into its care under Treasury control, that the defence which would otherwise arise under section 33 (1) is denied to the debtor.

My Lords, I think that this conclusion is in accordance with the general purpose and scheme of the Exchange Control Act, and I do not regret it. I do feel, however, that the scheme, as so interpreted, has this unsatisfactory feature that the acceptor of a bill in the position of the appellants is left in a singularly helpless position if he can obtain Treasury permission neither to pay his creditor nor to transfer the sterling to a blocked account. There is nothing that he can do except await the issue of a writ against him and submit to judgment. Happily, with the general relaxation of exchange control on current account transactions, difficulties of this kind may by now be of no more than historical interest.

LORD COHEN. My Lords, I agree that this appeal must fail.

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LORD KEITH OF AVONHOLM. My Lords, this case is concerned with the payment of three bills of exchange accepted by the appellants and held by the respondents as holders in due course. These were dishonoured on presentation at the due dates. The respondents by specially indorsed writ have claimed payment of the total amount of these bills, viz., £8,700. The respondents are persons resident outside the scheduled territories as defined by the Exchange Control Act, 1947. The drawer of the bills at the date of drawing the bills, and at all subsequent times, was resident in France, which is also outside the scheduled territories as so defined. The question arises of the right of the respondents now to demand payment.

This requires some consideration of the provisions of the Exchange Control Act with regard to payment of debts to persons outside the scheduled territories. In this matter various situations may call for consideration under the Act. I find it sufficient to refer only to two. There is first a contract involving payment of a debt in which debtor and creditor at the date of making the contract are resident in the United Kingdom, but at the time of performance the creditor is resident outside the scheduled territories. In such case, the permission of the Treasury for payment is required under section 5 of the Act. There is secondly, the case where the creditor is resident outside the scheduled territories at the time of the making of the contract and remains so resident at the time of performance. This case comes under section 33 (1) of the Act. Other cases may be envisaged owing to changes of residence of debtor, or creditor, or both, but these need not be considered. The present case comes within the terms of section 33 (1).

I understand that the view that commends itself to your Lordships is that for all practical purposes no difference in result arises under the Act in these two cases. I would willingly accept this view, if I could see my way to fit it into the framework of the statute. The view commends itself by its simplicity, but I am unable to convince myself that this is the intention of the statute.

I can see good reasons for a distinction. Where there was no impediment to the performance of the contract at the time it was made there is no reason why the debtor should be advantaged, when the time of payment comes, by keeping the money in his pocket and the creditor possibly disadvantaged. Accordingly, under Schedule IV provision is made for the money being paid into court. The creditor cannot get it without the permission of the Treasury, but at any rate he knows it is there waiting for him if and when consent is given. In the other case, the parties know when they make their contract that it cannot be performed as things are, without Treasury consent. It would seem perfectly reasonable that Parliament should say in that case to the creditor: "You must wait till the Treasury gives consent before you can "enforce any payment by your debtor." That, it seems to me, is exactly what the statute has done. It may be, that section 33

(1) was introduced also to prevent the contract falling for invalidity. But, if so, that is no reason for supposing that the creditor was being given all the facilities and advantages conferred by the statute on creditors in other cases.

I accordingly examine very briefly the material provisions of the statute. Section 33 is a general section dealing, I think, with a number of matters not necessarily inter-related. Subsection (1) is a provision affecting contracts generally, not merely contracts for payment of money. It plainly enacts that, by the fiction of an implied condition, a term of a contract "shall not be per-" formed except in so far as the permission or consent is given "or is not required." If, as I understand, payment into court under the Fourth Schedule, in contracts for payment other than those falling under subsection (1) of section 33, is regarded as performance, then in cases coming under the subsection no such performance can, I should have thought, be demanded, on the plain words of the subsection. I find this view reinforced by the words of subsection (2) of section 33, which I set out at length: "Notwithstanding anything in the Bills of Exchange Act, "1882, neither the provisions of this Act, nor any condition, "whether express or to be implied having regard to those pro-"visions, that any payment shall not be made without the "permission of the Treasury under this Act, shall be deemed "to prevent any instrument being a bill of exchange or promissory "note." I take this to mean that the parties might attach an express condition to acceptance of a bill of exchange by which the due date of the bill is made a date certain, or the date when Treasury consent to payment is given, whichever is the later. The subsection applies likewise to an implied condition and such an implied condition is introduced by subsection (1).

On this construction of the statute I find no difficulty in the provisions of Schedule IV. There can be no maintainable proceedings for recovery of a debt if the debt is not yet due and, accordingly, paragraph 4 (1) does not apply. The language used is fully apt to cover cases other than those falling under section 33 (1). I attach some importance to the words "shall not be "defeated by reason *only* of the debt not being payable without "the permission of the Treasury, etc." These are apt words for a case coming under section 5, but not for a case under section 33 (1). Paragraph 5 (1) of the Schedule would, I think, apply as for ranking of a contingent debt. The paragraph does not require payment of the debt so ranked and the effect, I take it, is to compel the receiver or other administrator to conserve enough estate to meet the debt as ranked when Treasury permission is given. Paragraph 6 would not apply to the debt in suit here, for the reason that, in my view, it does not fall to be satisfied by payment into court, and no arrangement has been made for payment to a blocked account. I regard the words "if and to the "extent that the debt can be satisfied either by a payment into "court or by payment to a blocked account" as significant. They

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indicate that there are some debts that cannot, under the intent of the Act, be satisfied by the expedient of the creditor taking proceedings that will result in the sum claimed being paid into court. If this is not one such, I am unable to see what debts are covered by these words.

For these reasons I would allow the appeal.

Appeal dismissed.

Solicitors: *Lipton & Jefferies; Markby, Stewart & Wadesons.*

F. C.

[COURT OF APPEAL.]

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Nov. 23, 24.
Hodson and Ormerod L.JJ.

CUBAN ATLANTIC SUGAR SALES CORPORATION *v.* COMPANIA DE VAPORES SAN ELEFTERIO LIMITADA.

[1959 C. 393.]

Practice and Procedure—Writ—Service out of jurisdiction—Contract—Cargo to be shipped to safe port in United Kingdom at holders' option—Option to be declared before arrival of ship off Land's End—Sinking of ship before opportunity to declare option—Whether breach of contract for non-delivery within jurisdiction—R.S.C., Ord. 11, *r.* 1 (*e*).

Ships' Names—St. Elefterio.

The plaintiffs were holders of bills of lading under which the defendant shipowners, a Costa Rican corporation, undertook to load sugar in Cuba and to deliver to one safe port in the United Kingdom at plaintiffs' option, to be declared 120 hours before the ship arrived off Land's End. The ship sank shortly after sailing, before the option could be declared. The contract was governed by American law and was subject to the Hague Rules. The plaintiffs sought and obtained leave, pursuant to R.S.C., Ord. 11, r. 1 (*e*),[1] to serve notice of the writ, claiming damages for non-delivery, in Costa Rica, on the ground that there had been a breach of contract at every port within the United Kingdom, so that a breach had been committed within the jurisdiction. On appeal:—

Held, allowing the appeal, that as the contract could be performed in Scotland or Northern Ireland, as well as in England, until a port in England had been nominated it could not be said that it was to be performed within the jurisdiction; such breaches as might be proved, such as unseaworthiness or failure to arrive off Land's End, must have taken place out of the jurisdiction.

Bell & Co. v. *Antwerp, London and Brazil Line* [1891] 1 Q.B. 103 and *Comber* v. *Leyland and Bullins* [1898] A.C. 524 applied.

Decision of Wynn J. reversed.

[1] R.S.C., Ord. 11, r. 1: " . . . " service out of the jurisdiction of a " writ of summons or notice of a writ " of summons may be allowed by the " court or a judge whenever . . . (*e*) " The action . . . is one brought " against a defendant not domiciled " or ordinarily resident in Scotland " or Ireland in respect of a breach " committed within the jurisdiction of " a contract wherever made . . ."

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APPEAL from Wynn J.

The defendant shipowners appealed from an order of Wynn J. made on October 22, 1959, which gave the plaintiffs leave to serve notice of writ outside the jurisdiction. The plaintiffs claimed, as holders of two bills of lading dated January 25 and 31, 1958, damages for breach of contract in respect of the non-delivery at United Kingdom port of a number of bags of Cuban centrifugal sugar shipped on board the defendants' steamship *St. Elefterio* at Matanzas and Tarafa, Cuba. The matter came before Master Diamond in chambers, who gave the plaintiffs leave on an ex parte application to issue a concurrent writ of summons against the defendants and to serve notice of writ at Costa Rica where the defendants were incorporated. On the matter coming later before Master Harwood, who heard counsel on both sides and read affidavits, it was ordered that the order of Master Diamond should be discharged.

The contract between the parties was contained in bills of lading, which incorporated a charterparty headed "New York," dated November 4, 1957, which related to this ship; and by the addenda to the charterparty it was provided that the ship should proceed as ordered by charterers or their agents and with all convenient speed to (by the second addendum) one safe port United Kingdom at charterers' option, excluding Manchester and Dunston. The discharge port was declarable 120 hours prior to the vessel's arrival off Land's End. This charterparty was to be governed by American law. The arbitration clause provided that any dispute should be settled by commercial men resident in New York. The general average was to be settled in New York. The charterparty contained a clause paramount, incorporating the United States Carriage of Goods by Sea Act, and thereby incorporated the Hague Rules. The steamer was described in the charter as being tight, staunch, strong and in every way fitted for the voyage.

After the bags of sugar had been loaded at Cuba, the ship sank with the cargo on February 6, 1958, and the cargo was lost. Accordingly, no port was nominated.

On appeal, Wynn J. set aside the order of Master Harwood and granted the plaintiffs' application. The shipowners appealed.

Michael Kerr for the shipowners.

J. F. Donaldson for the cargo owners.

The following cases which were cited in argument are not referred to in the judgments: *Holland* v. *Bennett* [2]; *Cherry* v. *Thompson* [3]; *Martin* v. *Stout* [4]; *Ex parte Hayward* [5]; *Mackay* v. *Dick*. [6]

[2] [1902] 1 K.B. 867; 18 T.L.R. 510.

[3] (1872) L.R. 7 Q.B. 573.

[4] [1925] A.C. 359; 41 T.L.R. 176.

[5] (1886) 3 T.L.R. 687.

[6] (1886) 6 App.Cas. 251.

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HODSON L.J. (after stating the facts): The plaintiffs claim that they are entitled to bring their action based on failure to deliver, and it is to be noticed that the way in which they frame their claim is this: a claim for damages for breach of contract in respect of the non-delivery at United Kingdom port. Unless the words "United Kingdom port" are surplusage, the language of the writ does not enable their claim to be covered by the rules. Order 11, rule 1 (*e*), so far as relevant, is as follows: ". . . service "out of the jurisdiction of a writ of summons or notice of a writ "of summons may be allowed by the court or a judge whenever ". . . (*e*) The action . . . is one brought against a defendant not "domiciled or ordinarily resident in Scotland or Ireland, in "respect of a breach committed within the jurisdiction of a "contract wherever made . . ." This application is based upon the contention that the claim was made in respect of a breach within the jurisdiction.

The phrase "United Kingdom port" covers more than the jurisdiction. The jurisdiction of these courts does not extend to Northern Ireland or Scotland; so that prima facie the plaintiffs are not entitled to succeed. They have succeeded before the judge, upon the footing that the true effect of the obligation which was imposed upon the defendants was to deliver at *every* United Kingdom port, not at one, although the contract was to deliver at one. The argument which was accepted by the judge was this. It is said: "You, the defendants, contracted to deliver at a "nominated port in the United Kingdom. We, the plaintiffs, "had the option of nominating a port within that range. We "would have been able to nominate a port within that range at "the stated hour—120 hours before Land's End—if the ship "had not been lost, and by your own wrongdoing you have put "us in a position where it was no longer in our power to nominate "a port in the United Kingdom within the range." Accordingly it is said that the defendants cannot be in a better position by reason of their own wrongdoing than they would have been in if the ship had been seaworthy and had been able to bring her cargo to a United Kingdom port.

It is said that it is necessary to give effect to the rule by treating this as if it were a breach within the jurisdiction; and indeed the judge upon that basis found that there was a breach as alleged within the jurisdiction. He said: "In allowing this "appeal I base myself entirely upon the narrow ground that a "contract to carry goods to any port in the United Kingdom "(with the exception of two named ports), which gives the "obligee an option to choose not later than a certain time, or "the happening of a certain event, to which port goods shall be "carried, comprises within the obligation undertaken by the "obligor, the shipowners, an obligation to deliver to each and "every port in the United Kingdom other than the excepted "ports." Later he said: "When he fails to deliver anywhere, "he has committed a breach of his obligation to deliver where he

" could have been called upon to deliver, i.e., at any place at " which he could have been called upon to deliver. It does not " avail the defendants to show, through no fault of the plaintiffs, " the option was not exercised. The contract having been broken " at every port in the United Kingdom (other than the excepted " ports) there was a breach of contract committed in England."

In my judgment that is a conclusion which it is not open to the court to reach. The question is not whether a breach must be deemed to have been committed, or whether a breach must necessarily be taken to have been committed when the defendants have put themselves in the wrong, but whether a breach has been committed in the United Kingdom; and until a port in England within the jurisdiction has been nominated there was no obligation upon the shipowners of which they were in breach.

That seems to me to be the plain conclusion upon the language of the rule. It is quite true (as was pointed out by the judge) that there is no authority directly in point; but I think there is persuasive authority upon the language of the old rule, which was superseded in 1921. Order 11, rule 1, formerly read (under subheading (*e*)): " Service out of the jurisdiction of a writ of sum- " mons or notice of a writ of summons may be allowed by the court " or a judge whenever . . . The action is founded on any breach or " alleged breach within the jurisdiction of any contract wherever " made which, according to the terms thereof, ought to be per- " formed within the jurisdiction, unless the defendant is domiciled " or ordinarily resident in Scotland or Ireland." Mr. Donaldson, for the plaintiffs, pointed out that the words " according to the " terms thereof " and the words " ought to be performed within " the jurisdiction " do not appear in the present rule. The words " according to the terms thereof " do not seem to me to add anything to the words which precede it; and although I accept the submission of Mr. Donaldson that the wording of the old rule is, as it were, looking at the situation from a different point of time from the wording of the present rule, nevertheless I find no material distinction between the wording of the two rules, for the purposes of the consideration of this matter.

Some authority which has been quoted by Mr. Kerr for the defendants seems to me to have a bearing upon this problem. The first case is *Bell & Co.* v. *Antwerp, London and Brazil Line*,[1] which was, of course, a decision under the old rule. " A foreign " company chartered a ship from English shipowners to take a " cargo from London to a foreign port; and by the terms of the " charterparty it was stipulated that all lighterage should be at " charterers' or consignees' risk and expense, the charterers " indemnifying the shipowners from all lighterage on cargo at the " port of discharge; but no place was specified for payment of " moneys that might become payable under such contract of " indemnity." It was held " that such contract was not one

[1] [1891] 1 Q.B. 103.

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" which, ' according to the terms thereof,' ought to be performed " within the jurisdiction, within the meaning of Order 11, rule 1 " (*e*), and therefore leave to serve notice of the writ out of the " jurisdiction in an action upon such contract against the foreign " company could not be given."

A great deal of the discussion in that case was about the place where the contract as to payment of money was to be performed; but Lord Esher M.R. in his judgment, having considered the facts of the case, made some observations which seem to me to be of general importance. He said [2]: " How, " then, does the case stand with regard to this contract to indem- " nify the shipowners in respect of lighterage? If the charterers " were bound to perform it out of the jurisdiction if required by " the shipowners to do so, how can it be said to be a contract " which, according to its terms, ought to be performed within " the jurisdiction? " It is to be observed that that was a case where the option was the plaintiffs' option and in that sense it is parallel with this case, in which the plaintiffs had the option to nominate their port of discharge. Lord Esher M.R. continued: " Where a contract is one which may be performed in or out of " the jurisdiction, as the case may be, I do not see how it can be " a contract which, according to its terms, ought to be performed " within any more than without the jurisdiction."

This is such a case. This is a contract which could be performed either in or out of the jurisdiction; and until the nomination of a port had been made it could not be said, in my judgment, that this was a contract to be performed within the jurisdiction. The matter was still at large.

The case cited was considered by the House of Lords in *Comber* v. *Leyland and Bullins*.[3] Lord Shand, in his speech, referred to the problem which had been considered after full arguments, in the two cases of *Bell & Co.* v. *Antwerp, London & Brazil Line*,[4] to which I have referred, and another case, to which we have also been referred, of *The Eider* [5]; and he said he was clearly of opinion that the view taken by the judges in those cases as to the construction and effect of what I call the old rule was right. He continued [6]: " The result of those cases, I take it, " is practically this—that when it is shown that a plaintiff is " entitled to require the performance of a contract in this " country, and that consequently a breach takes place in this " country, process may be served out of the country; but I hold " upon the authority of those cases, and believing them to be in " accordance with the true construction of the language used, " that the rule is limited to this, and that there is no right to " serve out of the jurisdiction where the performance of the " contract may be given either within the jurisdiction or abroad " in the option of the party who has undertaken the obligation."

[2] [1891] 1 Q.B. 103, 108.
[3] [1898] A.C. 524.
[4] [1891] 1 Q.B. 103.
[5] [1893] P. 119.
[6] [1898] A.C. 524, 533.

That was a case where the option was that of the party who had undertaken the obligation; and the learned Lord was not specifically dealing with a case where the option was a plaintiffs' option. But in referring to *Bell & Co.* v. *Antwerp, London and Brazil Line* [7] in his speech, part of which I have read, he was to my mind not doubting the validity of the view that the position would be the same if the option were a plaintiffs' option.

For the reasons I have given, supported by authority on the construction of the earlier rule, I am of the opinion that it is really impossible to come to the conclusion—which might be said to be one which justice would seek to arrive at—that there was here a claim for breach of contract within the jurisdiction. There has never been any breach within the jurisdiction because the time for nomination never arrived. If the ship was unseaworthy when she left Cuba and the owners did not take steps with due diligence to make her seaworthy before she started on her voyage, that would be a breach of contract outside the jurisdiction. Similarly, the failure to arrive at the point 120 hours before Land's End would be a breach outside the jurisdiction; but in my view there is no breach within the jurisdiction here.

Mr. Donaldson sought, both before the master and the judge, to introduce evidence to establish that a port in this country would certainly have been nominated (as we were told, I think, Hull); and no doubt there would have been available evidence to show that, as a matter of commercial practice, that nomination would have been made. We have not looked at that evidence, and I do not think that such evidence would be admissible. Even if it were admitted it would carry the plaintiffs no further; however much they might be able to say that Hull would have been the nominated port, it never was the nominated port and by that method they could not, as I see it, have extricated themselves from the difficulty which they are in, and brought themselves within the rule.

I would allow the appeal.

ORMEROD L.J. I agree. Mr. Kerr at the beginning of his argument said (and I think rightly) that the jurisdiction of the courts under Order 11, rule 1, should be administered with the greatest care, as it is a rule which tends to encroach upon the sovereignty of other nations. Bearing that in mind, one has to consider the one and only important question in this appeal, and that is whether the defendants have committed a breach of contract within the jurisdiction.

As the judge said, there is really no direct authority on this matter and the question has to be decided by considering the circumstances and the wording of the rule. The position in this case was that, by the combined effect of the charterparty and the various addenda, the obligation on the defendants was to

[7] [1891] 1 Q.B. 103.

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deliver the cargo of sugar at a nominated port within the United Kingdom, subject to one or two exceptions which are not material. That obligation remained during the time the contract was in existence, and remained in that form. It could only be reduced or crystallised by the plaintiffs nominating the port at which the sugar had to be delivered when the ship had arrived at a position 120 hours from Land's End—a contingency which we know never happened. There never was any nomination, and therefore the obligation remained as it had been from the beginning.

But Mr. Donaldson asks us to say (and I think this is really the substance of his argument) that it was the intention of the plaintiffs to nominate a particular port, a port within the jurisdiction of this court: they did not nominate that port because they had no opportunity of nominating any port at all: but the defendants cannot be heard now to say that the plaintiffs did not nominate that port, because it was owing to the fault or breach of contract of the defendants that it was impossible to do so. In those circumstances the plaintiffs must be deemed to have nominated a particular port. In effect it was submitted that the defendants are estopped from denying that a port was nominated.

That is the argument which the plaintiffs put before this court. But it is not, in my view, in accordance with the terms of the rule. The rule does not say "a breach which shall be deemed "to have been committed within the jurisdiction," or "a breach "which the defendants are estopped from denying was com- "mitted within the jurisdiction." The rule gives power to serve out of the jurisdiction only if there has been a breach of contract within the jurisdiction. In my opinion there has not been, and I agree that this appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Holman, Fenwick & Willan; Waltons & Co.*

F. R. D.

[COURT OF APPEAL.]

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Oct. 22, 23, 26, 27; *Nov.* 20.

Lord Evershed M.R., Sellers and Harman L.JJ.

PHILIPSON-STOW AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[1958 P. No. 1727.]

Revenue — Estate duty — Property chargeable — Immovable property situate outside Great Britain—Settlement—Testamentary disposition—Whether property excluded for estate duty purposes from property passing on death of tenant for life—Proper law of disposition—Finance Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 47), *s.* 28 (2).

Conflict of Laws—Immovable property—Will—Settlement—Trust for sale—Proper law.

By section 28 (2) of the Finance Act, 1949, property passing on the death of a person "shall be deemed for the purposes of estate

"duty not to include any property passing on the death which is "situate out of Great Britain if . . . the proper law regulating "the devolution of the property so situate, or the disposition under "or by reason of which it passes, is the law neither of England nor "of Scotland and . . . (*c*) that the property . . . is, by the law of "the country in which it is situate, immovable property."

By his will made in English form, a testator, having declared that, inasmuch as he had an English domicile, his will should operate as far as the case admitted according to English law, devised certain property in England, defined in the will as his "settled estates," to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over. The testator devised and bequeathed the residue of his estate to his trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his "settled estates." The testator died on May 17, 1908, domiciled in England. His wife died on December 22, 1930; and his eldest son on September 23, 1954.

The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained. On the question whether the land in South Africa, which was by the law of South Africa immovable property, was, by virtue of section 28 (2) of the Finance Act, 1949, excluded, for estate duty purposes, from the property passing on the death of the testator's son:—

Held (dismissing the appeal, Harman L.J. dissenting), that as before the testator's son died the estate had been fully administered and the income of the South African land had been received and applied by the trustees as part of the general income of the estate in pursuance of the directions in the will, on the son's death the property passed by reason only of those dispositions to the present tenant for life; accordingly, for the purposes of section 28 (2), the proper law regulating the disposition was the law which the testator had intended by the terms of his will should regulate his dispositions, that is English law, and the South African property was not excluded for estate duty purposes from the property passing on the death.

In re Moses [1908] 2 Ch. 235; *In re Miller* [1914] 1 Ch. 511; *In re Berchtold* [1923] 1 Ch. 192 distinguished.

Attorney-General v. *Johnson* [1907] 2 K.B. 885 applied.

Per Harman L.J. So long as the property remained an immovable it was controlled by the lex situs; the existence of the trust for sale in the will had not altered the quality of the property from an immovable to a movable asset for the lex situs did not so admit.

Decision of Upjohn J. [1959] Ch. 395; [1959] 2 W.L.R. 427; [1959] 3 All E.R. 879 affirmed.

APPEAL from Upjohn J.

By his will, dated March 14, 1898, the testator, Sir Frederic Samuel Philipson Philipson-Stow, declared, by clause 2, that "inasmuch as I have an English domicile it is my wish and "intention that this my will and any codicil I may make shall be "construed and operate as far as the case admits according to "the law of England." Having appointed executors and trustees, the testator, by clause 4 of the will, devised his Blackdown Estate near Fernhurst in the county of Sussex, defined as "my settled

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" estates," to the use of his wife for her life with remainder to his trustees for a term of 100 years upon trusts which had long since come to an end, with remainder to the use of his eldest son, Sir Elliot Philipson Philipson-Stow, for his life, with remainder to the use of the first and every other son of his eldest son in tail male with remainders over. By clause 5, he directed that, if any person to whom an estate in tail male was limited was born in his lifetime, the estate tail was to be cut down to a life interest. By clause 16 he declared that his trustees should be trustees of the will and every compound settlement consisting of the will and any other instrument for the purpose of the Settled Land Acts.

By clause 25, the testator devised and bequeathed all his " real and personal estate whatsoever wheresoever and whether " situate or being in the United Kingdom or in South " Africa or elsewhere (except such real and personal estate and " effects hereinbefore or by any codicil to this my will otherwise " disposed of) " to his trustees upon trust for sale and conversion, with an extensive power of postponement and the usual directions for payment of funeral and testamentary expenses and investment of the proceeds. Subsequent clauses of the will contained directions to the trustees to set aside out of the residuary estate portions for daughters and younger sons; and by clause 37, the testator provided that " The ultimate residue of the said invest- " ments representing my said residuary estate after setting apart " and appropriating the several funds aforesaid for the benefit " of my daughters and younger sons shall be held by my trustees " upon the trusts following (that is to say) Upon trust after " providing thereout if need be for such keeping up and repair of " my said mansion house and settled estates as aforesaid to pay " the annual income thereof to my said wife during her life she " maintaining and educating and keeping a home for my sons " and daughters And after her death such ultimate residue shall " be held by my trustees as if the moneys or investments repre- " senting the same were capital moneys arising under the Settled " Land Acts 1882 to 1890 from my said settled estates."

Clause 39 contained wide powers for the investment of capital money in the usual trustee securities, extending to investment not only in the United Kingdom, but the Colonies of the Cape of Good Hope, Natal, Dominion of Canada or Australasia or in the Orange Free State or Transvaal Republic. Clause 41 directed that all net rents, profits and income arising from the residuary estate until the sale, calling in and conversion should be treated as income arising from the proceeds of a sale. Clause 42 gave the trustees wide powers of management, including the management of immovable property abroad and by clauses 43 and 44 power was given to appoint agents for that purpose and to delegate powers. By a codicil dated May 6, 1908, the testator substituted his son in the place of one named in the will who was a South African resident in South Africa.

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The testator died on May 17, 1908, resident and domiciled in England. At the date of his death he owned a five-tenths undivided interest in farm property, known as "Steenbokspan," in the Union of South Africa. In 1916 the various persons entitled to undivided shares in the property entered into an arrangement by way of partition in accordance with and effective by South African law, whereby the trustees of Sir Frederic's will became entitled to a seven-eighths undivided share in the property in lieu of their previous interest. It was not submitted that the interest of the trustees derived from the partition but the case was argued on the footing that the trustees' present interest was that of which the testator had purported to dispose by his will. The executors and trustees paid the legacies and made provision for the daughters' and younger sons' portions. They retained, in exercise of their power to postpone sale, and at the date of the hearing still retained, the land at Steenbokspan. The income arising from that land had been paid to the testator's widow during her life and, after her death on December 22, 1930, to the testator's eldest son. He died on September 23, 1954, and his son, Sir Frederic Lawrence Philipson-Stow, became entitled to the income for life, his interest, as Lord Evershed M.R. pointed out, having been affected by the provision in clause 5 of the will.

On August 25, 1958, the trustees took out a summons under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, to determine, inter alia, whether the share in the land at Steenbokspan now forming part of the testator's residuary estate ought to be treated for the purposes of estate duty as excluded, by virtue of section 28 (2) of the Finance Act, 1949,[1] or otherwise, from the property passing on the death of his son, or ought to be treated as passing on such death.

Upjohn J. held that on the construction of section 28 (2) the farm passed under a "disposition," that is, the testator's will, and not by devolution, and that the proper law regulating a testamentary disposition of foreign land was dependent on the testator's intention, which in this case pointed to the English law. Accordingly, he held that the farm was not excluded from the

[1] Finance Act, 1949, s. 28 (2): "As respects property passing on the death of a person dying after the commencement of this Part of this Act, subsection (2) of section two of the Finance Act, 1894 (which exempts from estate duty property situate abroad and not chargeable with legacy duty or succession duty), and section twenty-four of the Finance Act, 1936 (which restricts the exemption conferred by the said subsection (2)), shall not have effect; but that property shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and that one at least of the following conditions is satisfied, namely,— . . . (*c*) that the property so situate is, by the law of the country in which it is situate, immovable property."

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property passing on the death of his son for purposes of estate duty.

The trustees appealed. It was conceded that their interest in Steenbokspan was immovable property by the Law of South Africa for the purpose of section 28 (2) (*c*) of the Act of 1949.

Anthony Plowman Q.C. and *R. Cozens-Hardy Horne* for the plaintiffs.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases, in addition to those referred to in the judgments, were cited in argument: *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[2]; *Murray* v. *Champernowne*[3]; *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*[4]; *Bank of Africa Ltd.* v. *Cohen*[5]; *Iveagh* v. *Inland Revenue Commissioners*[6]; *Penn* v. *Baltimore* (*Lord*).[7]

Cur. adv. vult.

November 20. LORD EVERSHED M.R., having stated the facts substantially as set out above, read the relevant part of section 28 (2) of the Finance Act, 1949, and said: The question posed for our decision in terms of the subsection is whether the Steenbokspan property which passed (as Mr. Plowman has not disputed) on Sir Elliot's death, is exempt from duty on the ground that the proper law regulating the devolution of the property or the "disposition" under or by reason of which" the property passed was the law not of England but of South Africa.

We were very properly referred to a number of cases during the argument but none was a direct authority upon the question with which we are concerned. I propose, therefore, to express my conclusion upon that question as a matter of the meaning of the language used in the section, treating that question as res integra; and later to say something upon the cases cited. But, like Upjohn J., I look first at the relevant statutory provisions as they would have affected such a problem as the present prior to the passing of the Finance Act, 1949. By section 2 (2) of the Finance Act, 1894, immovable property passing on the death of the deceased, when situate out of the United Kingdom, was only liable to be charged with estate duty if succession duty was payable in respect thereof (or would have been so payable but for the relationship of the person to whom the property passed). Liability for succession duty in such a case depended in turn upon section 2 of the Succession Duty Act, 1853, which, so far as relevant, was in the following terms: "Every past or future dis-" position of property, by reason whereof any person has or shall

[2] [1910] 2 Ch. 502.
[3] [1901] 2 Ir.R. 232.
[4] [1938] A.C. 224; 54 T.L.R. 5; [1937] 4 All E.R. 206.
[5] [1909] 2 Ch. 129; 25 T.L.R. 625.
[6] [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609.
[7] (1750) 1 Ves.Sen. 444.

" become beneficially entitled to any property or the income " thereof upon the death of any person dying after the time " appointed for the commencement of this Act, . . . and every " devolution by law of any beneficial interest in property, or the " income thereof, upon the death of any person dying after the " time appointed for the commencement of this Act to any other " person, in possession or expectancy, shall be deemed to have " conferred or to confer on the person entitled by reason of any " such disposition or devolution a ' succession '; and the term " ' successor ' shall denote the person so entitled; and the term " ' predecessor ' shall denote the settlor, disponer, testator, obligor, " ancestor, or other person from whom the interest of the succes- " sor is or shall be derived."

The scope of the last-mentioned section was qualified by Lord Cranworth L.C. in the year 1865 in a case to which I shall revert when I later deal with the authorities. For present purposes, it is to be noted that the section distinguished between a present or future disposition of property, on the one hand, and on the other, a devolution by law of any beneficial interest in property. Succession duty was abolished by the Finance Act, 1949, and it cannot be doubted that section 28 (2) of that Act was designed to impose a criterion for liability for estate duty of (inter alia) immovable property situate out of the United Kingdom in substitution to that formerly contained in section 2 (2) of the Finance Act, 1894. It is, I think, no less clear (and was not disputed before us) that the distinction between devolution and disposition contained in the Act of 1949 reproduced the similar distinction in section 2 of the Succession Duty Act, which I have read; in other words, it is, in my opinion, not in doubt that whereas " devolution " was introduced to cover the passing of property upon intestacy or other process of law, by " disposition " was meant some instrument or the effect of some instrument (e.g., a will or settlement) conferring or purporting to confer beneficial interests in property. So far, therefore, as the present case is concerned, " devolution " can be disregarded, and the relevant " disposition " is that contained in or conferred by Sir Frederic's will. But the question remains, what, within the terms of the section, is the " proper " law regulating " that disposition? So stated, the problem posed is a short one; and so, in the end, I think it to be. But its difficulty is, to my mind, created in the present case by the formula used, " proper law." The words " proper law " are well understood when applied to a contract. In such a context they mean the law which the contracting parties intend to govern their contractual obligations, wherever performed. But they have a less natural significance where applied to a will.

In *Duke of Marlborough* v. *Attorney-General* (*No. 1*)[1] the phrase was applied by Lord Greene M.R. to a marriage settlement of personal property as meaning the law governing (that is,

[1] [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165.

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intended by the parties to the settlement to govern) the settlement. "Counsel for the duke and for the Crown," said Lord Greene M.R.,[2] "were in agreement in submitting that in "the case of a marriage settlement the question whether succes-"sion duty is payable under section 2 of the Succession Duty "Act, 1853, is to be answered by reference to the law governing "the settlement—in other words, the proper law of the settle-"ment." It seems likely enough that Parliament, when enacting the Finance Act, 1949, was intending to use the words in a similar sense. But whether or not that is so, I think it is inescapable that the words must be treated as having a sense analogous to that given by Lord Greene M.R.

But the solution of the difficulty is not thereby far advanced when the formula has to be applied to immovable property outside the United Kingdom of which a testator has purported to dispose by will. Mr. Plowman's argument has been founded on the principle (enshrined in rule 85 in Dicey's Conflict of Laws) that all rights over or in relation to immovable property must in general be governed by the law of the country where the immovable is situate (i.e., the lex situs). Thus, according to Mr. Plowman's argument, whatever "disposition" the testator may purport to make as regards foreign immovables, the effect or the efficacy of those dispositions must depend upon and be controlled by the lex situs. In the case of a direct devise of a foreign immovable to A absolutely, Mr. Pennycuick did not dispute that the law regulating or controlling the devise must be the lex situs; since the devise (like a transfer out and out inter vivos) could only take effect in accordance with, and as permitted by, the local law. So it would follow that the devise of Steenbokspan by Sir Frederic to his executors would be governed or controlled by South African law.

But it was Mr. Pennycuick's argument that the conclusion is, or may be, otherwise when you find that the original devise to the executors has taken full effect according to the local law (as the evidence in the case showed), that the administration of the estate in South Africa has been completed, and that at the relevant date (i.e., Sir Elliot's death), the position was that the income of the property was being received by Sir Frederic's trustees and applied by them, under the terms of the will, as part of the general trust income; for when that stage is reached, then, according to the ordinary sense of the subsection, the property or the right to the enjoyment of the income of the property passed by reason only of the dispositions contained in Sir Frederic's will; and the law governing or regulating those dispositions was, at that stage, the law which Sir Frederic intended, according to the terms and context of his will, should govern or regulate them, namely, English law.

The difficulty, to my mind, of accepting Mr. Plowman's argument is that the consequence of its acceptance must be that in

[2] [1945] Ch. 78, 82.

every case of a disposition by will or settlement of a foreign immovable, the proper law regulating the disposition must always be the lex situs. Mr. Plowman did not, indeed, shirk the consequence which he said was inevitable. But the conclusion seems to me to render futile the obvious and apparent intention of the subsection and is, therefore, one, in my judgment, which the court should not accept unless no other solution is possible; and, like Upjohn J., I do not think the court is under such compulsion. It is no doubt true that if and to the extent that a testator's or settlor's disposition of or in regard to foreign immovables (or the income or proceeds thereof) comes into conflict with the lex situs, the latter must prevail; and it is in that sense (according to Mr. Pennycuick) that Dicey's rule 85 must be read.

But to the extent that no such conflict arises, or where (as here) there is no conflict, and the relative rights of the persons now entitled to the enjoyment of the property or its income are determined exclusively by reference to the testator's will, then it is true to say, within the meaning of the subsection, that the proper law regulating the beneficiaries' rights is that which the testator intended, i.e., English law. In my judgment, sensible effect can and should be given to the subsection in the way for which Mr. Pennycuick contends; and, as a matter of construction of the subsection without reference to the authorities cited, it is shown that on Sir Elliot's death, the South African property passed by reason, and by reason only, of the dispositions in Sir Frederic's will relating to his general trust estate, and that the "proper law" regulating those dispositions was the law which he intended by the terms of his will (including clause 2) to regulate or govern them, that is, English law.

[His Lordship referred to the joint affidavit of the plaintiffs and a letter to the plaintiffs' solicitors from the general manager of the Colonial Orphan Chamber and Trust Co., dated August 30, 1955, exhibited to that affidavit, which said: "Although the "property is registered in the individual names of the trustees, "they held purely as trustees and, therefore, subject to the terms "of the late Sir Frederic Philipson-Stow's will from which they "derive their appointment, a copy of which will be filed in the "office of the Registrar of Deeds." His Lordship continued:]

I turn then to the question whether the conclusion which I have stated as a matter of construction of subsection (2) of the Finance Act, 1949, is inconsistent with or supported by the authorities cited to us, none of which, as I have stated, is an authority directly upon the subsection.

Mr. Plowman particularly relied upon three cases (which he cited also before Upjohn J.), namely, *In re Moses*,[3] *In re Miller*,[4] and *In re Berchtold*.[5] The testator in *In re Moses* [6] had given, devised and bequeathed his real and personal estate, which included a leasehold property in South Africa, to his wife for life,

[3] [1908] 2 Ch. 235.
[4] [1914] 1 Ch. 511.
[5] [1923] 1 Ch. 192.
[6] [1908] 2 Ch. 235.

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and, subject thereto, in favour of other beneficiaries. The testator was a domiciled Englishman and his will was in English form. The question then arose whether the rule in *Howe* v. *Dartmouth (Lord)* [7] was applicable as regards the South African leasehold; but it was held by Swinfen Eady J. that since that rule was (according to uncontradicted evidence) not recognised or applied in South Africa, the right of the widow as respects the South African immovable property (i.e., the leasehold) must be governed by South African law, with the result that she was entitled to the enjoyment of that property for her life notwithstanding its wasting character. The judgment was a short one and depended, as I read it, upon the proposition that the validity of a testamentary disposition of a foreign immovable must be governed by the lex situs; and that, according to that lex, the gift of a life interest in the South African leasehold took effect according to its terms, i.e., so that the usufructuary was entitled to enjoy the rents in specie during her life without giving any security as to the value upon her death, and with the right to obtain an interdict against the executors (sic) if they attempted a sale.

In re Miller [8] was concerned with the will of a domiciled Scotsman so far as it affected an English immovable, namely, real property in Park Lane, London. The will was in Scottish form, but also executed in manner required by English law, and disposed of Scottish immovable, as well as the Park Lane, property, by a gift of them in favour of A " and the heirs of his body " in fee." It was proved, as a matter of Scots law, that the addition of the words " in fee " following the phrase " heirs of " his body " had the effect of giving to the beneficiary, in addition to an estate tail (or its equivalent), certain rights of disposition. It was, accordingly, argued that in the will of a domiciled Scotsman expressed in Scottish form some similar effect should, by some appropriate means, be given to the words as they affected the Park Lane property. But Warrington J. rejected this view, holding that the effect of the devise of an English immovable must be determined by the lex situs, viz., English law, with the result that the use of the words " in fee " had no special significance, and could not limit or qualify the estate tail which was conferred effectively by the devise in favour of " the heirs of the " body." The judge said [9]: " . . . the incidents of the estate " which can be created in English land must be determined by " the law of the country where the land is situated and not by the " law of the country where the testator is domiciled or where " the will is made."

The two cases of *In re Moses* [10] and *In re Miller* [11] are undoubtedly authority for the proposition that any purported disposition by will (or by transfer or other means inter vivos) of immovable property in another country must be subject to the

[7] (1802) 7 Ves. 137.
[8] [1914] 1 Ch. 511.
[9] Ibid. 519.
[10] [1908] 2 Ch. 235.
[11] [1914] 1 Ch. 511.

control of the lex situs in the sense that that lex will govern and determine the effectiveness of the (purported) disposition. But that proposition is, in my judgment, insufficient for Mr. Plowman's purposes. We are here concerned with the meaning of the statutory formula which imposed liability for estate duty upon " property passing " on a death if (so far as concerns the present case) the property passed by reason of a disposition of which the proper law was English. As I have earlier said, Mr. Plowman's argument appears inevitably to involve the result that all immovable property abroad, of which an English testator may in some sense " dispose," is, while unsold, exempt upon any passing from duty—a result which, if intended, could have been very simply stated. It is not in doubt (and the Crown have conceded) that as regards a direct disposition by will of foreign immovables (e.g., to the testator's executors) the lex situs will govern and must prevail. But the question here relates to a case where the administration of the testator's estate in South Africa, having long since been concluded, the income of that estate is, and has since before the date of the relevant death been, received by the trustees in England of the testator's will and applied by them as part of the general income of the estate. As such, the enjoyment of the income of the South African property passed on the death of Sir Elliot to the present tenant for life; and it did so (as I think) by reason, and by reason only, of the disposition to that effect contained in the testator's will, which dispositions were and are governed by the English law—for there is no suggestion of any conflict in this respect between South African and English law, or that South African law provided any impediment or qualification to the effectiveness of the English testamentary disposition or, indeed, that South African law, at that stage, came into the matter at all.

I do not forget that in certain circumstances the law of country A may apply the law of country B and that in such circumstances it is the law of country A which nevertheless governs. But no such considerations appear to apply here. As I understand the evidence, the trustees of Sir Frederic's will have long since been registered, according to South African law, as owners of the Steenbokspan property and all their administrative duties have long since been performed. Since a date prior to Sir Elliot's death, they have regularly received the income of the property as owners. Their application of that income as part of the general estate has been solely in accordance with the directions in Sir Frederic's will; and pursuant to those directions, the right to receive that income passed on Sir Elliot's death to the present tenant for life.

The facts of *In re Berchtold* [12] were somewhat complex but for present purposes it is sufficient to state that a domiciled Hungarian had by an effective English will disposed of immovable

[12] [1923] 1 Ch. 192.

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property in England, namely, a freehold estate in Birmingham, to trustees on trust for sale. The beneficial interest in the proceeds of sale under the will belonged at his death to a second Hungarian national, who had, however, died intestate. The question was whether the persons entitled upon that intestacy to the English immovable (which was still unsold) were to be determined according to the law of Hungary or the law of England. It was not in doubt that the question whether the Birmingham estate should be treated as immovable property or (by reason of the trust for sale) movable was to be determined by the lex situs, i.e., the law of England. If, according to that law, the property was immovable, then the devolution upon intestacy would depend upon lex situs, English law; but if the property were properly (by the lex situs) regarded as movable, then the devolution would depend upon the lex domicilii, i.e., the law of Hungary. Russell J. decided in favour of the former alternative.

In my judgment, since the case was concerned solely with the question of devolution upon intestacy, it cannot assist towards the solution of the present case, and is no authority for the view that for any purpose (including that of estate duty) the disposition by the will of the original testator had at the date of the intestate's death to be treated as governed by one law rather than another.

I conclude then that there is nothing in any of the authorities cited by Mr. Plowman which is inconsistent with the view that I have formed upon the meaning of section 28 (2) of the Finance Act, 1949; and I turn to *Attorney-General* v. *Johnson*,[13] which, as later explained in this court, was much relied upon by Mr. Pennycuick. The relevant facts of that case were that a testator domiciled in England had by his English will left his real and personal estate, which included a tea plantation in Assam, to trustees on trust for sale. He disposed of the proceeds of sale upon trust to pay the surplus income after providing for annuities to eight persons and the survivors and survivor of them for the period of the life of the longest-lived annuitant. The testator died in 1896. The question was whether upon the "passing" occasioned by the respective deaths in 1903 and 1905 of two of the persons entitled to the surplus income, succession duty and, therefore, by virtue of section 2 (2) of the Finance Act, 1894, estate duty, was payable in respect of the Assam immovable which remained unsold pursuant to the trustees' power to postpone the sale. Bray J. answered the question affirmatively. It was, however, stated by Lord Greene M.R. in *In re White* [14] that the grounds for the decision were obscure, and in the present case the Crown has not sought to rely upon them as they appear from Bray J.'s judgment.

[13] [1907] 2 K.B. 885.

[14] [1939] Ch. 131, 141; [1938] 2 All E.R. 691.

But in *Attorney-General* v. *Belilios* [15] in this court the case was regarded as having been correctly decided. Lord Hanworth M.R. said [16] in the course of the argument that it appeared to be a very plain case. Sargant L.J. said of it [17]: "In *Attorney-General* v. *Johnson* [18] the succession held taxable was in "property in Assam remaining unsold, but the succession was "created by an English will devising the property to English "trustees upon trust to sell and hold for beneficiaries here. "The law creating and governing the trust was English." Lawrence L.J. said [19]: "*In re Cigala's Settlement Trusts* [20] and "*Attorney-General* v. *Johnson* [21] are cases where the trusts "were established by persons domiciled in England and were "English settlements from the moment when they were made, "therefore constituting dispositions under which the beneficiaries claimed title by virtue of the laws of England."

It is no doubt true, as Mr. Plowman argued, that the observations of the court upon *Attorney-General* v. *Johnson* [21] were obiter; and it is, of course, also true that that case arose under the Succession Duty Act and the Finance Act, 1894, and not under the Act with which we are presently concerned. Mr. Plowman further contended that the observations of this court already quoted were erroneous and should not now be followed. I should not wish to say—and it is not necessary to do so—that the language of Sargant L.J. and Lawrence L.J. should be treated as involving the extreme propositions which that language, taken literally, might be said to justify. But the language is at least persuasive authority for the view that where (as in *Attorney-General* v. *Johnson* [21] and as in the present case) the situation was that the income of a foreign immovable was being regularly received by trustees in this country as part of the general estate (that is, after the testator's estate here and abroad had been fully administered) and was being applied by the trustees according to the dispositions of the English will, then upon the death of one entitled to a share in that income, there was a succession which attracted duty under the Succession Duty Act and a passing which attracted estate duty accordingly under section 2 (2) of the Finance Act, 1894. And it is to be noted that the final words of the passage which I have cited from Lawrence L.J. reflected the language of Lord Cranworth L.C. (which I anticipated at the beginning of this judgment) in *Wallace* v. *Attorney-General*.[22] That case is not relevant upon its facts, but in the course of his judgment Lord Cranworth L.C. stated that the apparently unqualified language of section 2 of the Succession Duty Act must be treated as limited so as

[15] [1928] 1 K.B. 798; 44 T.L.R. 214.
[16] [1928] 1 K.B. 798, 809.
[17] Ibid. 821.
[18] [1907] 2 K.B. 885.
[19] [1928] 1 K.B. 798, 827.
[20] (1878) 7 Ch.D. 351.
[21] [1907] 2 K.B. 885.
[22] (1865) L.R. 1 Ch. 1.

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only to tax persons "who become entitled by virtue of the laws "of this country."

In the result, in my judgment, Mr. Pennycuick was entitled to say that prior to the abolition of succession duty and the coming into operation of the Finance Act, 1949, *Attorney-General* v. *Johnson* [23] "held the field" and should be regarded as authority for liability for succession duty and, therefore, estate duty in respect of foreign immovables where, as in such a case as the present, the income of the immovable being received by trustees of an English will as part of their general estate and being applied by them in pursuance, and pursuance only, of the disposition of the English will, the successor upon a predecessor's death "became entitled by virtue of the laws of England." And if this is right, then in my judgment it can further be said that upon the enactment of section 28 (2) of the Finance Act, 1949, and the substitution thereby of the new criterion for estate duty for that formerly contained in the Finance Act, 1894, it is reasonable to construe the language of the Act of 1949 consistently with the interpretation which had been given to the earlier legislation.

One final point was taken by Mr. Plowman, namely, that by virtue of section 78 of the Settled Land Act, 1925, when applied to the special terms of Sir Frederic's will, the Steenbokspan property was not, upon Sir Elliot's death, held upon any effective trust for sale. My short answer to this point is that it makes no difference for present purposes whether it was so or not; the essential fact being that, upon and prior to Sir Elliot's death, the income of the property was in fact being received by the trustees as owners and being applied by them as part of the general income of the trust estate according to the directions in Sir Frederic's will.

In the result I think that the decision of Upjohn J. was correct and that the appeal should be dismissed.

SELLERS L.J. I agree with the judgment of the Master of the Rolls that has just been delivered, which I have had an opportunity of reading beforehand, and I too would uphold the decision of Upjohn J. and would dismiss the appeal.

HARMAN L.J. I have the misfortune to dissent from the conclusions arrived at by my Lords.

The words to be construed are "the proper law regulating "... the disposition." I agree with Lord Evershed M.R. in holding that the disposition here is the testator's will and I accept his views both as to the origin of the words "proper "law" and the meaning to be attached to them. I feel no great difficulty in applying these words to a unilateral document such as a will, but as will be seen hereafter, they do not

[23] [1907] 2 K.B. 885.

produce the same effect as when applied to contracts where the proper law is to be determined once for all at the contract date. In the case of a will, the proper law may, and in the instant case does, change at a time after the testator's death, and cannot be settled on the happening of that event.

The testator here has expressly declared that his will should operate according to the law of England "so far as the case "admits," and the question is whether in the case of foreign immovables the case does so admit. The words are an acknowledgment that in many countries the law does not allow freedom of testamentary disposition. The law in South Africa apparently does allow it in this respect, but it is that law and not the English law which makes the disposition effective. It is conceded by the Crown that if the Finance Act, 1949, had been law before the testator's death, estate duty would not have been payable on the happening of that event, nor indeed on a devolution thereafter so long as the administration of the estate in South Africa was not complete. This must be because the South African law was the law regulating the disposition at those stages. It is furthermore conceded that if there had been a direct devise of the property to Sir Elliot after his mother's death, no estate duty would have been payable when the property devolved upon him because the proper law would still be that of South Africa.

It is, however, argued that there comes a point when there is a change in the proper law and, indeed, so far both parties agree. What is in dispute is the point at which this event occurs. The Crown argues, and Lord Evershed M.R. agrees, that this point had been reached before Sir Elliot's death because the administration was complete and the former tenant for life at the time of his death was receiving the rents and profits by virtue of the English will. The taxpayer argues that this point will not come until the date when, if ever, the trust for sale in the English will is carried into effect and the proceeds are transferred to this country.

It seems to me cardinal that the existence of the trust for sale in the English will has not altered the quality of the property from an immovable to a movable asset. Authority for this is *In re Berchtold* [24] and it is, as I understand, not disputed by the Crown. The reason is that the law attaching to immovable property is the lex situs and that in that law the equitable doctrine of conversion has no part. Clearly then to this extent the law regulating the disposition is the law of South Africa. Similarly, in *In re Moses* [25] the English rule in *Howe* v. *Lord Dartmouth* [26] was excluded by the lex situs. Again in *In re Miller* [27] the English law prevailed in its effect upon the devise of an English immovable and prevailed over the law of

[24] [1923] 1 Ch. 192.
[25] [1908] 2 Ch. 235.
[26] 7 Ves. 137.
[27] [1914] 1 Ch. 511.

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Scotland where the will was made and where the testator was domiciled.

It seems to me that so long as the foreign immovable remains an immovable, it must in fact be controlled by the lex situs. The immediate reason why the present tenant for life is receiving the rents and profits is no doubt because of a direction in the English will, but that only takes effect because the South African law allows it to do so. If, for instance, that law did not recognise the provision cutting down the interest of a tenant in tail living at the death of the testator to a life interest but conferred upon him an absolute interest, that would undoubtedly prevail over the direction in the English will.

It is objected that to construe the statute in the way I have suggested is to nullify its effect in every case of foreign immovables and that it would have been much simpler, if that were the legislature's intention, to say so in so many words. I do not feel the force of this. It is conceded by the taxpayer that once the asset arrives in England, or rather perhaps when it becomes a movable, then the beneficiaries take solely by virtue of English law and that becomes the proper law. *Attorney-General* v. *Campbell* [28] is a good illustration of this, for there the foreign property had in fact been converted in obedience to the directions in the will and invested in England and, therefore, on the death of the annuitant an English succession arose, notwithstanding the fact that the testator was domiciled in Portugal and his property was originally situated there. In that case Lord Westbury in his speech said [29]: "Now, all this is an im-"mediate consequence of the first principles of law, and the "Master of the Rolls has been misled by language which was "used by Lord Cranworth L.C. in *Wallace* v. *Attorney-General*,[30] "where the extraordinary conclusion was contended for, that "under the will of a gentleman dying domiciled abroad the first "legatee, though he was not liable to legacy duty, became "liable to succession duty under the Act. It is quite clear that "you cannot apply an English Act of Parliament to foreign "property whilst it remains one property; but after the purposes "of administration have been answered and distribution made, "if a party taking this distributive part comes to this country "and invests it upon trusts, it assumes the character of a "British settlement and British property, and is no longer to "be dealt with as if it was merely a portion of a foreign testator's "estate to be received in the course of administration."

Similarly, in *Attorney-General* v. *Belilios* [31] the testator's property remained situate in Hongkong and it was declared that no estate duty was payable under section 2 (2) of the Finance Act, 1894. In *Attorney-General* v. *Jewish Colonisation Association* [32] estate duty was held payable because the trustee under

[28] (1872) L.R. 5 H.L. 524.
[29] Ibid. 530.
[30] (1865) L.R. 1 Ch. 1.
[31] [1928] 1 K.B. 798.
[32] [1901] 1 K.B. 123; 17 T.L.R. 106.

the relevant deed in whom the assets were vested was an English company and the trusts must be executed solely under English law.

This leaves *Attorney-General* v. *Johnson*,[33] which undoubtedly decides that though the foreign property was still unsold, estate duty was payable in England. In my judgment this decision was wrong and really depended on the view of the judge that the trust for sale operated to convert the foreign property into movables—see the judgment. This is the explanation suggested by Lord Greene M.R. in *In re White*.[34] This decision was not criticised in *Attorney-General* v. *Belilios* [35] (above) but the point did not arise directly in that case and was not, I think, being considered by Sargant and Lawrence L.JJ.[36] Moreover, the decision in *Attorney-General* v. *Johnson* [37] has not much left to support it after the criticisms of Lord Greene M.R. in *In re White*,[38] and the concession which the Crown felt constrained to make here that it could not rely on the judge's view that the Assam property was an English chose in action.

I am further of opinion that the liability to estate duty under the section depends on the situation at the relevant time, which here is the death of Sir Elliot, of the property disposed of by the will and that Dicey's rule applies.

In my judgment the case does not depend upon the forum in which the trusts of the will ought to be enforced. The cases of *Sudeley* v. *Attorney-General* [39] and *In re Smyth* [40] seem to turn on the question of the forum of administration and on the view not now contended for that an English trust for sale of foreign immovables converted them into personal property and, therefore, into movables. True it is that the trusts of this will might be enforced against the trustees by a suit in England, but it could not be effective by obliging them to take proceedings in South Africa, and the ultimate sanction must lie there. Suppose, for instance, that the law of South Africa were to be altered so that the trusts of an English settlement were ordered to be disregarded so far as they related to land in South Africa, it could not be denied that South African law would prevail. It seems to me, therefore, that the law regulating the disposition remains in the last resort the South African law and that law, therefore, so long as the property remains in South Africa, is the proper law of the disposition.

Appeal dismissed with costs.
Leave granted to appeal to the House of Lords.

Solicitors: *Norton Rose & Co.*; *Solicitor of Inland Revenue.*

E. D.

[33] [1907] 2 Q.B. 885.
[34] [1939] Ch. 131, 141.
[35] [1928] 1 K.B. 798.
[36] Ibid. 821, 827.
[37] [1907] 2 K.B. 885.
[38] [1939] Ch. 131, 141.
[39] [1897] A.C. 11.
[40] [1898] 1 Ch. 89; 14 T.L.R. 77.

[COURT OF APPEAL.]

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Hodson and Ormerod L.JJ. and Wynn-Parry J.

INSTITUTION OF MECHANICAL ENGINEERS *v.* CANE (VALUATION OFFICER) AND WESTMINSTER CITY COUNCIL.

[LVC/183/1956.]

Rates and Rating—Science or fine art—Exemption—Society "to promote the development of mechanical engineering"—Supported mainly by annual subscriptions—Whether instituted for purposes of science exclusively—Whether subscriptions voluntary—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The Institute of Mechanical Engineers was founded in 1847 as a voluntary association and later incorporated by Royal Charter, the object being "to promote the development of mechanical engineering "and to facilitate the exchange of information and ideas thereon," for which purpose the institute was empowered to encourage invention and research, to hold meetings for reading and discussing communications, to distribute proceedings, reports and papers, to co-operate with educational bodies and to do other things conducive to the attainment of its object.

Membership of the institution was of great advantage to engineers, as they had the benefit of the educational facilities provided, of associating with other members of the profession, of receiving the reports of proceedings and other publications, and of enjoying a special professional status by virtue of their membership. The income of the institution was some £168,000, of which £138,000 came from members' subscriptions and the balance from investment income, sale of publications, and other sources. The cost of the publications distributed to members was about 30 per cent. of the annual subscriptions.

The local valuation officer made a proposal that the premises of the institution should be included in the valuation list on the ground that it was not entitled to the benefit conferred by section 1 of the Scientific Societies Act, 1843, as a society "instituted for "purposes of science exclusively" and "supported wholly or in "part by annual voluntary contributions." The Lands Tribunal held that the institution was entitled to the benefit of the section, as the object was a purpose of science, and the subscriptions of the members of such an institution ought to be regarded as voluntary unless the value of the publications received approximated closely to the amount of the subscriptions. On appeal:—

Held, allowing the appeal, (1) that the institution was not formed for purposes of science exclusively. The term "mechanical "engineering" included not only the science, but the practice and technique of engineering, which were separate and distinct (post, pp. 53, 58).

Observations in *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.* [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984 applied.

(2) That the institution was not supported by voluntary contributions, as the subscriptions of the members were not "volun-"tary" within the meaning of the Act. "Voluntary" was not in this context the opposite of "compulsory," and in considering this question regard must be had to the motive inducing members to join, as opposed to the purpose of the institution (assuming it to be scientific); and to the question whether members joined from disinterested motives without looking to any professional advantage in

return. In the present case the substantial professional benefits conferred by membership were an inducement to join (post, p. 63).

Overseers of the Savoy v. *Art Union of London* [1896] A.C. 296; 12 T.L.R. 377 and *Inland Revenue Commissioners* v. *Forrest* (1890) 15 App.Cas. 334 applied.

Birmingham Churchwardens v. *Shaw* (1849) 10 Q.B. 868 disapproved.

APPEAL from the Lands Tribunal.

The Institution of Mechanical Engineers was founded in 1847 as a voluntary association, and was granted a Royal Charter in April, 1930. Clause 7 of the Charter provided: "The objects and "purposes for which the institution is hereby constituted are to "promote the development of mechanical engineering and to "facilitate the exchange of information and ideas thereon and for "that purpose: (A) To encourage invention and research in "matters connected with mechanical engineering and with this "object to make grants of money or books or otherwise to assist "such invention and research. (B) To hold meetings of the "institution for reading and discussing communications bearing "upon mechanical engineering or the application thereof or upon "subjects relating thereto. (C) To print publish and distribute "the proceedings or reports of the institution or any papers "commmunications works or treatises on mechanical engineering "or its application or subjects connected therewith. (D) To "co-operate with universities, other educational institutions and "public educational authorities for the furtherance of education "in engineering science or practice. (E) To do all other things "incidental or conducive to the attainment of the above objects "or any of them."

It was claimed and acknowledged that membership of the institution was of great value to persons practising as mechanical engineers, who received substantial corporate benefits by way of examinations for student or graduate membership, the receipt of the proceedings of the institution and other scientific and technical publications, and opportunities for associating with other members of the profession, and the members enjoyed a special professional status. The income of the institution for the year 1955 was some £168,000, of which some £138,000 was derived from members' annual subscriptions and the balance was provided by income of invested funds, sale of proceedings, examination fees and rents. The cost of the publications distributed to members represented about 30 per cent. of the total annual subscriptions.

The institution had enjoyed exemption from rating under section 1 of the Scientific Societies Act, 1843, as a society "instituted for purposes of science exclusively" and "supported "wholly or in part by annual voluntary contributions." In 1956 a proposal was made by the local valuation officer that the premises of the institution in Westminster should be rated; this was confirmed by the local valuation court, but an appeal to the

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Lands Tribunal was allowed. The tribunal held, first, that the object as stated in clause 7 of the charter was a purpose of science, paragraphs A to E of the clause being ancillary to that purpose in that they indicated the means to which that object could be achieved. Secondly, the tribunal held that the institution satisfied the requirement that it should be supported by annual voluntary contributions; in so doing the tribunal applied what was termed a "local rule" that subscriptions to such societies did not cease to be voluntary unless the value of the publications received by the members approximated closely to the amount of the subscriptions, which was not the fact in the present case. The valuation officer and the local rating authority appealed.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer.

W. L. Roots Q.C. and *F. A. Amies* for the institution.

R. W. Bell for the local rating authority.

The following cases which were cited in argument are not referred to in the judgment: *Watcham* v. *Attorney-General of East Africa Protectorate* [1]; *In re Duty on Estate of New University Club* [2]; *O'Sullivan* v. *English Folk Dance and Song Society* [3]; *Camden (Marquis)* v. *Inland Revenue Commissioners.* [4]

Cur. adv. vult.

Dec. 1. HODSON L.J. The judgment which I am about to read is the judgment of the court, and is a composite judgment.

These appeals are from a decision of the Lands Tribunal dated March 11, 1958, allowing an appeal from a decision of the local valuation court for Central London given on August 9, 1956, confirming an assessment for the purpose of rating of a hereditament owned and occupied by the respondents.

The question at issue is whether the respondents are entitled to exemption from rating under the provisions of the Scientific Societies Act, 1843, section 1 of which reads as follows: "(1) No "person or persons shall be assessed or rated, or liable to be "assessed or rated, or liable to pay, to any county, borough, "parochial, or other local rates or cesses, in respect of any land, "houses, or buildings, or parts of houses or buildings, belonging "to any society instituted for purposes of science, literature, "or the fine arts exclusively, either as tenant or as owner, and "occupied by it for the transaction of its business, and for carry-"ing into effect its purposes, provided that such society shall be "supported wholly or in part by annual voluntary contributions "and shall not, and by its laws may not make any dividend,

[1] [1919] A.C. 533; 34 T.L.R. 481.
[2] (1887) 18 Q.B.D. 720.
[3] [1955] 1 W.L.R. 907; [1955] 2 All E.R. 845.
[4] [1914] 1 K.B. 641.

" gift, division or bonus in money unto or between any of its " members and provided also that such society shall obtain the " certificate of the barrister-at-law or lord advocate, as herein- " after mentioned."

Before the Lands Tribunal it was contended by the respondents (1) that the institution was formed for the purpose of science exclusively; and (2) that it was supported wholly or in part by annual voluntary contributions. The Lands Tribunal upheld the respondents' contentions and allowed their appeal.

The first question for consideration is whether on a true construction of the charter it can be said that the respondent society, hereafter referred to as the institution, was formed for the purposes of science exclusively. If the answer to this question is in the negative, then clearly this appeal must be allowed. If, on the other hand, we should come to the conclusion that the question demands an affirmative answer, then two further questions arise. (1) Are the activities of the institution such as come within its objects as defined by its charter, or do the respondents occupy their premises for the pursuit of activities not exclusively scientific; and (2) are the respondents supported wholly or in part by annual voluntary contributions?

According to paragraph 1 of the petition for a Royal Charter, the Institution of Mechanical Engineers was founded in the year 1847 as a voluntary association " having for its general objects " the promotion of the science and practice of mechanical " engineering." It was incorporated in 1878 under the Companies Acts as an association limited by guarantee, and was granted a Royal Charter on April 22, 1930.

Clause 7 of the charter reads as follows: [His Lordship read the clause and continued:] The appellants contend that the objects of the institution as defined by this clause are such that it cannot be said that it was formed for the purposes of science exclusively. The Lands Tribunal answered this first question in the affirmative. The president, after referring to the evidence of Professor Saunders said: " It is clear that the development of " mechanical engineering is a technical process. There must be " few people in this country better qualified than Professor " Saunders to explain in language the ordinary man can appre- " ciate what that process involves, and I accept his contention " that the promotion of the development of mechanical engineer- " ing means the increasing the scientific data so that you can do " things in mechanical engineering by the application of dis- " covered scientific principles rather than by intuition or guess. " This leads me to the conclusion that the object of clause 7 of the " charter is a purpose of science. I think that paragraphs (A), " (B), (C), (D) and (E) of the clause are ancillary to that " purpose in that they indicate the means by which the object " can be achieved, and on a true construction of the charter, I " hold that the institution is instituted for the purpose of science " exclusively."

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The evidence of Professor Saunders, who is Dean of Engineering and head of the department of mechanical engineering at the Imperial College of Science at the University of London, was as follows: "I think mechanical engineering is an applied science "and as such it contains a true scientific element and an art "element. An engineer is obliged in the course of his work to "make many decisions and to do many things which are not "based on science alone; they are based on his experience, "accumulated knowledge from experience, and perhaps also "intuitive knowledge. The aim, however, of an engineer is to "get the best possible efficiency in what he does and to replace "the art element wherever possible by the scientific one. I "would have thought that it is impossible to separate completely "the two elements, that in any given problem both elements "must be present. But I would make strongly the point that "you cannot advance scientific engineering in a vacuum as a "science only. You can only advance it by doing things, by "building things, by studying the results, and in so doing "increasing the scientific content of your knowledge. So that, "listening to Mr. Rowe, I would have felt that it is quite "impossible to advance mechanical engineering science without "studying the practical matters, without in fact considering the "art content of the subject."

It is no doubt true to say that the term "mechanical engineer-"ing" connotes a true scientific element. It was not in dispute in any of the proceedings that there is a science of mechanical engineering, and that the promotion of the development of mechanical engineering must or at least should involve the development of that science. It may well be that the sum of scientific knowledge will be increased by practical experience in engineering construction. But that is not the same thing as saying that the promotion of the development of mechanical engineering means the pursuit of an exclusively scientific object. An institution may exist for a number of purposes. Although one or more of these may properly be described as scientific, the others may not be so, although the carrying out of them may add to the sum of scientific knowledge. During the argument we were referred to various dictionary definitions of the word "engineering." They did not seem to us to assist.

The term "mechanical engineering" is one in common use, and it appears to us that the way to approach the question is to consider whether in the ordinary usage of the term it can be said to refer exclusively to science. The sub-paragraphs to clause 7 of the charter do not appear to advance the matter. It is true that sub-paragraph (D) refers to the furtherance of education in "engineering science or practice," but otherwise they are consistent with either view of the meaning of the term "mechanical "engineering."

It was contended by the appellants that the term included not only the development of the technique and practice of

engineering but the development of the engineering industry and various incidental matters such as works organisation and management. Unless we are constrained by authority to come to a different conclusion, we are of the opinion that on a proper construction of clause 7 of the charter the institution is not formed for the purpose of science exclusively. Without necessarily giving it the wide meaning for which the appellants contend, the term "mechanical engineering," in our judgment, includes something more than the science of mechanical engineering. At the least it includes the practice and technique of engineering.

It may be, as Professor Saunders has said, that science and practice are to some extent interdependent, that modern engineering technique is in part at least the outcome of scientific research and the application of known scientific principles, and that the practice of engineering may add to the sum of knowledge and experience from which further scientific principles may be discovered and applied. But that does not mean that the science and practice of engineering are the same thing, or that the purpose of their development can be said to be exclusively technical or practical. The two purposes may well run side by side, each to some extent the complement of the other, but in our view they remain nonetheless separate and distinct purposes.

It is helpful in coming to a conclusion on this part of the case to have regard to one or two passages in the speeches of the learned law Lords in *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[1] One of the questions for decision was whether the college was in law a charity, the relevant passage in the charter being "the due promotion and "encouragement of the study and practice of the said art and "science 'of surgery'." It was held that it was. Lord Normand said[2]: "The words 'the study and practice of the art and "'science' of surgery do not, in my opinion, mean 'the academic "'study and professional practice of the art and science of "'surgery'; they signify rather the acquisition of knowledge and "skill in surgery both by abstract study and by the exercise of "the art in the dissecting room and the anatomy theatre, and "they are capable of covering both the discovery of new know-"ledge, which is the fruit of research, and the learning of existing "knowledge either by students who are qualifying or by qualified "surgeons desirous of improving their knowledge and skill." Lord Morton said[3]: "This being so, I have no doubt that the "object of this newly created body, the college, is stated in the "last recital and is 'the due promotion and encouragement of "'the study and practice of the art and science of surgery.' As "I read the words 'study' and 'practice' they embody two "ideas, research in the laboratory and that practical experience "which can only be gained by using surgical instruments upon

[1] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.
[2] [1952] A.C. 631, 641.
[3] Ibid. 654.

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"human or other bodies. The object of the college is to promote "the art and science of surgery by encouraging each of these "activities." Lord Reid said [4]: "It is true that in *In re Royal "College of Surgeons of England* [5] the Court of Appeal took a "somewhat different view. There the case for the college was "that its property was legally appropriated and applied for the "promotion of science, and the court held, I think rightly, that "this was not the only purpose for which the property was held "and used. The promotion of science is one way of promoting "the study and practice of the art and science of surgery, but "it is not the only way"; and Lord Tucker said [6]: "In my view, "the objects of the college as set out in the charter of 1800, "and never thereafter varied, were (1) the promotion of the "science of surgery; (2) the promotion of education in surgery. "The latter can only be achieved by practice as well as study, "and the holding of examinations is an essential step in the "educational process." Their Lordships were not, of course, considering the effect of section 1 of the Scientific Societies Act, 1843, but it is interesting to note that they regarded the science and practice or art of surgery as separate objects.

In *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association* [7] Jenkins J. said: "(i) 'Science' for the "present purpose includes applied, as well as pure or speculative, "science (see *per* Lord Macnaghten in *Inland Revenue Commis- "sioners* v. *Forrest* (2) [8]) so that purposes directed to the promo- "tion of science in its application to a particular trade or "industry, such as the iron and steel trade or industry in the "present case, may be regarded as purposes of science within the "meaning of the section.

"(ii) The question whether a particular society is 'instituted "'for purposes of science literature or the fine arts exclusively' "within the meaning of the section must be determined by "reference to the purposes of the society as defined by its con- "stitution, rather than the purposes it may actually have "pursued in practice." and he later said [9]: "On the question "of technical education we were referred to *Royal College of "Music* v. *Westminster Vestry* (1),[10] where it was held that the "teaching of music was a means of promoting the fine art of "music. But this proceeds on the ground that music is a fine "art, and only goes to show in the present case that the teaching "of science is a means of promoting science, not that technical "education is necessarily and exclusively scientific education, as "in my view it is not."

And in the *British Launderers Research Association* v. *Hendon Borough Rating Authority*,[11] a case which was considered at the

[4] [1952] A.C. 631, 661.
[5] [1899] 1 Q.B. 871.
[6] [1952] A.C. 664.
[7] [1949] 1 K.B. 434; 65 T.L.R. 183.
[8] (1890) 15 App.Cas. 334.
[9] [1949] 1 K.B. 434, 456.
[10] [1898] 1 Q.B. 809 (C.A.)
[11] [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21.

same time as the *Battersea* case,[12] Denning L.J. said[13]: "The "purposes of science, however, do not include the purposes of the "firms or persons who make use of science. Many of our great "industrial concerns, such as I.C.I., make use of science and, "indeed, institute research laboratories for the purposes of "science, but only as incidental to their industrial purposes. So "also our technical schools make use of science and institute "laboratories for the purposes of science, but only as incidental "to the training of craftsmen. In such cases the laboratories are "instituted for the purposes of individuals, not for the purposes "of science except as incidental to the purposes of individuals."

In the *Institute of Fuel* v. *Morley*,[14] the House of Lords, reversing the decision of the Court of Appeal, came to the conclusion that the institute was formed exclusively for the purpose of science, and was, accordingly, exempt from rates. The purposes of the institute as set out in paragraph 7 of its charter were: "(a) To promote, foster, and develop the general advance-"ment of the various branches of fuel technology as an end in "itself, and as a means of furthering the more scientific and "economic utilisation of fuel of all kinds for industrial, com-"mercial, public, agricultural, domestic, transport and/or other "purposes, and to promote, assist, finance and support such in-"dustrial and scientific research, investigation, and experimental "work in the economical treatment and application of fuel as the "institute may consider likely to conduce to those ends, and to "the benefit of the community at large." It was held that the exclusive purpose of the society was scientific, and any advantages enjoyed by the members were ancillary to the advancement of fuel technology.

Lord Morton said[15]: "Mr. Lyell, for the respondents, sub-"mitted that the sub-paragraph stated two purposes, whereof "the first was scientific and the second was of a commercial "nature. I think it is quite possible to read (a) as stating two "purposes, one beginning with the words 'to promote, foster and "'develop,' and the other with the words 'to promote, assist, "'finance and support.'

"In my view, however, such a sub-division does not assist "the respondents, as each of the two purposes so stated is to my "mind a scientific purpose. I cannot find in either of them any "suggestion that the institute can embark on any commercial "pursuit; they are both confined to the acquisition of knowledge "in the realm of fuel technology, which is admittedly a science, "and to the spread of such knowledge for the benefit of the "community."

It was pointed out by Mr. Lyell in the argument in the present case that it was conceded from the outset that fuel technology

[12] [1949] 1 K.B. 462.
[13] [1949] 1 K.B. 434, 468.
[14] [1956] A.C. 245; [1956] 2 W.L.R. 64; [1955] 3 All E.R. 843.
[15] [1956] A.C. 245, 253.

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was a science, and that the institute were occupying their premises for this purpose only. The substantial question at issue, therefore, was whether the other subjects were purposes which rendered the main purpose other than exclusive, or whether they were ancillary to that main purpose.

In *Society of Chemical Industry* v. *Cane*,[16] a case decided by the Court of Appeal, objects A and B of the preamble to the charter read as follows: "(A) To advance applied chemistry in "all its branches; (B) to afford the members thereof opportunities "for the interchange of ideas with respect to improvements in "the various chemical industries and for the discussion of all "matters bearing upon the practice of applied chemistry and the "publication of information thereon"; and clause 3 reads: "The "objects of the society shall be to carry on the work commenced "and heretofore generally carried on by the society of 1881 and "to promote the application of chemical science to arts and "manufactures and also the discussion and diffusion of all know-"ledge and information and to further by causing to be made or "assisting in the making of investigations inquiries and reports "upon novelties improvements inventions processes and the "practical application of scientific discoveries bearing upon the "practice of applied chemistry and of any of the industrial arts "thereto allied and to carry on the publication of the journal."

It was held that the society was exempt from rating. Parker L.J. said[17]: "The main argument before this court turned on "the construction of object B of the society as originally estab-"lished in 1881. Do the words of that object and, in particular, "the words 'with respect to improvements in the various "'chemical industries,' on their true construction, denote a "commercial purpose, not merely ancillary to the advancement "of applied chemistry, but a distinct, albeit subsidiary, purpose? "In deciding that question, I think it is important to bear two "things in mind. First, as the Act says, one has to see if the "society is 'instituted for the purposes of science exclusively.' "For that purpose, one looks at the objects clause, the objects "clause being the authorised activities of the society. The fact "that those authorised activities are labelled A, B, C, D, etc., "however many there may be, does not mean that they all con-"stitute separate purposes; albeit separately labelled, there may "be only one purpose in question. The second thing to bear in "mind is that the science we are dealing with here—it is admitted "it is a science—is applied chemistry, and applied chemistry "necessarily involves the promotion of chemistry applied to com-"mercial and industrial purposes. Accordingly, one would expect "to find references to industry, but it does not follow that one "of the objects is to promote industry, though no doubt dis-"semination of the knowledge acquired in the pursuit of applied

[16] (1956) 54 L.G.R. 496; (1956) Ryde's Rat. Cas. 106.
[17] 54 L.G.R. 496, 503.

" chemistry will necessarily promote industry." Again in this case it was common ground that applied chemistry was a science and its promotion was therefore a scientific object.

The institution, in argument on this part of the case, placed considerable reliance on the decision of this court in the case of the *Institution of Civil Engineers* v. *Inland Revenue Commissioners*.[18] The question in that case was whether the Institute of Civil Engineers was " a body of persons . . . established for " charitable purposes only " and therefore exempt from income tax under section 37 (1) (*b*) of the Income Tax Act, 1918. It was held that they were so exempt. The society was incorporated by Royal Charter and the object for which it was founded was " the " general advancement of mechanical science, and more particu- " larly for promoting the acquisition of that species of knowledge " which constitutes the profession of a civil engineer, being the " art of directing the great sources of power in nature for the use " and convenience of man."

Lawrence L.J. in the opening sentence of his judgment said [19]: " The question in this case is whether the Institution of Civil " Engineers is a body of persons established for charitable " purposes only and therefore exempt from income tax under " section 37 (1) (*b*) of the Income Tax Act, 1918. The answer " to this question depends upon whether the institution is " established solely for the advancement of the science of civil " engineering (an admittedly charitable purpose), or whether one " of the purposes for which it is established is to benefit civil " engineers in order to enable them to practise their profession " to greater advantage," and later he said [20]: " Bearing in mind " that the original Charter of 1828 clearly states the only purpose " for which the institution was established, and that this purpose " has never been added to or varied by any of the supplemental " Charters, and further bearing in mind that the House of Lords " has decided that this purpose is for the general advancement " of the science of civil engineering, it follows in my judgment " that the institution is established for a charitable purpose only, " notwithstanding that it is of advantage to a civil engineer in " his profession to be a member of the institution, this result not " being a purpose for which the institution was established but " being incidental to and consequent upon the way in which " the institution carries out the charitable purpose for which " alone it was established."

Other authorities were cited by counsel for both parties in the course of this part of the argument, but they did not in our view give us any further assistance in coming to a decision. The effect of all the authorities would seem to be that each case must be considered according to the terms of its Charter, and it is to the true construction of these terms that regard must be had in

[18] [1932] 1 K.B. 149; 47 T.L.R. 466.
[19] [1932] 1 K.B. 149, 167.
[20] Ibid. 171.

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determining whether the purposes of the institution are exclusively scientific. In considering the question regard must be had to the further question of whether purposes which do not appear to be scientific are merely ancillary purposes to the fulfilment of the exclusive object. That further question does not arise in the present case.

The object and purpose for which the institution was constituted is "to promote the development of mechanical engineering." We have already expressed our opinion that these words have a wider meaning than "to promote the development of "mechanical science" and there appears to be nothing in the authorities cited to us which leads us to a different opinion. We would, therefore, answer the first question by holding that the institution was not formed for the purpose of science exclusively.

In these circumstances it is unnecessary to consider separately whether the premises have been used by the institution for purposes other than those set out in the charter. There is, however, the further question upon which the institution's entitlement to exemption depends, that is to say, the question whether it is supported wholly or in part by annual voluntary contributions.

The income of the institution for the year ending December 31, 1955, was £168,482 2s. 11d. of which £138,750 2s. 6d. was derived from subscriptions, and the balance was made up chiefly of interest on capital, sale of "Proceedings," examination fees and rents. Out of these items it has been held by the Lands Tribunal that the subscriptions qualify as annual voluntary subscriptions, so that provided the institution were formed for scientific purposes, it would be exempt from rating. There is no doubt that the subscriptions are annual and that they support the institution in fact, indeed it depends for its support in the main upon these subscriptions, but the argument turned upon whether they are voluntary contributions. This matter was considered by the House of Lords in *Savoy Overseers* v. *Art Union of London*,[21] where it was decided that the Art Union of London, albeit a scientific Society, was not "supported by voluntary "contributions" within the meaning of the Scientific Societies Act, 1843.

This decision therefore laid to rest a heresy which first appeared in the *Birmingham Churchwardens* v. *Shaw*,[22] where Lord Denman had apparently treated the word "voluntary" as the antithesis to the word "compulsory."

It remains, therefore, to consider what is the true effect of the decision in the *Art Union* case, since it is argued on behalf of the institution that the *Art Union* case was determined against the union upon the sole ground that the members received full value for their money in return for their subscriptions. It is true that each member of the House emphasised this aspect of the

[21] [1896] A.C. 296; 12 T.L.R. 377. [22] (1847) 10 Q.B. 868.

case in his speech. We take as an illustration language used by Lord Macnaghten [23]: "It appears to me to be almost absurd to "say that a society is supported by voluntary contributions when "it prides itself, as the Art Union of London openly does, on "returning to every contributor the equivalent of his contribution "in respect to value and money's worth."

What then is the position where it can be fairly argued that the subscriber does not receive full value for his money and receives little by way of tangible benefits in return for his subscription? No clear answer has as yet been given by the courts to this question. We were told that in these cases what has been described as a "local rule" has been followed by the Lands Tribunal to the effect that subscriptions do not cease to be voluntary because the subscribers obtain the publications of the society at a reduced rate unless the value of the publications approximate closely to the amount of the subscriptions. In the case of the institution the cost to the members of the relevant publications, namely, "The Chartered Mechanical Engineer" and of the "Proceedings" which represented about 30 per cent. of the total of the annual subscriptions was held not to defeat the claim of the institution that the subscriptions were voluntary within the meaning of the Act. No other benefit was taken into account as consideration for the subscription sufficient to destroy the voluntary nature of the payment.

We do not find anything in the speeches of the House of Lords in the *Art Union* [24] case nor in subsequent authorities which supports the liberal interpretation of the word voluntary given by the tribunal in this and no doubt (as the president has indicated) in other cases.

Lord Herschell used these words [25]: "I do not think it was "intended to exempt from rating buildings belonging to a society "merely because the payments by which it was wholly or in "part supported were made voluntarily and not compulsorily, "when they were not made gratuitously, but were the price of "the advantages obtained in return for them. The expression "'supported by voluntary contributions' has long been well "known in connection with hospitals and other institutions; I "think the essential idea conveyed by them is that the payments "are a gratuitous offering for the benefit of others, and not the "price of an advantage purchased by the contributor. It was "pointed out by Kay L.J. that in the case of some hospitals, the "contributors receive a number of letters of admission measured "by the amount of their subscriptions. But though this may "give them a voice as to the persons who are to be the objects of "the charity, I think it would be unreasonable to regard the "contribution as being on that account not a gratuitous charitable "gift, but the purchase of a personal advantage. If, indeed, a

[23] [1896] A.C. 296, 312.
[24] [1896] A.C. 296.
[25] Ibid. 310.

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"hospital were established on co-operative principles, each "contributor being entitled to claim medical treatment there, "and the inmates being confined to contributors, I should say "that it was not supported by 'voluntary contribution,' even "when there was nothing to compel any person to become a "contributor, and he might cease to be so at any time he "pleased."

It will thus be apparent that the question does not depend on whether there is any consideration at all for a payment. A nominal consideration may be ignored, and this no doubt has led the tribunal to take a liberal view in some cases. We cannot, however, regard as nominal the contractual advantages which members of an institution such as this derive from their membership, and in our opinion the authorities are against such a contention. The object of the individual members in joining a society must, as Lord Macnaghten pointed out in the *Art Union* case,[26] be looked at separately from the purpose of the society itself.

It is true that the evidence accepted by the president was to the effect that the institution has not sought to promote the professional interests of its members, but it cannot be said that the subscriptions made to the institution are in their nature altruistic. If one concedes in this connection that the purpose of the institution is exclusively scientific, it does not follow that the motive which leads members to join it is that science may be advanced. One must still ask the question: "Are the members "acting from disinterested motives, and not looking for any "return in the shape of distinct personal advantage?"

The question must be answered by looking at the nature of the society as revealed by its charter and by-laws, which regulate the election of members and the payment of subscriptions, and to the other activities of the society in which its members may take part.

It is legitimate to look at the petition upon which the charter was founded. Paragraph 7 reads: "The activities of the institu-"tion have for long been of great value to the profession. The "researches directed, conducted, or assisted by the institution "and the discussions thereon have dealt with every aspect of "mechanical engineering and have contributed not a little to the "development of that science. The opportunities afforded by "the meetings of the institution for the interchange of ideas and "experience have proved of great value to the members; the "development of its own qualifying examinations and its co-"operation with departments of Your Majesty's Government in "technical education have raised the standard of technical "knowledge throughout Your Majesty's Empire, while the elec-"tion of suitable persons as graduates and students affords "encouragement to those commencing their engineering career,

[26] [1896] A.C. 296, 313.

" and brings them in touch with senior members of their " profession and with its current development."

The introduction to the annual report for the year 1953 contains these passages: " In introducing their report the council " wish to draw attention to some of the more interesting events " of a year notable for the fact that for the first time in the " institution's history, the total membership exceeded 40,000. " This fact bears witness to the increasingly influential part that " the institution is playing in mechanical engineering, and to " the esteem in which it is held in the profession. It is " particularly gratifying to draw attention to the appeal which " membership of the institution holds for the younger aspirants " to professional status. The council continues to give careful " thought to the finances of the institution and sought ways in " which economies could be effected without impairing the value " of services rendered to members; in this respect the detailed " review of our publications carried out during the year has special " importance."

Not only are members entitled to the publications referred to in the findings of the president, but also they obtain the other corporate benefits of a society composed of professional men interested in the same subjects and deriving advantages from their corporate studies. It should be remembered that the institution is to all intents and purposes wholly supported not by outside donors but by members who might be expected to join in order to enjoy the advantages which they can scarcely help obtaining from their membership. If motive in joining is (as we think it is) to be considered, it is impossible to ignore the fact that many of the activities of the institution will be inducements to join.

We give, as examples, some aspects of its educational work, its formation of an appointments bureau (although there was no evidence of its use), its provision of a model contract for use in projects involving mechanical engineering, the main object of which was found by the president to be to protect the material interests of the engineer in his professional capacity. These advantages are not in themselves negligible, though they may be less valuable than the more intangible general benefits of membership to which we have referred.

Support for the view which we have formed is to be found in the opinions of the House of Lords in the case of *Inland Revenue Commissioners* v. *Forrest*,[27] where the question was whether the property of the Institution of Civil Engineers was exempt from duty under the Customs and Inland Revenue Act, 1885, as being applied for the promotion of science. In speaking of that institution Lord Watson said[28]: " I do not doubt that membership is " accompanied by a certain amount of prestige which may prove " to be of service to a member in his professional career; but I

[27] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[28] 15 App.Cas. 334, 351.

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" believe that the same result would attend membership of any " society which effectively promoted a branch of science intimately " connected with the profession or business in which the member " was engaged."

Lord Macnaghten said of that institution [29]: " Probably the " founders of that society were not insensible to the advantages " which such an institution was likely to confer upon its members " in their professional capacity. That would have been a formid- " able objection if the language of the Act of 1885 had been the " same as that of the Act of 1843." The dictum contained in the last sentence is directly in point in considering the position of the Institution of Mechanical Engineers.

In considering *Regina* v. *Institution of Civil Engineers* [30] Lord Watson said [31]: " In order to bring a society within section 1 of " the Act of 1843 two statutory requisites must concur. The " society must be instituted exclusively for the purposes of " science, literature or the fine arts; and it must also be sup- " ported, in whole or in part, by annual voluntary contributions. " I do not think that the legislature intended that fixed yearly " payments which individuals agree to make in consideration of " their being admitted to a society and allowed to share in its " management (there being a legal obligation to make such pay- " ments so long as their membership continues), should be " regarded as voluntary contributions within the meaning of the " Act."

In the *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [32] Romer L.J. said: " Where a society is instituted for " a charitable purpose it is obvious that the membership of the " society may confer upon its holder personal advantages of " considerable value to him in his profession or in his social " standing." The Lord Justice then proceeded to give examples.

The judgment of their Lordships in the *Forrest* case [33] was held virtually to have overruled the decision of the Divisional Court in *Regina* v. *Institution of Civil Engineers*.[34] Romer L.J. said [35]: " As regards that judgment "—that is, the decision of the Divisional Court—" Lord Macnaghten while agreeing in the con- " clusion said that he had some difficulty in accepting the " propositions and following the reasoning on which the conclusion " was based. The conclusion was that the institution was not " entitled to exemption under the Act of 1843; and I think that " Lord Macnaghten meant no more than that the conclusion could " be supported on the ground that the institution was not " supported in whole or in part by ' voluntary ' contributions."

The observations which have been cited from the cases which have been before the courts involving the Institution of Civil

[29] 15 App.Cas. 334, 354.
[30] (1879) 5 Q.B.D. 48.
[31] 15 App.Cas. 334, 348.
[32] [1932] 1 K.B. 149, 172; 47 T.L.R. 466.
[33] 15 App.Cas. 334.
[34] 5 Q.B.D. 48.
[35] [1932] 1 K.B. 149, 177.

Engineers are, we think, of persuasive authority in support of the view which we have formed, that the only inference which can be drawn from the documents and from the findings of fact of the president is that the subscriptions of members of the Institution of Mechanical Engineers cannot be regarded as voluntary within the meaning of that word in the Act of 1843.

We would answer this further question by holding that the institution is not supported wholly or in part by annual voluntary contributions. On these two grounds, therefore, the appeals will be allowed.

Appeals allowed.

Appellants to pay to valuation officer and Westminster City Council half the costs of the appeal.

Leave to appeal.

Solicitors: *Solicitor of Inland Revenue; Bristows, Cooke & Carpmael; Allen & Son.*

F. R. D.

[HOUSE OF LORDS.]

HOCHSTRASSER (INSPECTOR OF TAXES) . APPELLANT;

AND

MAYES . . . . . RESPONDENT.

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1959
Oct. 13, 14, 15; *Nov.* 30.

Revenue—Income tax—Employment—Collateral agreement—Scheme by employer to provide housing assistance to employees—Loss on sale of dwelling on transfer to new place of work to be made up by employer—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 156 (2), *Sch.* 9, *Rules applicable to Schedule E*, *r.* 1.

By section 156 (2) of the Income Tax Act, 1952: "Tax under "[Schedule E] shall also be charged in respect of any office, employ- "ment or pension the profits or gain arising or accruing from which "would be chargeable to tax under Schedule D but for the proviso "to paragraph 1 of that Schedule."

Imperial Chemical Industries Ltd. was a very large company owning numerous factories in different places, and employing a very large staff, many of whom were required by their service agreements to be prepared to serve the employers wherever required. In order to assist in the housing of married male employees of certain grades, and to facilitate their transfers, the employers designed a scheme whereby they assisted by interest-free loans to a certain extent towards the purchase of houses by such staff. The scheme further provided, inter alia, that if on transfer the employee wished to sell or let his house, he was to give an option to the employers to purchase it at a fair valuation; if the option was refused, he was free to sell it, but in either case the employers guaranteed him against any capital loss, provided that the house

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD DENNING.

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had been maintained in good repair. Employees who accepted the scheme were required to enter into formal agreements, the terms of which were in accordance with the provisions of the scheme.

M. was employed from 1941 under various contracts with the company, requiring him to work at such of their factories as they should direct. In 1951 he entered into an agreement with them pursuant to the housing scheme. In pursuance of that agreement, he bought a house for £1,850, of which £500 was advanced to him by them by way of interest-free loan. On his transfer to another factory, he sold the house with their consent for £1,500 and they paid him £350 to compensate his loss. He was assessed under Schedule E to income tax on the latter sum:—

Held, that although the fact of employment was the causa sine qua non it was not the causa causans of the payment of £350, that it did not therefore arise therefrom, and that he was wrongly assessed (post, pp. 69, 72, 74, 76).

Westminster v. *Inland Revenue Commissioners* [1936] A.C. 1; 51 T.L.R. 463 applied.

Seymour v. *Reed* [1927] A.C. 554; 43 T.L.R. 584; and *Herbert* v. *McQuade* [1902] 2 K.B. 631; 18 T.L.R. 728 considered.

Decision of the Court of Appeal [1959] Ch. 22; [1958] 3 W.L.R. 215; [1958] 3 All E.R. 285 affirmed.

APPEAL from the Court of Appeal (Jenkins and Pearce L.JJ., Parker L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated July 7, 1958, dismissing an appeal by the appellant, Eric John Lazare Hochstrasser (Inspector of Taxes), from an order of the High Court (Upjohn J.) dated December 20, 1957, whereby an appeal by him on a case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Langbourgh East in the County of York was dismissed and their determination was affirmed. The appeal related to an assessment to income tax made on the respondent, Leonard Henry Mayes, under Schedule E of the Income Tax Act, 1952, from the year 1954–55 in the sum of £1,170, which included a sum of £350 paid or credited to him pursuant to an agreement dated June 1, 1951, known as "the housing agreement" and made between Imperial Chemicals Ltd. of the one part and the respondent of the other part.

The facts are stated in the reports of the proceedings below [1959] Ch. 22; [1958] 3 W.L.R. 215.

John Pennycuick Q.C. and *Alan Orr* for the appellant.
F. N. Bucher Q.C. and *H. H. Monroe* for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Blakiston* v. *Cooper*[1]; *Moorhouse* v. *Dooland*[2]; *Dewhurst* v. *Hunter*[3]; *Cameron* v. *Prendergast*[4] and *Tilley* v. *Wales*.[5]

[1] [1909] A.C. 104; 25 T.L.R. 164.
[2] [1955] Ch. 284; [1955] 2 W.L.R. 96; [1955] 1 All E.R. 93.
[3] [1932] 146 L.T. 510.
[4] [1940] A.C. 549; 56 T.L.R. 499; [1940] 2 All E.R. 35.
[5] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280.

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS. My Lords, the question at issue in this appeal is whether the respondent, who was at all material times an employee of Imperial Chemical Industries Ltd. (I.C.I.), was rightly assessed under Schedule E of the Income Tax Act, 1952, in the sum of £1,170, which included a sum of £350 paid to him in circumstances to be now stated.

I will first remind your Lordships of the relevant statutory provisions.

It is by section 156 of the Income Tax Act, 1952, provided as follows:

"The Schedule referred to in this Act as Schedule E is as "follows—

"Schedule E

"1. Tax under this Schedule shall be charged in respect of "every public office or employment of profit. . . .

"2. Tax under this Schedule shall also be charged in respect "of any office employment or pension, the profits or gains arising "or accruing from which would be chargeable to tax under "Schedule D but for the proviso to paragraph 1 of that "Schedule. . . .

"5. The provisions set out in Schedule IX to this Act shall "apply in relation to the tax to be charged under this Schedule."

Schedule IX, so far as relevant, was as follows:

"Rules Applicable To Schedule E

"1. Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E, or to whom any annuity, pension or "stipend chargeable under that Schedule is payable, in respect of "all salaries, fees, wages, perquisites or profits whatsoever there-"from for the year of assessment, after deducting the amount of "duties or other sums payable or chargeable on the same by "virtue of any Act of Parliament, where the same have been "really and bona fide paid and borne by the party to be charged."

I will now refer to the facts of the case, which I must do by reference to the case stated by the Commissioners for the General Purposes of the Income Tax, using so far as possible their own language.

The respondent is a married man with two children who were born in 1949 and 1953. He has been employed by I.C.I. since 1941, at which time he lived with his parents at Welwyn. His first employment was as a laboratory assistant. In September, 1950, he was transferred to the I.C.I. works at Hillhouse in Lancashire on appointment as an assistant technical officer (chemist). During the first few months, which were a probationary period, he lived in rooms. On April 27, 1951, he entered into a service agreement with I.C.I., of which for the purpose of this case the salient feature was that he agreed to serve anywhere in the United Kingdom of Great Britain and Northern Ireland,

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and that I.C.I. should be at liberty to change the locality of his employment within those limits. There was also a provision that should I.C.I. require him to change his residence they would pay him such removal and other expenses incidental thereto as they should consider fair and reasonable in the circumstances, and a further provision that the agreement, if not otherwise previously determined, might be terminated by either party by three months' notice in writing.

It was at the time of his transfer to Hillhouse that the respondent first learned of a scheme established by I.C.I. to assist their married employees to purchase houses for their own occupation, a summary of which was given to him. At first he found trouble in purchasing a house owing to the limitations on price with which he had to comply in order to be eligible for assistance under the scheme, but in June, 1951, he purchased No. 16, Ribble Road, Fleetwood, for the sum of £1,850, of which £90 was provided by himself, £1,460 was borrowed on first mortgage from a building society and £300 was borrowed on second mortgage from I.C.I. This purchase was made pursuant to a so-called housing agreement, the terms of which have been considered to be of vital importance to this case. It was dated June 1, 1951, and was in the standard form for which the scheme provided. The agreement is very elaborate in character, defining with great nicety the conditions upon, and the limits within which, I.C.I. will implement the guarantee against loss upon resale which is its main purpose. Its provisions have been summarised by Jenkins L.J., and I am glad to adopt his summary, which is as follows:

"(i) In the event of the employee being transferred to a new "place of employment in the service of I.C.I. and consequently "desiring to sell or let the house, the employee must offer to sell "the house to I.C.I. If I.C.I. accepts, then the house is to be "bought by I.C.I. at the current market value ascertained by "valuation; and if such value is less than the employee's expendi- "ture on the house I.C.I. becomes liable to pay the difference "to the employee. If I.C.I. declines, then the employee is at "liberty to sell to a third party and I.C.I. becomes liable to pay "the employee the amount, if any, whereby the price realised "falls short of his expenditure on the house. (See clause 2 of the "agreements.)

"(ii) In the event of the sale of the house by the employee "or his personal representatives within 12 months after (A) the "refusal by I.C.I. of an offer made on transfer under (i) above, "or (B) the retirement of the employee, or (C) the death of the "employee (whichever first happens) I.C.I. becomes liable to pay "to the employee or his personal representatives the amount if "any whereby the price realised on such sale falls short of the "employee's expenditure on the house. (See clause 3 (1).)

"(iii) If the house is not sold before the expiration of the "period of 12 months mentioned in (ii) above, then there is to be "a valuation of the house and I.C.I. becomes liable to pay to

" the employee or his personal representatives the amount (if " any) whereby the employee's expenditure on the house exceeds " the amount of the valuation. (See clause 3 (2).)

" (iv) If at any time before such one of the three events " mentioned in (ii) above as shall first happen the employee while " still in the service of I.C.I. desires to sell the house he may do " so, but in that case he is only to be entitled to the benefit of " I.C.I.'s guarantee against capital loss if he obtains I.C.I.'s " consent to the sale and offers to sell the house to I.C.I. If " I.C.I. accepts the offer then the house is to be bought by I.C.I. " on similar terms to those stated in (i) above (*i.e.*, with the " benefit of the guarantee). If I.C.I. declines the offer then the " employee may sell to whom he pleases and I.C.I.'s guarantee " is to apply to any resulting capital loss. (See clause 4.)

" The agreement is to continue in force for a period expiring " 12 calendar months after the death of the employee, but subject " to fulfilment of accrued rights it ceases automatically upon such " one of the following events as shall first happen, that is to say, " if the employee shall:

" (A) Be transferred for service with I.C.I. elsewhere and " offers to sell the house to I.C.I.

" (B) Retire from the service of I.C.I. on pension.

" (C) Cease to be employed by I.C.I. for any other reason.

" (D) Sell or let the property or any part thereof.

" (E) Cease to use the house as a permanent residence. (See " clause 11.)

" It is a condition precedent to I.C.I. affording to the " employee a guarantee against any capital loss he may suffer " that the employee shall at all times keep the house in good " tenantable repair. (See clause 6.) "

In October, 1954, the respondent was transferred to Wilton Works in the county of York and thereupon offered his house for sale to I.C.I. under the housing agreement. I.C.I. declined the offer and the respondent sold it with their consent for £1,500. The sum of £350 (being the loss for which I.C.I. admitted liability on resale) was duly paid or credited to the respondent by I.C.I. This is the sum in respect of which tax under Schedule E is claimed to be exigible from the respondent.

It is right that I should add one further paragraph from the case stated upon which reliance was placed by the appellant or the respondent. It was as follows: " 3. (G) I.C.I. have to move " a great number of their staff from one part of the country to " another. The company recognises that the transfer of a " married man involves him in domestic upheaval. Although a " man might be willing to buy a house in the new location, his " chief worry was the loss he might make if he had to sell the " house. I.C.I. try to operate a staff policy which results in a " contented staff. Unless the staff are contented they do not do " their best work. I.C.I. therefore introduced the housing " scheme so that they should have employees whose minds were

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" eased to some extent of the worry of possible financial embar-
" rassment in the future arising out of the removal occasioned
" by the company's action. The agreement cannot operate unless
" and until the house is sold for less money than it costs to buy.
" Under the housing agreement the employees cannot make a
" profit as a result of the housing agreement. An employee's
" salary is calculated quite independently of anything he might
" receive under the housing agreement. I.C.I. salaries compare
" favourably with salaries paid by other employers not operating
" a housing scheme."

Upon these facts the commissioners held that the sum in question was not assessable to tax. Their reason was that the payment was to meet a capital loss incurred by the respondent in fulfilling the obligations of his employment. This is not precisely the way in which the case has been subsequently presented and I need say no more about it.

Upjohn J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved upon. " In my judgment," he said,[1] " the " authorities show this, that it is a question to be answered in " the light of the particular facts of every case whether or not a " particular payment is or is not a profit arising from the employ-" ment. Disregarding entirely contracts for full consideration in " money or money's worth and personal presents, in my judgment " not every payment made to an employee is necessarily made " to him as a profit arising from his employment. Indeed, in my " judgment, the authorities show that to be a profit arising from " the employment the payment must be made in reference to the " services the employee renders by virtue of his office, and it must " be something in the nature of a reward for services past, present " or future." In this passage the single word " past " may be open to question, but apart from that it appears to me to be entirely accurate. Applying the law thus stated to the facts of the present case, the learned judge held that the sum of £350 was not a profit " therefrom," that is, arising from the office or employment.

In the Court of Appeal the same view was taken by Jenkins L.J. and Pearce L.J. Parker L.J. (as he then was) came to a different conclusion, and for that reason (and in deference to the argument of learned counsel) I must deal somewhat more fully with the case than I should otherwise have thought necessary. At the outset the learned Lord Justice stated the relevant principle of law thus[2]: " Where you find that an employee has " during the course of his employment received from his employer " a benefit in money or money's worth, that receipt is a profit " of his employment and taxable as such unless (1) it amounts

[1] [1959] Ch. 22, 33; [1958] 2 W.L.R. 982; [1958] 1 All E.R. 369.

[2] [1959] Ch. 22, 54–55; [1958] 3 W.L.R. 215; [1958] 3 All E.R. 285.

"to a gift to him in his personal capacity, e.g., a benefit "conferred out of affection or pity; or (2) it has been received for "a consideration other than the giving of services." And he goes on to point out that in these two exceptions, though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services—a distinction which, abandoning the vernacular, as Younger L.J. had in an earlier case, Pearce L.J. describes by saying [3] that the employment in such a case is a causa sine qua non of the benefit but not the causa causans. Parker L.J. then examines the facts of the case and comes to a conclusion which he expresses in these words [4]: "Bearing these considerations in mind I find it quite impossible "to arrive at any conclusion other than that there is no sub-"stantial consideration apart from services." This, put in other words, is a finding that the substantial consideration for the payment by I.C.I. of £350 to the respondent was the rendering of service by him.

My Lords, if in such cases as these the issue turns, as I think it does, upon whether the fact of employment is the causa causans, or only the sine qua non, of benefit, which perhaps is only to give the natural meaning to the word "therefrom" in the statute, it must often be difficult to draw the line and say on which side of it a particular case falls. But I think that the approach should not be exactly that of Parker L.J. It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the statute but arbitrarily inferred from it. Thus, in the present case it is for the Crown to establish that a payment made under the housing agreement is a reward for the employee's services. Let me interpolate that the addition of the words "as such" adds nothing to the proposition. How, then, does the Crown seek to prove its case? It does not, and could not, suggest that the agreement is in any way colourable. Nevertheless it is driven to the argument that a payment made under it is a reward for services and nothing else. This argument it fortifies by a close analysis of the benefit or detriment accruing to or suffered by the employee, and concludes that no substantial consideration for the payment moves from the employee.

My Lords, I altogether dissent from this argument and conclusion. There is nothing express or implicit in the agreement which suggests that the payment is a reward for services except the single fact of the relationship of the parties, and it is clear enough from *Inland Revenue Commissioners* v. *Westminster* [5] that that fact alone will not justify such a conclusion. On the other hand, there is the significant fact that the salary earned by the employee compares favourably with salaries paid by other employers not

[3] [1959] Ch. 22, 61.
[4] Ibid. 56–57.
[5] [1936] A.C. 1; 51 T.L.R. 467.

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operating a housing scheme, and is the same whether or not he takes advantage of the housing scheme. This at once suggests that there is some other reason for the payment than services rendered or to be rendered. Nor, though it was little stressed by the respondent, can I ignore his particular status as a married man peculiarly in need of housing accommodation, which made him, with other married employees, an object of particular concern to his employers. In these circumstances, I should be disposed to say that the Crown has failed to make a case and leave the matter there. For, assuming, as I must assume, that the agreement is not colourable, I doubt whether it is relevant to ask what, if any, consideration moved from the employee and whether it was substantial or sufficient or what you will. Nor, if it became relevant, should I in the present case feel equal to the task of weighing the benefit or detriment enjoyed by the one side or the other. It was a bargain and, as good bargains should be, thought by each side to be worth while. I have the highest authority for my course if I leave it there and "reject "the lore of nicely calculated less or more."

My Lords, in the course of the argument a considerable number of authorities were cited, some of them decisions of this House. In nothing that I have said have I intended to cast any doubt upon them. I should not be justified in doing so. But I do not apologise for going back to the very words of the statute and ignoring explanatory words like "as such," nor do I think it useful to examine whether an agreement under which payment is made is "collateral." The question is one of substance, not form. I accept, as I am bound to do, that the test of taxability is whether from the standpoint of the person who receives it the profit accrues to him by virtue of his office: see *Seymour* v. *Reed*[6] and *Herbert* v. *McQuade*.[7] I do not doubt that a taxable profit may take the form of the discharge of an employee's obligation as well as of a direct payment: cf. *Hartland* v. *Diggines*,[8] nor that a lump-sum payment to directors may in some circumstances, just as in other circumstances it may not, be subject to tax. Here fine distinctions have been made which are not directly relevant to the present case. Again, there may well be cases, of which *Nicoll* v. *Austin*[9] is an example, where a managing director or other officer of a company is taxable in respect of the outgoings of a house occupied by him which are discharged by the company. Such cases may be near the line, as may cases in which the question is whether a payment is made to an employee as a reward for his services or (to use the words of Parker L.J.'s exception) is made out of affection or pity.

But having said that, my Lords, I must add that, in my opinion, there is little doubt on which side of the line the present case falls. It was not established by the facts found by the

[6] [1927] A.C. 554; 43 T.L.R. 584.
[7] [1902] 2 K.B. 631; 18 T.L.R. 728.
[8] [1926] A.C. 289; 42 T.L.R. 262.
[9] (1935) 19 T.C. 531.

commissioners, nor was it a legitimate inference from those facts that the sum of £350 paid to the respondent was a reward for his services. The appeal should, in my opinion, be dismissed with costs.

LORD RADCLIFFE. My Lords, I have had the opportunity of reading in advance the speech which has just been delivered by my noble and learned friend. I agree with his conclusion that this appeal ought to be dismissed, and I agree with the reasons which he advances for his opinion. It is not necessary, therefore, that I should say more than a few words as to what I regard as the determining consideration in this case.

It is, as he says, near the line. I do not imply by that that I find any particular difficulty in deciding upon which side of the line it lies; but it is not easy in any of these cases in which the holder of an office or employment receives a benefit which he would not have received but for his holding of that office or employment to say precisely why one considers that the money paid in one instance is, in another instance is not, a " perquisite " or profit . . . therefrom."

The test to be applied is the same for all. It is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise " from " the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word " from " in this context. It has been said that the payment must have been made to the employee " as such." It has been said that it must have been made to him " in his capacity of employee." It has been said that it is assessable if paid " by way of remunera- " tion for his services," and said further that this is what is meant by payment to him " as such." These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words. For my part, I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee. It is just because I do not think that the £350 which are in question here were paid to the respondent for acting as or being an employee that I regard them as not being profits from his employment.

The money was not paid to him as wages. The wages of employees are calculated independently of anything which they get under the housing scheme, and the I.C.I. salaries compare favourably with salaries paid by other employers in the chemical industry who do not operate a housing scheme. We are bound to say on the facts found for us that the source of the £350 was the housing agreement into which the respondent had entered on June 1, 1951, and that the circumstances that brought about

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his entitlement to the money was not any services given by him but his personal embarrassment in having sold his house for a smaller sum than he had given for it.

I regard the employer's payment as being in substance a free benefit conceded to the employee. It is true enough that the guarantee or indemnity offered was not unqualified, that an employee adopting the housing scheme undertook certain obligations, and that some of these were capable of enuring in certain events to the advantage of the employer. But there is no reason to suppose that the employer's purpose in proposing the scheme was to obtain these advantages. What it wanted was to ease the mind and mitigate the possible distress of an employee who, having sunk money in buying a house, might find himself called upon at short notice to put it on the market without any assurance of getting the whole of his money back. To me, therefore, it seems beside the point to scrutinise the housing agreement with the aim of measuring precisely how much in the way of valuable consideration was afforded by the employee under the agreement. I should have taken the same view of the result if he had afforded none.

The essential point is that what was paid to him was paid to him in respect of his personal situation as a house-owner, who had taken advantage of the housing scheme and had obtained a claim to indemnity accordingly. In my opinion, such a payment is no more taxable as a profit from his employment than would be a payment out of a provident or distress fund set up by an employer for the benefit of employees whose personal circumstances might justify assistance.

My Lords, I said at the beginning that I thought this case was near the borderline. I have tried to indicate clearly why I do not regard the payment as falling on the side of taxability. On the other hand, I do not find in this decision any qualification of the principle that an employer who pays an employee's personal bills as part of his reward for services rendered is paying a taxable wage or profit under Schedule E. That is a different case.

LORD COHEN. My Lords, the facts have been sufficiently stated by the noble and learned Lord on the Woolsack, and I need not repeat them. The question for your Lordships' decision is whether the respondent is liable to income tax under Schedule E on the sum of £350 which he received, not under his service agreement with Imperial Chemical Industries Ltd., but under an indemnity contained in the housing agreement entered into between him and the company when, on his transfer to Hillhouse, he bought a house to accommodate himself and his family and received assistance from I.C.I. in the purchase thereof, and an indemnity in certain events against loss on the resale of it for less than the purchase price.

The Crown claimed tax on this sum of £350 as being due under Schedule E in respect of his office or employment with

I.C.I. The relevant provision of the Rules applicable to Schedule E is contained in paragraph 1 of Schedule IX, which provides that: " Tax under Schedule E shall be annually charged on every " person having or exercising an office or employment of profit " mentioned in Schedule E . . . in respect of all salaries, fees, " wages, perquisites or profits whatsoever *therefrom* " (the italics are mine).

This claim has been rejected by the General Commissioners, by Upjohn J. and by a majority of the Court of Appeal but on somewhat different grounds. The commissioners rejected it on the ground that the payment was to meet a capital loss and was therefore not assessable to income tax. Upjohn J. adopted the statement of the law by Morris L.J. in *Bridges* v. *Hewitt*, *Same* v. *Bearsley*,[10] where the learned Lord Justice said: " . . . the fact " that someone who receives a benefit is the holder of an office " does not by itself prove that what he received was a profit from " the office. That has to be decided by considering on the " evidence whether what was received was received as remunera- " tion for services rendered in the office." Accepting this as the true test, Upjohn J. came to the conclusion that the sum of £350 now in question was not a profit. It was, he said, something which was wholly collateral and really had nothing to do with the office or the services which the respondent was bound to render to his employers.

Jenkins L.J. and Pearce L.J. in the Court of Appeal reached the same conclusion, but Jenkins L.J. examined the proposition that Mr. Pennycuick advanced on behalf of the Crown in the Court of Appeal and before us, and said that he was prepared to accept that proposition but that even so, on the facts of the case before him he was satisfied that the Crown's appeal failed. The proposition in its final form before us was that an employee is liable to pay tax under Schedule E on everything received by the employee as such, unless it is received for full consideration in money or money's worth other than services as employee.

My Lords, I confess the words " as such " cause me some difficulty. They have been used more than once by learned judges in reported cases; for instance, by Morris L.J. in *Bridges* v. *Hewitt*,[11] when after citing from Schedule IX to the Act the words " in respect of all salaries, fees, wages, perquisites or " profits whatsoever therefrom for the year of assessment," he said: " The word ' therefrom ' must be construed in its context. " A profit accruing by reason of holding an office or employment " may be a profit ' therefrom.' This may be so even though " some payment which is received is not made by the employer " of the recipient and even though the payment is made volun- " tarily. The profit need not necessarily be in the form of a cash " payment. The conception which is introduced by the word " ' therefrom ' is that some taxable remuneration may accrue to a

[10] [1957] 1 W.L.R. 674, 698; [11] [1957] 1 W.L.R. 674, 691.

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" person by reason of his having or exercising an office or employ-
" ment of profit. The reference is to what is received by the
" holder of an office or employment in that capacity: to the holder
" of the office or employment as such."

My Lords, I am prepared to accept that statement of the law, but it is, I think, clear from the final conclusion of Morris L.J. in the case last cited, and from the decisions cited by Jenkins L.J. in his judgment in the present case (see especially *Beak* v. *Robson*,[12] *per* Lord Simon, and *Cowan* v. *Seymour*,[13] *per* Younger L.J.) that it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee. The court must be satisfied that the service agreement was the causa causans and not merely the causa sine qua non of the receipt of the profit.

My Lords, on the facts of the present case I am satisfied that Jenkins L.J. was right when he said[14]: " I think it may
" well be said here that while the employee's employment by
" I.C.I. was a causa sine qua non of his entering into the housing
" agreement and, consequently, in the events which happened,
" receiving a payment from I.C.I., the causa causans was the
" distinct contractual relationship subsisting between I.C.I. and
" the employee under the housing agreement, coupled, of course,
" with the event of the declining in value."

Parker L.J. did not, I think, differ from his brethren as to the principles of law applicable to the case; he differed only on the application of those principles to the facts of the case, for he said[15]: " I find it quite impossible to arrive at any conclusion
" other than that there is no substantial consideration apart from
" services " for the indemnity against loss.

My Lords, I differ from this conclusion. It is clear from the finding of the commissioners that the respondent was receiving under his service agreement the full salary appropriate to the appointment he held: the housing scheme pursuant to which the housing agreement was made was introduced by I.C.I. not to provide increased remuneration for employees but as part of a general staff policy to secure a contented staff, and to ease the minds of employees compelled to move from one part of the country to another as the result of the company's action. The housing agreement itself gave advantages to the company which may not be easy to qualify but which are not negligible or colourable. For these reasons, as well as for the reasons given by the noble and learned Lord on the Woolsack, I agree with Jenkins L.J. that the housing agreement constituted a genuine bargain advantageous, no doubt, to the respondent, but also not without

[12] [1943] A.C. 352; 59 T.L.R. 90; [1943] 1 All E.R. 46.
[13] [1920] 1 K.B. 500; 36 T.L.R. 155.
[14] [1959] Ch. 22, 53–54.
[15] Ibid. 57.

its advantages to I.C.I., and I see no reason for disregarding it as the source of the payment sought to be taxed in this appeal.

I would dismiss this appeal.

LORD KEITH OF AVONHOLM. My Lords, I agree.

LORD DENNING. My Lords, Mr. Mayes is a married man with two children. He has for many years been employed by Imperial Chemical Industries Ltd. under a service agreement at a salary which at the material time was some £820 a year. It was provided by the agreement that if his employers wished to transfer him from one part of the country to another, they were at liberty to do so, but in that event they were to pay his removal expenses. He was first employed at Welwyn in Hertfordshire, but later he was transferred by the company to Hillhouse in Lancashire. In 1951 he found a house in Lancashire suitable for his needs at a price of £1,850. He had only £90 of his own, so he had to borrow the rest on mortgage. A building society lent him £1,460 at interest and his employers lent him £300 free of interest. Imperial Chemical Industries Ltd. had a housing scheme to help employees placed as he was; and it was under this scheme that they lent him the £300. His employers also agreed that, if he were to be afterwards transferred to any other part of the country, and so had to leave the house, they would guarantee him against any loss or depreciation on it. The detailed terms were set out in a housing agreement. Three years later Imperial Chemical Industries Ltd. transferred him to Wilton in Yorkshire and he had to leave the house. He sold it at a loss. He had paid £1,850 for it but he only sold it for £1,500. So he incurred a loss of £350. His employers, Imperial Chemical Industries Ltd., were bound under the housing agreement to indemnify him against this loss and they did so. They paid him £350. He used it to pay off the money he had borrowed, so he made nothing out of it at all. The Crown now claim that this £350 is a profit from his employment and taxable under Schedule E.

My Lords, tried by the touchstone of common sense—which is, perhaps, rather a rash test to take in a revenue matter—I regard this as a plain case. No one coming fresh to it, untrammelled by cases, could regard this £350 as a profit from the employment. Mr. Mayes did not make a profit on the resale of the house. He made a loss. And even if he had made a profit, it would not have been taxable. How, then, can his loss be taxable, simply because he has been indemnified against it? I can readily appreciate the case which was put in argument—namely, that if an employer, by way of reward for services, agrees to indemnify his employee against his losses on the Stock Exchange, the payments which the employee received under the indemnity would be taxable. But that would be because the losses were his own affair and nothing to do with his employment:

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the payments of indemnity would there be a straight reward for services. This payment of £350 was nothing of that kind. It was a loss which Mr. Mayes incurred in consequence of his employment and his employers indemnified him against it. I cannot see that he gets any profit therefrom. If Mr. Mayes had been injured at work and received money compensation for his injuries, no one would suggest that it was a profit from his employment. Nor so here, where all he receives is compensation for his loss.

Why, then, if this case is as plain as I think it is, has it got so far as to reach your Lordships' House? Only, I suggest, because of a broad proposition which the Crown advanced about " profits." This proposition was put forward almost as if it were a definition of what the law regards as the " profits " of an employment. It was supported with quite a show of authority. So much so that the Court of Appeal were induced to accept it as correct—though the majority, to be sure, refused to hold that it applied in this case. I need hardly say that, if there were available to your Lordships a definition of " profits," it would be a pearl of great price. But I am afraid that this pearl turned out to be cultivated and not real. It was culled from the cases and not from the statute. It did not survive the critical examination of your Lordships. When subjected to close scrutiny, it was found to be studded with ambiguities and defaced by exceptions. It would, if accepted, put a greater burden on the taxpayer than ever the statute warrants, and it would introduce more confusion into a subject where enough already exists.

I would ask your Lordships, therefore, to put on one side the proposition submitted by the Crown and to go back to the words of the statute. I do not find much help in any of the previous decisions: and the speeches in them cannot rule the day. They show the way in which judges look at cases, and in that sense are useful and suggestive, but in the last resort each case must be brought back to the test of the statutory words.

So tested the question simply is: Was this £350 received by Mr. Mayes a " profit " from his employment? I think not, for the simple reason that it was not a remuneration or reward or return for his services in any sense of the word. I would therefore dismiss this appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; J. W. Ridsdale.*

F. C.

[PRIVY COUNCIL.]

SIR EDWARD BETHAM BEETHAM AND ANOTHER . . . . . APPELLANTS;

AND

TRINIDAD CEMENT LTD. . . . . RESPONDENTS.

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Dec. 16.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trade Dispute — Definition — "Difference" — Trade union acting for employees of company—Claim for bargaining status—Refusal of company to recognise union—"Difference" between union and company—Governor's statutory duty to "inquire" into causes of dispute before appointing board of inquiry—Administrative, not judicial or quasi-judicial inquiry—Trade Disputes (Arbitration and Inquiry) Ordinance, 1950 (*c.* 22, *No.* 10), *ss.* 2 (1), 8 (1), *of Trinidad and Tobago—Industrial Courts Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 69), *s.* 4 (1)—*Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 5).

The Trade Disputes (Arbitration and Inquiry) Ordinance, 1950, of Trinidad and Tobago (identical in relevant respects with corresponding United Kingdom legislation) provides by section 8: "(1) Where any trade dispute exists . . . the Governor may . . . "inquire into the causes and circumstances of the dispute, and, if "he thinks fit, refer any matters appearing to him to be connected "with or relevant to the dispute to a board of inquiry appointed "by him . . ."

By section 2 (1): "'Trade dispute' means any dispute or "difference between employers and workmen . . . connected with "the employment or non-employment . . . of any person."

Two out of the number of employees of the respondent company who belonged to a trade union were dismissed by the company. The union sought to persuade the company to discuss the cases of the dismissed men, but the company refused to recognise the union as authorised to act on behalf of employees who had individual grievances, stating that the company had its own works committee for dealing with such cases. Shortly thereafter the union wrote to the company claiming that it then represented "a substantial "majority" of the company's employees and was applying "for "bargaining status" for the manual workers of the company, and it took the matter up with the Commissioner for Labour who, however, was immediately informed by the company that it had "no intention of becoming involved in any way with the union "concerned." On the matter being reported to him, the Governor of Trinidad, acting under section 8 (1) of the Trade Disputes (Arbitration and Inquiry) Ordinance, appointed a board of inquiry to inquire into and report on the causes and circumstances of a trade dispute which, the minute of appointment stated, existed. Thereupon the company, alleging that there was no trade dispute to be inquired into, began the present proceedings claiming that the appointment of the board of inquiry was ultra vires and null and void:—

Held, that by definition a trade dispute existed wherever a "difference" existed, and a difference could exist long before the

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

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parties became locked in combat—it was sufficient that they should be sparring for an opening. Here, where, in relation to their claim for bargaining status, the union were asking to be allowed to negotiate and the company were persistently refusing to do so, there was clearly a difference between them, and "it would be "strangely out of date to hold . . . that a difference between a "trade union acting for its members and their employers cannot be "a trade dispute." Further, the union, in making its claim for bargaining status, *was* acting for its members, for the claim had been brought to the attention of the union members in the company, who might fairly be assumed to have approved of it, and, in consequence, the difference was one "between employers and work-"men." Accordingly, at the time when the Governor appointed the board of inquiry there was in existence a dispute whether the workmen should be permitted to have the union as their bargaining agent, and the appointment was not null and void.

Dictum of Lord Wright in *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 189; 59 T.L.R. 1; [1942] 2 All E.R. 425 applied.

Reg. v. *Industrial Disputes Tribunal, Ex parte American Express Co.*, The Times, July 23, 1954, approved.

The provision in section 8 (1) of the Ordinance that the Governor "may . . . inquire into the causes and circumstances of the "dispute" before appointing a board of inquiry meant that he must inquire in his administrative capacity, and not that he had to conduct anything in the nature of a judicial or quasi-judicial inquiry.

Local Government Board v. *Arlidge* [1915] A.C. 120; 30 T.L.R. 672 considered.

Order of the Supreme Court of Trinidad and Tobago reversed.

APPEAL (No. 29 of 1958) from an order of the Supreme Court of Trinidad and Tobago (November 14, 1957).

The following facts are taken from the judgment of the Judicial Committee: On April 16, 1956, the Governor of Trinidad appointed a board of inquiry. It consisted of Mr. Bernard Gillis Q.C. sitting alone. His duty was to inquire into a trade dispute which was said to exist in the island between a company called Trinidad Cement Ltd. and certain of its workmen. On the next day, April 17, 1956, Mr. Gillis sat to hold the inquiry but the company at once objected to it. It said there was no trade dispute for him to inquire into. Mr. Gillis thereupon adjourned the hearing so as to enable the company to challenge the validity of the Governor's action. On May 25, 1956, the company issued a writ in the Supreme Court of the colony claiming that the appointment by the Governor of the board of inquiry was ultra vires and therefore null and void. The case was tried before Archer J. who, on November 14, 1957, made an order declaring the appointment null and void. The Governor appealed from his decision to Her Majesty in Council.

In making the appointment the Governor presumed to act under an Ordinance called the Trade Disputes (Arbitration and Inquiry) Ordinance, which said in section 8 (1) that: "Where "any trade dispute exists or is apprehended the Governor may,

" whether or not the dispute is reported to him under this Ordin-
" ance, inquire into the causes and circumstances of the dispute
" and, if he thinks fit, refer any matters appearing to him to be
" connected with or relevant to the dispute to a Board of In-
" quiry . . . appointed by him for the purpose of such reference,
" and the Board shall inquire into the matters referred to it and
" report thereon to the Governor." Section 8 (3) said that the board might, if the Governor thought fit, consist of one person appointed by the Governor.

The phrase " trade dispute " was defined by section 2 (1) in these terms: " ' Trade Dispute ' means any dispute or difference " between employers and workmen, or between workmen and " workmen, connected with the employment or non-employment, " or the terms of the employment, or with the conditions of " labour, of any person."

Trinidad Cement Ltd. (hereinafter called " the company ") had a factory at Claxton Bay where they employed from 300 to 500 men. The Federated Workers' Trade Union (hereinafter called " the union ") sought to get the workers at the factory to join the union and succeeded in getting 100 or 200 to do so. These formed a branch of their own within the union.

On October 15, 1955, the company dismissed a workman called Clifford Bobb, who was a member of the union. The union took up his case and wrote to the company asking " for an early inter-
" view along with Mr. Bobb and his witnesses so that an amicable
" settlement can be reached." The company did not reply. The union wrote again to the company. This letter, too, was ignored. The union thereupon wrote to the Commissioner for Labour in the island and asked him if he could arrange a meeting with both parties under his chairmanship " to go into this most important " matter." As it happened, just about this time in November, 1955, the company dismissed another workman called Edmund Simon, who was also a member of the union. So the union took up his case too. They asked the Commissioner for Labour if he could arrange for his case to be discussed at the same time as that of Mr. Bobb.

The Commissioner for Labour was willing to do as he was asked. He tried to arrange a meeting between both parties: but he failed because of the attitude taken up by the company. The commissioner's representative went to see the company's works manager on November 29, 1955. He was told quite bluntly that the company " do not recognise the union and are therefore not " prepared to accede to the union's request for a meeting to " discuss the dismissal of Clifford Bobb or Edmund Simon." The works manager said that the company had its own machinery by way of a works committee for dealing with the grievances of workmen: and it was not willing to meet the union to discuss the dismissals.

On January 7, 1956, the matter reached a higher level. The commissioner having failed to arrange a meeting, the Minister for

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Labour himself intervened. He asked the company to come and see him. At this meeting he told the company's representative that the company's refusal to meet the union was a source of embarrassment to the Government: and that if the company persisted in its attitude, he would have to consider reporting the matter to the Executive Council with a view to having an inquiry instituted. Even this had no effect on the company. On January 9, 1956, the works manager wrote to the Minister saying: "We "are quite unable to discuss the matters referred to any further."

On March 15, 1956, the men at the factory, who were members of the union, held a branch meeting. They thought that the inquiry to deal with the Bobb and Simon matters was too long delayed. A resolution was passed unanimously recommending that the head office of the union should write to the Government to have the matter expedited. The men at this meeting were concerned about the delay with the Bobb and Simon matters and nothing else.

Thus far there were two matters in dispute: the first was whether or not the dismissals of Bobb and Simon were justified: but this had merged into the second, which was whether the union had any locus standi to take up such matters with the company. The company refused to recognise the union as being authorised to act on behalf of its members (like Bobb and Simon) who had individual grievances: and the union took strong exception to this refusal.

On March 26, 1956, the union staked out its claim to recognition by the company. The union claimed not merely "limited "recognition" but "general recognition." If the members of a union were in a minority in a factory, the union might well claim to represent its own members in cases of individual grievances, but it could not claim to bargain on behalf of all the workmen in the factory. In such a case the employers might afford the union "limited recognition," that was recognition limited to individual grievances. But if the members of a union were in a majority, then the union might claim to make representations on behalf of everyone—whether members of the union or not—and might claim full bargaining rights on general questions of wages and working conditions. In such a case the employers might afford the union "general recognition."

The claim which the union made on March 26 was not merely for limited recognition (which would cover the Bobb and Simon cases) but for general recognition as a majority union. On that day the general secretary wrote to the company: "I am directed "by the executive committee of the above-named union to "inform you that the union now represents a substantial majority "of your employees and is applying for bargaining status for the "manual workers of your company." In addition, he asked for the membership to be checked to confirm the claim. (It should be noticed that the general secretary brought this letter to the attention of the branch. He sent a copy to the secretary of the

branch at the same time as he sent the original to the company.) The company did not reply to this letter. It ignored it as it had done the earlier letters. So the union took the matter up again with the Commissioner for Labour. And he again did his best. He wrote to the company asking whether they were agreeable to the membership being checked. The reply of the company was short and to the point. It was dated April 14, 1956, and addressed to the commissioner: "As we have no intention of "becoming involved in any way with the union concerned, we "do not feel that any useful purpose would be served by adopting "the suggestion contained in your letter."

April 14, 1956, was a Saturday. The letter was received (as the trial judge found) by the Commissioner for Labour on April 16, 1956. He did not wait to tell the trade union about it. He seemed to have reported it straight away to the Governor who, on the self-same day, appointed Mr. Gillis Q.C. to hold an inquiry. The inquiry, as already pointed out, proved abortive because the validity of it was challenged by the company.

From that time forward the branch of the union at Claxton Bay disintegrated rapidly. The men said: "If we cannot get any "result from these two cases, what is the use of belonging to the "union." By the end of August or September, 1956, not a single member was paying his subscriptions. The branch died and with it all the disputes, whatever they were, petered out. No longer were the dismissals a live issue. No longer could the union claim limited or general recognition at Claxton Bay, for it had no members there whom it could represent. No issue was left between the union and the company. But serious issues remained between the company and the Governor of Trinidad: because the company had successfully challenged his authority in the courts and he appealed to Her Majesty in Council so as to know whether his action was lawful or not.

1959. Nov. 11, 12. *Sir Lionel Heald Q.C.* and *J. G. Le Quesne* for the appellants.

R. W. Goff Q.C. and *Raymond Walton* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Conway* v. *Wade* [1]; *Bents Brewery Co. Ltd.* v. *Hogan* [2]; *Bird* v. *O'Neal.*[3]

Dec. 16. The judgment of their Lordships was delivered by LORD DENNING who, after stating the nature of the claim and the relevant statutory provisions as set out above, continued: Their Lordships observe that the Ordinance follows the pattern of the legislation in the United Kingdom and uses the self-same words: see section 4 (1) of the Industrial Courts Act, 1919, and the

[1] [1909] A.C. 506; 25 T.L.R. 779.
[2] [1945] 2 All E.R. 570.
[3] W.Ind.C.A., April 9, 1957.

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definition of " trade dispute " in section 5 of the Trade Disputes Act, 1906.

Their Lordships also observe that, although the Ordinance gives the Governor power to act, not only when a trade dispute *exists*, but also when it *is apprehended*, nevertheless in the present case the Governor was content to assert, as the basis of his jurisdiction, that a trade dispute *exists*. The minute of appointment, after reciting the Ordinance, went on to say:

" And Whereas *a dispute exists* between Trinidad Cement " Limited and certain of its workmen, members of the Federated " Workers' Trade Union.

" Now therefore the Governor by virtue of the powers vested " in him by the said Ordinance and of all other powers enabling " him in that behalf appoints Mr. Bernard B. Gillis, M.A. (Can- " tab), one of Her Majesty's Counsel, to constitute a Board of " Inquiry.

" And the Governor directs that the terms of reference to the " Board shall be as follows:

" (*a*) To inquire into and report on the causes and circum- " stances of the said dispute; (*b*) To inquire into and report on the " likely effect (if any) of the said dispute . . . upon industrial " relations between employers and employed in the Colony gener- " ally . . . "

Their Lordships draw attention to the fact that the Governor, in the minute of appointment, did not define the dispute. He did not say what it was. He left it to be gathered by those concerned from the facts known to them. To these facts therefore their Lordships now turn. [His Lordship stated the facts set out above and continued:] The principal question is this: Did a trade dispute exist on April 16, 1956? The Governor did not give any particulars of the dispute in the order which he made on that day. But he did in the pleadings in the action. The dispute, he said, was this: " Whether workmen, being hourly-paid employees in " the employment of the plaintiff company . . . should be per- " mitted to have as their bargaining agent, or otherwise to be " represented by, the Federated Workers (or any other) Trade " Union . . . " That pleading was so comprehensive that the dispute might be said to be the wide question whether the company ought to permit its workmen to be represented by any trade union at all. No dispute of that width was ever proved. As the trial judge said: " Non-recognition of trade unions was some- " thing that neither of the parties had fought about and it had " been brought into the arena by the Minister without their know- " ledge or consent." But the Governor is not to be tied down by the wide words of the pleading. It is a well-established rule of pleading that any words in an averment can be treated as surplusage and struck out provided that, after they have been struck out, that which is left is sufficient to maintain the claim

or defence, as the case may be: see *Anderson* v. *Thornton*.[1] The Governor is therefore entitled under this pleading to contend that, even though there was no dispute on the wide question, nevertheless, there was a dispute (1) " whether workmen . . . in " the employment of the plaintiff company . . . should be per- " mitted . . . to be represented by the Federated Workers . . . " Trade Union "; or alternatively (2) there was a dispute " whether workmen . . . in the employment of the plaintiff com- " pany . . . should be permitted to have as their bargaining " agent . . . the Federated Workers . . . Trade Union."

As to the first of these alternatives, their Lordships are clearly of opinion that, following on the dismissals of Bobb and Simon, there was a dispute whether the workmen should be permitted to be represented by the union. The facts are plain enough. The union claimed to represent the two men. The company refused to recognise the union: and it did so in terms which showed that the company refused to recognise the union as being autho- rised to act for any men in respect of their individual grievances. The union resented this. So, indeed, did the men themselves, if their attitude at the branch meeting of March 15, 1956, is anything to go by. The only question that can arise about this dispute is whether or not it still existed on April 16, 1956. The judge thought it did not then exist. It had been relegated to the background and had become submerged in the claim of the union for bargaining status.

Their Lordships are prepared to assume that this was the case: but if so, the second alternative has to be considered: Was there on April 16, 1956, a dispute whether the workmen should be permitted to have the union as their bargaining agent? The trial judge thought not. His reasoning is to be found in this key passage of his judgment: " The issue which the union was now " seeking to raise [by its letter of March 26, 1956] was separate " and distinct from the Bobb and Simon issue . . . For the first " time the union was asking for collective bargaining status and " on the ground that it represented a substantial majority of the " company's workmen . . . There had been no ultimatum on " either side and the negotiations had not progressed beyond the " initial bargaining stage . . . The prime characteristic of a trade " dispute is deadlock and the determination on the part of both " sides to the dispute to stand firm. A mere difference in point " of view cannot by itself constitute a trade dispute, and it is " necessary that the view on each side should be persisted in to the " point of rigidity."

Whilst their Lordships appreciate to the full the great ability and care which the judge brought to bear upon the case, they cannot agree with him in this part of it. By definition a trade dispute exists wherever a " difference " exists; and a difference can exist long before the parties become locked in combat. It

[1] (1853) 8 Ex. 425.

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is not necessary that they should have come to blows. It is sufficient that they should be sparring for an opening. And it seems to their Lordships that the parties had reached that point here, even in regard to the claim for bargaining status. The union had applied for bargaining status. The company had ignored the request just as it had ignored previous requests. The union had sought the mediation of the Commissioner for Labour: but, when he came forward, the company rejected his approach out of hand, just as it had rejected his previous approach. "We "have no intention of becoming involved in any way with the "union concerned." When this statement is taken in its setting—with the background of repeated refusal by the company to recognise the union over the two dismissals—the position at April 16, 1956, can be put simply thus: "Here is this union "knocking at the door of the company asking to be let in to "negotiate: and the company time and time again refusing to "open it, nay more, keeping it locked and barred against the "union." That was clearly a difference between them which subsisted at that very time.

But then it was said that this was not a difference between the company and *the workmen*, as the Ordinance requires, but only a difference between the company and *the union*: and attention was drawn to the statement by Bennett J. that a dispute between such bodies is not a trade dispute: see *Rex* v. *National Arbitration Tribunal, Ex parte Bolton Corporation*.[2] To this their Lordships think that Lord Wright gave a sufficient answer when that case reached the House of Lords. He said[3]: "It would be strangely out of date to hold, as was argued, that "a trade union cannot act on behalf of its members in a trade "dispute, or that a difference between a trade union acting for "its members and their employer cannot be a trade dispute." Accepting this statement, however, it was said that in this case the trade union was not acting *for its members*, but for itself. The claim for bargaining status was never authorised or approved, so it was said, by any of the members of the branch at Claxton Bay. It was done by the head office acting on its own initiative. And reliance was placed on observations in some of the cases that if a trade union acts "on a frolic of its own," there is not a trade dispute: see *Rex* v. *National Arbitration Tribunal, Ex parte Keable Press Ltd.*[4]; *Reg.* v. *Industrial Disputes Tribunal, Ex parte Courage & Co. Ltd.*[5] Their Lordships cannot accept this argument. The claim was made by the executive committee who were by the rules entrusted with the general management of the union: and it was clearly within the scope of their authority to put forward a claim for bargaining status. If the union were able

[2] [1941] 2 K.B. 405, 421; 57 T.L.R. 644; [1941] 2 All E.R. 800.
[3] Sub nom. *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 189; 59 T.L.R. 1; [1942] 2 All E.R. 425.
[4] [1943] 2 All E.R. 633.
[5] [1956] 1 W.L.R. 1062; [1956] 3 All E.R. 411.

to obtain bargaining status it would be able to promote the interest of its members far better than if it were unrecognised. Moreover, the claim had been brought to the attention of the branch, who may fairly be assumed to have approved of it. The union can therefore properly be considered as acting for its members: and, in consequence, the difference was one "between "employers and workmen."

Their Lordships are glad to find that in England a Divisional Court presided over by Lord Goddard C.J. in a somewhat similar case came to a similar conclusion: see *Reg.* v. *Industrial Disputes Tribunal, Ex parte American Express Co.*[6]

There remain, however, two further points. It was said that the Governor was under the Ordinance under a duty to "inquire into the causes and circumstances of the dispute" before he appointed the board of inquiry: and that he had not inquired as he ought to have done. He ought, it was said, to have given a fair opportunity to both parties to make representations before he acted: and the familiar passages in *Local Government Board* v. *Arlidge*[7] were cited. Their Lordships reject this contention. True it is that the Governor had to inquire, and no doubt he did—in his administrative capacity—but he had not to conduct anything in the nature of a judicial or quasi-judicial inquiry.

Then it was said that the Governor did not make a valid reference to the board of inquiry because he did not, in the minute of appointment, specify the nature of the dispute. There is nothing in this point. If there is a dispute in existence the parties must know of it and there is no need to tell them about it. They may not be able to formulate it themselves, at that stage, or at any rate, not precisely. So how can the Governor be expected to do so? Suffice it for it to be formulated by the parties themselves when they get before the board.

Their Lordships find, therefore, nothing invalid in the appointment by the Governor of the board of inquiry. It was not null and void. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and judgment entered for the defendants with costs. The respondents must pay the costs of the appeal to Her Majesty.

Solicitors: *Charles Russell & Co.; Braby & Waller.*

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[6] The Times, July 23, 1954.

[7] [1915] A.C. 120; 30 T.L.R. 672.

[COURT OF APPEAL.]

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July 10, 13, 16, 17, 20, 21, 22, 23, 27, 28, 29; *Nov.* 26.

Morris, Ormerod and Willmer L.JJ.

RIVERSTONE MEAT CO. PTY. LTD. *v.* LANCASHIRE SHIPPING CO. LTD.

[1955 R. 2318.]

Shipping—Bill of lading—Seaworthiness—Hague Rules—Damage to cargo due to defective storm valves—Negligence of workman of independent contractor—Whether shipowner liable for lack of due diligence—(Australian) Sea Carriage of Goods Act, 1924 (*No.* 22 *of* 1924)—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., art. III, r.* 1, *art. IV, r.* 2 (*a*).

Ships' Names—Muncaster Castle.

Negligence—Safe system of work—Plant and equipment—Latent defect—Principle governing employer's liability.

Vicarious Liability—Delegate or independent operator—Specialised work—Liability of principal in contract or tort for due care—Whether liable for negligence of independent contractor.

On May 7, 1953, 150 cases of tinned ox tongues were shipped on board the defendants' vessel at Sydney for carriage to London under bills of lading to which the plaintiffs were parties. The bills were made subject to the Australian Sea Carriage of Goods Act, 1924.[1] When the goods were discharged at London 113 cases were found to be damaged by sea water which had entered the hold by way of defective inspection covers to storm valves on the port and starboard sides of the hold. Immediately before her outward voyage to Australia, the vessel was passed through her No. 2 special survey and her annual load line survey. For this purpose the marine superintendent employed by the defendants' agents instructed a reputable firm of ship repairers to open up all the storm valves and inspection covers. After the inspection by the Lloyd's surveyor, a fitter employed by the repairers closed each inspection cover and secured it with nuts. Once the nuts had been hardened up no visual inspection could detect any unevenness in the position of the cover. No sea water entered the hold during the outward voyage and water was not discovered until the cargo was being unloaded in London. The presence of the water in the hold was due to the negligence of the fitter, who failed sufficiently to secure the nuts on the inspection cover, with the result that the working of the ship in rough weather loosened the nuts. The vessel with the hold in its then condition had remained classified by the classification society since she became a cargo vessel on conversion in 1948. There was no previous record of cargo damage in the hold. On a claim by the plaintiffs for damages for breach of contract, the trial judge rejected the contention of the cargo-owners that the carriers, having delegated their duty to repairers, had failed to prove that they had exercised due diligence to make the ship seaworthy and were therefore liable under article III, rule 1, of the Act of 1924. The plaintiffs appealed:—

[1] Australian Sea Carriage of Goods Act, 1924, Sch., art. III, r. 1: "The "carrier shall be bound, before and "at the beginning of the voyage, to "exercise due diligence to—(*a*) make "the ship seaworthy."

Art. IV, r. 2: "Neither the "carrier nor the ship shall be respon- "sible for loss or damage arising or "resulting from—(*a*) act, neglect or "default of the master, mariner, "pilot, or the servants of the carrier "in the navigation or management "of the ship."

Held, that, on the facts, the defendants had discharged the onus on them of showing that they had exercised due diligence to make the ship seaworthy, and therefore were not in law liable for the negligence of the repairers' fitter.

W. Angliss & Co. (Australia) Pty. v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456; 43 T.L.R. 675, and *Davie* v. *New Merton Board Mills Ltd.* [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346 applied.

Dictum of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628 explained.

Per Morris L.J. I consider that the present case falls to be decided according as to whether the carriers delegated the performance of their duty or themselves performed and discharged it. The negligent fitter was not their servant, and there is no room for the application of the principle respondeat superior (post, p. 106).

Per Willmer L.J. Where the matter in question is one of building, or rebuilding, or repairing a ship, or of the supply of equipment or spare parts, I can see no reason in principle why the court cannot properly be invited to conclude, as a jury question, that the carrier has exercised due diligence, upon proof (a) that he has engaged a reputable contractor or supplier, (b) that he has provided for the work to be properly superintended by his own representative, and (c) that such representative has in fact exercised due diligence. To hold the contrary would, it seems to me, lead to absurd results which cannot have been in the contemplation of those who framed the rules (post, p. 118).

Decision of McNair J. [1959] 1 Q.B. 74; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261 affirmed.

APPEAL from McNair J.[2]

By a bill of lading signed at Sydney on May 7, 1953, by the agent of the defendants, Lancashire Shipping Co. Ltd., and incorporating the provisions of the rules in the Australian Sea Carriage of Goods Act, 1924, 150 cases of ox tongues were shipped on board the defendants' vessel, *Muncaster Castle*, for carriage to London. The plaintiffs, Riverstone Meat Co. Pty. Ltd., were indorsees of the bill of lading. On arrival at London 113 cases were found to be damaged by sea water.

In an action by the plaintiffs for damages, it was claimed that the damage was caused by the unseaworthiness of the vessel, it being alleged, inter alia, that the inspection covers over the storm valves in the scupper pipes were defective, whereby sea water leaked into the hold and damaged the goods.

By their defence the defendants contended that they exercised due diligence to make the ship seaworthy and therefore were not in breach of article III, rule 1 of the Act of 1924. They also claimed the protection of the exception in article IV, rule 2 (*a*).

McNair J. gave judgment for the shipowners. He held that a carrier could not be held liable for want of due diligence to make a ship seaworthy within article III, rule 1 (*a*) of the Hague Rules, where the unseaworthiness had resulted from the

[2] [1959] 1 Q.B. 74; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261.

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negligence of a workman employed by a competent ship repairer engaged by the carrier, the result of whose negligence would not be discoverable by appropriate surveys and inspections carried out in accordance with ordinary prudent practice; that in the present case the shipowners had discharged the burden of proving that they had exercised due diligence and, therefore, were not liable under article III, rule 1 (*a*) of the Act of 1924.

The plaintiffs appealed.

Ashton Roskill Q.C. and *J. Franklin Willmer* for the plaintiff cargo-owners.

A. A. Mocatta Q.C. and *Michael Kerr* for the defendant shipowners.

The following cases were cited by counsel in argument in addition to most of those referred to in the judgments of the court: *The Abrazia*[3]; *Bethlehem Shipbuilding Corporation* v. *Gutradt Co.*[4]; *American Linseed Oil Co.* v. *Norfolk & North American Steamshipping Co.*[5]; *Minister of Materials* v. *Wold*[6]; *London & Rangoon Trading Co.* v. *Ellerman Line.*[7]

Cur. adv. vult.

November 26, 1959. The following judgments were read:

MORRIS L.J. On May 7, 1953, a number of cases of canned ox tongues were shipped in good order and condition on board the S.S. *Muncaster Castle* at Sydney. The ship belonged to the respondents—Lancashire Shipping Co. Ltd. The goods were shipped for carriage to London. They were stowed in the after part of No. 5 lower hold. They were shipped under a bill of lading signed at Sydney on May 7, 1953. The goods belonged to the appellants, Riverstone Meat Co. Pty. Ltd., who, either as original shippers or as indorsees, were parties to the bill of lading. It was a term or condition of the bill of lading that it should have effect subject to the provisions of the rules in the schedule to the Australian Sea Carriage of Goods Act, 1924, as applied by that Act. The carriers were to be entitled to all the privileges, rights and immunities contained in that Act and its schedule as if the same were specifically set out in the bill of lading.

The ship arrived in London on July 12, 1953. On July 16 it was found that there was some water in No. 5 hold. No water had previously been detected. It has been held by McNair J. that sea water had entered No. 5 hold by way of defective storm valves on the port and starboard sides of that hold, there being one valve on each side. When the appellants' goods were

[3] (1904) 127 Fed. 495.
[4] (1926) 10 Fed. 769.
[5] (1929) 32 Fed. (2nd Series) 281.
[6] [1952] 1 Lloyd's Rep. 485.
[7] (1923) 14 Ll.L.Rep. 497; 39 T.L.R. 284.

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discharged it was found that 113 cases, out of a total of 150, were damaged by the sea water that had entered the hold. The appellants made a claim for the damage to the goods. The amount of their loss, £974 10s. 3d., was not in dispute. The appellant cargo-owners alleged that their loss was caused because the ship was unseaworthy. One respect in which unseaworthiness was alleged was that the inspection covers over the storm valves in the port and starboard scupper pipes situated in the forward frame space of No. 5 hold were defective, whereby sea water leaked into the hold. Other allegations of unseaworthiness were made at the trial with which we are not now concerned. In the result, after a careful investigation, the judge held that the vessel was unseaworthy in that, at the time when the appellants' cargo was loaded at Sydney, the nuts on the inspection covers were loose to such an extent as would permit of water finding its way into the hold. The respondent shipowners said, however, that they could exonerate themselves by reason of the contractual term contained in the bill of lading giving them similar protection to that given by the schedule to the Australian Sea Carriage of Goods Act, 1924. Article III, rule 1, of such schedule provides as follows: "The carrier shall be "bound, before and at the beginning of the voyage, to exercise "due diligence to—(a) make the ship seaworthy; (b) properly "man, equip, and supply the ship; (c) make the holds, re- "frigerating and cool chambers, and all other parts of the ship "in which goods are carried, fit and safe for their reception, "carriage and preservation." Article III, rule 2, provides: "Subject to the provisions of Article IV, the carrier shall pro- "perly and carefully load, handle, stow, carry, keep, care for "and discharge the goods carried." Article IV, rule 1, provides as follows: "Neither the carrier nor the ship shall be liable for "loss or damage arising or resulting from unseaworthiness unless "caused by want of due diligence on the part of the carrier to "make the ship seaworthy, and to secure that the ship is pro- "perly manned, equipped and supplied, and to make the holds, "refrigerating and cool chambers and all other parts of the ship "in which goods are carried fit and safe for their reception, "carriage and preservation in accordance with the provisions of "paragraph 1 of article III. Whenever loss or damage has "resulted from unseaworthiness the burden of proving the exer- "cise of due diligence shall be on the carrier or other person "claiming exemption under this section."

The question, therefore, arose at the trial whether the shipowners could discharge the burden of proving that there had been no want of due diligence on their part to make the ship seaworthy. They had contractually bound themselves so that, before and at the beginning of the voyage from Sydney, which commenced when the vessel first left Sydney after May 7, 1953, they were under obligation to exercise due diligence in certain respects, which included exercising due diligence to make the

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ship seaworthy. In fact, as has been held by the learned judge, and as is not now challenged, the vessel was not seaworthy on May 7, 1953. She was unseaworthy because the inspection covers were in the condition to which I have referred. The appellants' loss did in fact result from such unseaworthiness. The learned judge had, therefore, at the trial to investigate whether the respondents had exercised due diligence to make the ship seaworthy. The onus was on them to establish that they had. The very nature of the inquiry involves that the exercise of due diligence to make the ship seaworthy may not always bring it about that a ship is seaworthy.

The conclusions of fact reached by the learned judge were not the subject of dispute or complaint upon the hearing of the appeal. When it is being considered whether due diligence to make a ship seaworthy has been exercised it may be helpful to ascertain the history and the record of the ship and then to proceed to consider (inter alia) whether there have been such steps and such procedures as a prudent and careful carrier would take and follow.

It will, I think, be convenient to summarise the main conclusions of fact which were recorded by the judge.

1. The ship was acquired by the respondents in the year 1949. She had been built in the United States of America during the last war. She was originally completed as an aircraft carrier and was converted into a cargo carrier in 1948: so converted she conformed in all material respects to a C.3 type cargo vessel. On conversion she was classified with the British Corporation (which was united with Lloyd's Register in 1949) and remained so classified at all material times. Her tonnage was 8,000 gross and 4,800 net.

2. Throughout her service with the respondents, which continued until 1955, she was well maintained.

3. In February, 1953, which was immediately before the ship set out for Australia, she was passed through her No. 2 special survey by Lloyd's Register Surveyors. The ship was placed in the hands of Alexander Stephen & Sons Ltd. at Glasgow. She went into dry dock. Her class of registration was the highest for ships that had not been built under the supervision of the Society, and after the survey she was reported to be "so far as seen in good condition and eligible to remain as at present classed in the Register Book."

4. On the same occasion she was passed through her annual load line survey. After the inspection by the Surveyor to Lloyd's Register, be certified that the arrangements on board the ship were in agreement with or equivalent to those given in the original freeboard report and he verified the freeboard marking.

5. Under rules made under section 42 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, provision is made for the examination at the annual survey of the discharges

leading through the ship's side from spaces below the freeboard deck. In practice Lloyd's surveyors are content if 25 per cent. of the sea outlets are opened up for inspection on the annual survey but in fact the respondent shipowners insist that they should all be opened up.

6. Mr. Atkinson, of Moller Line U.K. Ltd., the managers of the ship, was attending to the ship on behalf of the respondents on the surveys. Mr. Atkinson is an experienced and competent marine superintendent. In compliance with the practice of the respondents, Mr. Atkinson instructed Alexander Stephen & Sons Ltd. to open up all the storm valves on the ship for inspection. They numbered 31 in all, including the two which were positioned in No. 5 hold. The opening of the storm valves necessarily involved opening up the inspection covers. That was done.

7. After the inspection by the surveyor to Lloyd's Register it became the duty of a fitter employed by Alexander Stephen & Sons Ltd. to replace and close the inspection covers. The covers are placed over the studs which are in the top of the inspection chamber and nuts are placed in position. The nuts should then be tightened at opposite angles to ensure even all-round pressure. If the nuts on one side are both tightened up before there is any tightening on the other side, the pressure will be uneven and it will be impossible to make a secure joint. This will be so even though the nuts ring true if, after being tightened up, they are tapped with a spanner.

8. The task of tightening up the nuts, when an inspection cover is replaced, is one that is well within the competence of a skilled fitter. It is ordinary and prudent practice to leave this task to a fitter and not to have the supervision either of Lloyd's surveyors or of the owners' superintendent.

9. Once the nuts have been tightened up no visual inspection could detect any unevenness in the positioning of the cover or any insufficiency in tightening up.

10. Alexander Stephen & Sons Ltd. are a ship repairing concern of the highest repute.

11. The ship sailed from Glasgow on March 15, 1953, with a general cargo for Australian ports. The cargo stowed in the after half of No. 5 hold was discharged at Sydney. None of the cargo carried on the outward voyage in No. 5 hold was damaged by sea water.

12. After the discharge at Sydney of the outward cargo stowed in the after half of No. 5 hold and before the appellants' cargo was taken on board and there stowed, the hold was inspected by the Chief Officer. There was no sign of leakage of sea water.

13. The ship left Sydney on May 7 and proceeded to Brisbane where outward cargo from Glasgow that had been in the forward part of No. 5 hold was discharged. As a result the places where the storm valves were situated became visible. The Chief Officer again inspected the hold and there were no signs either of sea water staining or of rust. The two inspections made by the

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Chief Officer and referred to above were properly carried out. No sea water did enter No. 5 hold on the outward voyage to Australia either through the storm valves or at all.

14. On the voyage from Australia there was a certain amount of rolling and pitching of the ship which was sufficient to loosen the nuts of the inspection covers in No. 5 hold if they had been improperly tightened up in Glasgow and if there had been some loosening in the working of the ship on the outward voyage.

15. The cause of the admission of sea water was that the fitter at Glasgow "negligently failed to secure the nuts on the "inspection cover evenly or sufficiently with the result that the "working of the ship on the outward voyage was sufficient to "produce the condition, by the time the plaintiffs' cargo was "loaded at Sydney, that the nuts had been loosened to such an "extent that with the vessel rolling and waves striking the sides "of the ship, sea water was forced through the interstices below "the inspection covers."

It seems to me that the question whether a carrier has exercised due diligence to make a ship seaworthy is primarily a question of fact. (See *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[1]) It must depend upon the particular features and circumstances of each particular case. It is for this reason that I have considered it appropriate to record the relevant findings of fact made by the judge in this case. Those findings are not challenged. On those findings did the respondents show that they had exercised due diligence to make the ship seaworthy? The judge was of opinion, subject to a consideration of one matter, that the respondents had discharged the burden that was upon them. The one matter was whether it could be said that the respondents must be held accountable in law for the negligence of the fitter. The conclusion of the judge was succinctly expressed in the words: "Unless the defendants "are in law responsible for the negligence of the fitter, as I have "found it, they have discharged the onus of proving the exercise "of due diligence so far as concerns the inspection covers." That conclusion is not challenged on appeal. The judge proceeded to consider whether the respondents were responsible in law for the negligence of the fitter. Upon an examination of the authorities he decided that they were not and, accordingly, he exonerated them. His decision as regards that one matter is now challenged on appeal.

The issue so raised is in neat and concentrated form. For our assistance in resolving it, we have had the advantage of hearing most powerful and learned and painstaking arguments from counsel, to whom we are greatly indebted. We were referred to and we considered a great many authorities.

The point which is in contest is, however, an extremely short one. Did the respondents exercise due diligence to make the ship

[1] [1934] A.C. 538, 543; 51 T.L.R. 5.

seaworthy? The appellants submit that as the respondents were under a duty to exercise due diligence, they are liable if they failed to perform their duty or if there was a failure on the part of anyone to whom the performance of the duty was delegated. That submission may in general be sound, but it prompts the inquiry as to whether the respondents did perform their duty and the inquiry whether they delegated performance of it. In the case of something so complex as a modern ocean-going ship, it is only reasonable to recognise that there must be a variety of matters which call for skilled or expert or specialised attention. There may be repairs or overhauls or adjustments or inspections which demand knowledge, experience and skill and which normally and reasonably are entrusted to those possessing the qualifications to undertake the work which has to be done. In the present case, which must depend upon its own facts, it seems to me that it was eminently reasonable for the respondents to entrust a ship repairing concern of the highest repute with the surveys to which I have referred, and, incidentally, with the task of taking off the inspection covers and of replacing them after the conclusion of the inspection by the surveyor to Lloyd's Register. On the facts as found, I would consider that in doing what they did the respondents did exercise due diligence to make their ship seaworthy. There was no delegation by them of their duty to exercise due diligence to make their ship seaworthy. There was a performance by them of that duty. They did exercise due diligence by taking steps which included employing Alexander Stephen & Sons Ltd. The particular task in regard to the inspection covers was well within the competence of a fitter: no supervision of a fitter was either in prudence or according to practice called for.

Unless, therefore, there is some authority which directs me to a different conclusion, I consider that the respondents proved that they had exercised due diligence to make their ship seaworthy. That was their duty. Such duty must not be unwittingly misstated so as to enlarge it into a duty to make the ship as seaworthy as due diligence on the part of anyone could make it.

In considering the present case the judge referred to what Wright J. said and decided in *W. Angliss & Co. (Australia) Pty.* v. *P. & O. Steam Navigation Co.*,[2] and to the speech of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*.[3] But, subsequently to the decision of the judge in the present case, the House of Lords have decided *Davie* v. *New Merton Board Mills Ltd.*[4] We, therefore, have the advantage of the authoritative guidance which is given in the speeches in *Davie's* case and we are relieved of the task of venturing to analyse the earlier pronouncements which were there considered. In his

[2] [1927] 2 K.B. 456; 43 T.L.R. 675.

[3] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[4] [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346.

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speech in *Davie's* case Viscount Simonds said [5]: "And, much as "I distrust analogies, I would add that there is a striking "resemblance between the shipowner who is held not to be liable "for the bad workmanship, undiscoverable by him, of the ship-"builder's employees and the employer who claims not to be "liable for the bad workmanship, equally undiscoverable, of the "employees of the manufacturer who supplied at second hand "the tools with which he has provided his workman." I do not read the speeches of Viscount Simonds or of Lord Reid as challenging the conclusion reached by Wright J. in the *Angliss* case.[6] Wright J. there decided that where a carrier contracted for the building of a ship he was not liable for lack of due diligence on the part of the shipbuilders or their workmen unless he had failed to engage builders of repute and to adopt all reasonable precautions, such, for example, as requiring the builders to satisfy one of the recognised classification societies or engaging skilled naval architects to advise him and skilled inspectors to supervise the work with due diligence. In his judgment Wright J. said [7]: "Under the old rule the only relevant question was whether the "ship was seaworthy or unseaworthy. That rule was no doubt "well adapted to more simple days when ships were not very "complicated wooden structures of a few hundred tons, but in "modern times, when ships are complicated steel structures full "of complex machinery, the old unqualified rule imposed too "serious an obligation on carriers by sea, and I think that the "new Acts have intended to emphasise the specialisation which "has developed in modern times, and to emphasise the distinc-"tion between carrier and shipbuilder and limit the carrier's "obligation to due diligence in his capacity as carrier. He is to "be liable for all such duties as appertain to a prudent and "careful carrier acting as such by the servants and agents "in his employment. If he has a new vessel built he will "be liable if he fails to engage builders of repute and to adopt all "reasonable precautions. He may be held bound to require, "for instance, the builders to satisfy one of the well-known "classification societies, such as Lloyd's, or to engage skilled "naval architects to advise him and skilled inspectors to super-"vise the work. In the same way, if he buys a ship he may be "required to show that he has taken appropriate steps to satisfy "himself, by appropriate surveys and inspections, that the ship "is fit for the service in which he puts her. But I do not think "in any case that the carrier can be held guilty of want of due "diligence simply because the builders' employees have put in "some bad work which, though concealed, renders the vessel "unfit.

"In the present case the defendants employed an inspector "to supervise the work. I have held that that inspector used

[5] [1959] A.C. 604, 623.
[6] [1927] 2 K.B. 456.
[7] Ibid. 461.

" due diligence. It may well be that, if he had negligently passed " bad work which he saw, or even, perhaps, which he ought to " have seen, the carrier would be liable for want of due diligence " on the part of one to whom he had delegated the task of " inspecting the work, although such supervision, it may be, " cannot be other than general or go to every detail of the work- " manship. Similarly, the carrier might perhaps be held liable " if the naval architect whom he employed to supervise the " design, applying current standards, failed to detect a definite " error in design, although I do not think that he would be so " liable for an error on the part of one of the classification " societies, such as Lloyd's, which occupy a public and quasi- " judicial position. He might also be liable if, either personally " or by his scientific advisers, he chose a special form of construc- " tion which involved, according to current standards, a known " risk—for example, if he chose to dispense with a cofferdam so " as to increase his cargo space although the best opinion thought " a cofferdam necessary. Again, the need for repairing a ship " may cast on the carrier a special duty to see, as far as reason- " ably possible, by special advisers for whom he is personally " responsible, that the repair adequately make good the defects."

I have read that passage at length because it seems to me to illustrate the correct approach. There may be infinite variations of facts and whether in a particular situation the carrier has exercised due care will be a question of fact. But it is to be observed from the passage quoted that the carrier was not held guilty of want of due diligence simply because the builders' men put in bad work which, though concealed, rendered the vessel unfit. The carrier could prove that he had exercised due diligence even though there was a want of it on the part of the builders' men. But, as Wright J. pointed out, there might be cases, where ship building is being done for a carrier or where ship repairing is being done for a carrier, in which supervision during the work or inspection after the work would be necessary or desirable. In such cases the inspector or special adviser would be the delegate of the carrier to perform one part of the carrier's duty to exercise due care. In such cases if the inspector or special adviser failed to exercise due diligence, that would be the failure of the carrier or a failure for which he would be liable.

I can see no distinction in essential principle, though perhaps much when facts come to be regarded, between cases where a ship is being built for a carrier and cases where a ship is being repaired or is being surveyed for a carrier.

It seems to me that in the last sentence of the passage which I have quoted above, Wright J. was saying that if a carrier is having repairs effected to his ship it may be necessary for him to appoint special advisers, for whom he would be " personally " responsible," to make a check to see that the repairs have been properly effected. This shows that the question as to what the exercise of due diligence demands is a question of fact depending

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on the circumstances. The sentence, though not strictly a part of the reasons for the decision, suggests that the carrier would not necessarily be liable for the negligence of the repairers. Wright J. had pointed out earlier [8] that: "The obligation of the "carrier to exercise due diligence to make the ship fit is clearly "not limited to his personal diligence." If in certain circumstances, when repairs are being effected, the exercise of due diligence requires that there should be a check on the repairers' work, the carrier would be "personally responsible" for the special advisers employed to make such check.

In each particular set of circumstances it will be a question of fact as to what steps and measures a carrier should take in order to exercise due care and diligence to make his ship seaworthy: it will be a further question of fact as to whether he has done all that he should. But there may be situations in which good and prudent practice and the exercise of due diligence will warrant a carrier in entrusting some particular work to skilled and competent people who are not his servants so that even if there is some failure or negligence on their part, there will, nevertheless, have been an exercise of due diligence on his part. On the facts as found by the judge the present case is, in my judgment, an example of such a situation.

Is there then any authority which casts doubt on this conclusion? There was a passage in the speech of Lord Wright in *Wilson & Clyde Coal Co.* v. *English* [9] which might have been thought to do so. It is quoted by Viscount Simonds in his speech in *Davie* v. *New Merton Board Mills*.[10] But we now have the pronouncements of their Lordships in that case. Taking the facts as found by McNair J., and they are not challenged, the question is: Are the respondent shipowners responsible in law for the negligence of the fitter?

If the fitter had been the servant of the respondents, the position would have been different. In *G. E. Dobell & Co.* v. *Steamship Rossmore Co.*[11] a shipowner was held responsible for the failure of the ship's carpenter to close a porthole, the closing of which was necessary in order to ensure the seaworthiness of the ship. In that case the contract incorporated the clauses of the Harter Act and it was argued that the provisions of clause 3 referred only to the exercise of due diligence by the owners themselves and not to the diligence of agents or servants. It was held, however, that the clause did not only refer to due diligence by an owner personally but to due diligence by him and his agents whom he employs to act for him. The precise problem with which we are concerned in the present case did not, however, arise in that case. But it must be recognised that just as a carrier will probably not be a shipbuilder and may, subject to whatever checks are in a particular case appropriate, place reliance upon a shipbuilder and the shipbuilder's men, so also a

[8] [1927] 2 K.B. 456, 460.
[9] [1938] A.C. 57, 78.
[10] [1959] A.C. 604, 622.
[11] [1895] 2 Q.B. 408.

carrier may, subject to whatever checks are in a particular case appropriate, entrust repairs or renewals or overhauls or surveys to those who are skilled in the work that is entailed and may place reliance upon such persons. In such a situation there is no delegation by a carrier of his duty but a performance by him of his duty.

The duty resting upon the carrier to exercise due diligence is one of which he cannot divest himself. In deciding what the exercise of due diligence requires, a carrier may act, or may have to act, by servants or agents: it is the carrier then who, by his servants or agents, is acting. As Wright J. pointed out in his judgment in the *Angliss* case, a carrier may be a company and in any case in the complication of modern affairs and by reason of the widely scattered situation of seaports, he must act by agents or servants.

In his speech in *Davie's* case Viscount Simonds said [12]: "No "one doubts that an employer cannot escape liability by appoint- "ing an agent to perform the employer's obligation on his behalf." If I may most respectfully say so, that states the matter very clearly.

A similar approach, as it seems to me, is shown in some words used by Lord Wright in his speech in *Northumbrian Shipping Co. Ltd.* v. *E. Timm & Son Ltd.*[13] Lord Wright said: "The "obligation to make a ship seaworthy is personal to the owners, "whether or not they entrust the performance of that obligation "to experts, servants or agents." If owners choose to entrust to others, be they experts or servants or agents, the duty which the owners must themselves discharge, then the owners are liable if their delegates fail to do what it is incumbent on the owners to do. But that is not to say that in some circumstances, depending upon their particular facts, owners (or those acting for owners) may not be able to discharge their duty by planning and organising and setting in train certain works or operations without being accountable for each and every fault of every person who may play any part in such works or operations. The carrier cannot wash his hands of his duty to exercise due diligence by passing it on to someone else, however competent. The duty remains. But that does not involve that if the duty of exercising due diligence is fully and faithfully performed and discharged, there is inevitably a liability for any and every negligent act of anyone who may take a part in some work which has to be done.

In line with the words of Viscount Simonds in *Davie's* case were the words of Lord Morton of Henryton [14] and of Lord Tucker [15] and Lord Keith.[16] Lord Tucker said: "It may well "be that in some cases the employer may delegate the perform- "ance of his obligations in this sphere to someone who is more "properly described as a contractor than a servant, but this will

[12] [1959] A.C. 604, 621.
[13] [1939] A.C. 397, 403; 55 T.L.R. 770; [1939] 2 All E.R. 658.
[14] [1959] A.C. 604, 629.
[15] Ibid. 646.
[16] Ibid. 652.

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"not affect the liability of the employer, he will be just as much "liable for his negligence as for that of his servant. Such a "contractor is entrusted by the employer with the performance "of the employer's personal duty. But this does not mean that "every person with whom the employer may have entered into "some contractual relationship connected with the manufacture "or supply of some machinery, appliance or tool which is ulti-"mately used in his business automatically becomes a person "entrusted by the employer with the performance of his common "law duty. Still less can the negligence of some person with "whom the employer has never been in contact contractually or "otherwise, or of whom perhaps he has never even heard, be "imputed to him." In my judgment that passage has relevance, mutatis mutandis, to the case of a carrier, who is under a duty to exercise due diligence to make his ship seaworthy. It must also be remembered that if a ship is undergoing a survey or an overhaul, there will often and in different ways be a necessity to purchase some new fittings or new structural material.

If a repairer purchased some new part from a reputable supplier and then fixed such part in position in a ship and if the ship became unseaworthy because the new part had been negligently made by the supplier although apparently satisfactory, I consider, unless the circumstances pointed to the necessity for some examination or test, it would be open to a court to hold that the owner of the ship had exercised due diligence to make the ship seaworthy and that he would not necessarily be accountable by reason of the negligence of the supplier.

Though in *Davie's* case the negligent manufacturer stood in no contractual relation to the employer and though the action was founded in tort, the speeches afford guidance to us in the present case because they analyse certain judicial pronouncements concerning the circumstances under which there may be responsibility for the acts of "independent contractors."

It is to be observed that Lord Morton's conclusion would have been just the same if the employers had bought direct from the manufacturers[17]: so also would have been Lord Tucker's conclusion.[18] There is, I think, an analogy between a duty to take reasonable care to provide proper appliances and a duty to exercise due diligence to make a ship seaworthy. The content of the duty will vary according to the circumstances of each case but the measure of the duty is the same. I can see no practical distinction for present purposes between the phrases "due dili-"gence" and "reasonable care."

Viscount Simonds[19] expressed his approval of what Lord President Normand had said in the Court of Session in the *Wilsons & Clyde Coal Co.* case in regard to *Bain* v. *Fife Coal Co. Ltd.*[20] Viscount Simonds said: "There is an illuminating passage in the "judgment of the Lord Justice-Clerk in *Bain*, who there asserted

[17] [1959] A.C. 604, 629.
[18] Ibid. 648.
[19] Ibid. 622.
[20] 1935 S.C. 681.

"it to be a fundamental doctrine of the law of master and "servant that there are certain duties owed by a master to his "servant so imperative and vital to safety that the master cannot "divest himself of responsibility by entrusting their performance "to others, so as to avoid liability in the event of injury arising "to the servant through neglect of any of those duties. 'I agree,' "said Lord Normand, 'with this opinion, subject to the explana-"'tion, which is to be gathered from the context, that, when "'delegation to others is spoken of, it is delegation to servants "'that is meant.' It is legitimate, therefore, to approach "*Wilsons'* case with the warning that anything said about the "default of any person other than the employer and his servants "cannot be regarded as relevant to the decision."

The analysis by Viscount Simonds [21] of what Lords Wright and Maugham said in *Wilsons'* case is all of great materiality in the present case, though Viscount Simonds pointed out that in *Davie's* case the manufacturer could not vis-à-vis the employer be regarded as an "independent contractor." Viscount Simonds [22] said: "As I have already said, a large number of authorities "were cited to us, many of them relating to the liability of an "employer, or more often of an occupier of land, for the default "of an independent contractor. It may one day fall to the "House to explain and, perhaps, to reconcile these cases. It is "not the occasion for that task when the fault lies at the door of "one who was not an 'independent contractor,' however wide a "meaning may be given to those words."

Lord Reid also analysed *Wilsons'* case and pointed out that in that case there was no question of the company being liable for the negligence of some person who was not their servant. He also pointed out that there was nothing in the speeches of Lord Thankerton or of Lord Macmillan or in the opinions in the Court of Session, which latter were approved in the House of Lords, to suggest any intention to deal with the question whether an employer is in any way liable for the negligence of any person who is not his servant. After reviewing what Wright J. said in *Angliss'* case, and what Lord Wright said in *Wilsons'* case, Lord Reid said [23]: "Lord Wright had the nature of the vicarious "liability of a shipowner sufficiently in mind to enable him to "select this as an appropriate analogy to the vicarious liability "of an employer to his servant, and it seems to me impossible "that he could at the same time have forgotten his judgment in "*Angliss* and equally impossible that he would have said no "more than he did in *Wilsons & Clyde* if he had come to think "that his judgment in *Angliss* was wrong. He certainly thought "that a master (or a shipowner) would in some cases be "vicariously liable for the negligence of a person who was not in "law his servant. But he thought that a shipowner would not "be vicariously liable for the shipbuilder's negligence; and by

[21] [1959] A.C. 604, 622, 623, 624.
[22] Ibid. 626.
[23] Ibid. 634.

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" parity of reasoning he must have taken the same view about a " master's liability in respect of plant which he had purchased. " I cannot avoid the conclusion that, if the facts of the present " case had been put before him in 1938, he would have decided " in favour of the present respondents." In similar manner I am of the opinion that if the facts of this present case had been before Wright J. in 1938, he would have decided it in favour of the present respondents.

Lord Reid examined the words used by Lord Maugham in *Wilsons'* case and concluded [24]: " It appears to me, therefore, " to be at least doubtful whether Lord Maugham would have held " an employer vicariously liable for the negligence of a manufac- " turer from whom he had bought plant or machinery."

After a review of the authorities, including *Thomson* v. *Cremin*,[25] Lord Reid said [26]: " The conclusion to which I have " come is that an employer, besides being liable to his servant for " injury caused by the negligence of his own servants, is in some " cases liable in respect of the negligence of others. Where, " then, is the line to be drawn? On the one hand, it appears that " an employer is liable for the negligence of an independent con- " tractor whom he has engaged to carry out one of what have " been described as his personal duties on his own premises and " whose work might normally be done by the employer's own " servant—at least if the negligent workmanship is discoverable " by reasonable inspection. On the other hand, for the reasons " which I have given, I am of opinion that he is not liable for " the negligence of the manufacturer of an article which he has " bought, provided that he has been careful to deal with a " seller of repute and has made any inspection which a reasonable " employer would make. That leaves a wide sphere regarding " which it is unnecessary, and it would, I think, be undesirable, " to express any opinion here. Various criteria have been sug- " gested and it must be left for the further development of the " law to determine which is correct."

Lord Keith agreed with the analysis made by Viscount Simonds and Lord Reid of the opinions expressed in *Wilsons'* case and Lord Keith said [27]: " Granted that in certain circumstances he " may be responsible for the negligence of persons who may be " described as independent contractors in the performance for him " of his common law duties, where does his liability for negligence " in the chain of performance end? The answer made by appel- " lant's counsel is, nowhere, for the only excuse which he " accepts is latent defect arising without negligence in manu- " facture and which could not be discovered by the maker of the " instrument in which the defect existed. This need not, and in " the present case does not involve negligence in a chain of delega- " tion and sub-delegation for here there was nothing but a

[24] [1959] A.C. 604, 636.
[25] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.
[26] [1959] A.C. 604, 645.
[27] Ibid. 652.

" purchase of a tool from a reputable wholesale supplier of tools. " For all practical purposes the appellant's case involves that an " employer is bound to warrant the sufficiency and safety of the " tools used by his servants."

Lord Keith also said [28]: " The duty of a master in supplying " a servant with plant or material cannot, in my opinion, be " placed higher than a duty to exercise reasonable care to see " that the plant or material is safe for the purpose for which it is " intended and he cannot be liable, except in a proper case of " delegated performance, for the negligence of someone other " than himself in the provision of that plant or material. I find " it unnecessary to consider whether that liability can extend " further than one remove in a chain of delegation. Purchase by " a master from a wholesale or retail merchant, without more, " is not, in my opinion, an instance of delegation. It is perform- " ance by the master himself."

Although the decision in *Davie's* case does not in any way conclude the question raised in the present appeal, the speeches there made do not lend any favour to the view that if the carriers exercised due diligence in the particular circumstances of this case by entrusting certain work to independent contractors of the highest repute, they are answerable for some act of undiscoverable negligence on the part of a servant of the independent contractors. There was no delegation of the carriers' duty to the independent contractors: there was a discharge by the carriers of their duty by various acts which included calling upon the skilled services of the independent contractors.

In the judgment of the Privy Council in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*[29] it was said in reference to the exercise of due diligence to make a ship seaworthy that: " The " condition is not fulfilled merely because the shipowner is per- " sonally diligent. The condition requires that diligence shall in " fact have been exercised by the shipowner and those whom he " employs for the purpose—see *Dobell* v. *Steamship Rossmore* " *Co.*" [30] The reference to the *Rossmore* case was, therefore, to a case which concerned the negligence of a servant. So also in the recent judgment of the Privy Council in *Maxine Footwear Co. Ltd* v. *Canadian Government Merchant Marine Ltd.*,[31] where those words were cited, a failure on the part of the fourth officer to exercise due diligence was failure on the part of a servant.

On behalf of the appellant cargo-owners it was powerfully submitted that in American or English cases which were concerned with the Harter Act, and in English cases dealing with the Hague Rules, there could be discerned a current of authority supporting the view that all those who may be engaged in the

[28] [1959] A.C. 604, 653.
[29] (1937) 58 Ll.L.Rep. 33, 40.
[30] [1895] 2 Q.B. 408.
[31] [1959] A.C. 589; [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740.

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work of making a ship seaworthy must be regarded as the delegates of the carrier in carrying out his obligation. It was submitted that the decision now under appeal involves a complete reversal of what has been a consistent line of approach. Reference was made to certain expressions of opinion by the editors of the 12th and 13th editions of Scrutton on Charterparties, as well as to the judgment in this court in *Dobell's* case,[32] to the words of Wright J. in *Angliss'* case,[33] and of Lord Wright in *Wilsons'* case,[34] and in the *Northumbrian Shipping* case [35] and in *Paterson Steamship Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[36] Reference was also made to passages in other cases, including *Smith Hogg & Co. Ltd.* v. *Black Sea & Baltic General Insurance Co. Ltd.*,[37] *International Packers* v. *Ocean Steamship Co.*,[38] and *Waddle* v. *Wallsend Shipping*.[39] I have referred above to certain passages from the judgments and speeches of Lord Wright. To these passages I may add the following words from his speech in *Smith Hogg & Co. Ltd.* v. *Black Sea & Baltic General Insurance Co. Ltd.*[40]: "The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect, such an exception can only excuse against latent defects. The overloading was the result of overt acts."

The various passages from judgments to which I have referred are strongly relied upon by the appellants, and when marshalled in sequence are said to reveal a steady and consistent line of authority supporting the view that all persons taking part in the work or operations connected with making a ship seaworthy must be regarded as the delegates of the shipowner or carrier, so that, if the ship is unseaworthy as a result of a negligent act on the part of any one of them, the shipowner or carrier has, per alios, failed to exercise due diligence to make the ship seaworthy. But it is to be noted that the issue raised in the present appeal was not effectively raised in the cases relied upon. In the *Angliss* case it was, however, clearly held that the carrier was not to be held guilty of want of due diligence simply because the builder's employees had put in some bad work which, though concealed, rendered the ship unfit. Some of the passages relied upon by the appellants are passages which, when analysed, are seen to have reference to servants. That appears from the speeches in *Davie's* case. Other passages when analysed show that the duty cast upon the carrier under article III, rule 1, is a personal duty of the carrier so that he cannot escape liability by appointing someone to perform his obligation on his behalf. But I do not read any

[32] [1895] 2 Q.B. 408.
[33] [1927] 2 K.B. 456.
[34] [1938] A.C. 57.
[35] [1939] A.C. 397.
[36] [1934] A.C. 538, 547.
[37] [1940] A.C. 997; 56 T.L.R. 893; [1940] 3 All E.R. 405.
[38] [1955] 2 Lloyd's Rep. 218.
[39] [1952] 2 Lloyd's Rep. 105.
[40] [1940] A.C. 997, 1001.

of the passages as laying it down that there cannot ever be circumstances under which a carrier may be free from liability for some act of negligence on the part of someone doing work on his ship, even though he can show that he has made arrangements of a kind reasonably made by carriers in circumstances where work may be entrusted to independent contractors.

It is neither necessary nor desirable to seek to formulate some test by reference to which it can be decided whether a carrier has performed his duty or whether he has delegated it. We are concerned only with the facts of the present case, and on the facts as found I consider there was a discharge by the respondents of their duty.

We were referred to a number of American cases and to expressions used in the judgments. Thus in *Mary L. Peters* [41] it was held that there was no such evidence of due diligence on the part of the owner or of those who represented him on the inspection and the repair of a ship before she sailed as would exempt the ship under the Harter Act. So in *The Colima* [42] it was said that there must be due diligence in the work itself, and there was a reference to agents to whom a carrier may have committed the work of fitting a ship for sea. In *Nordeutcher Lloyd* v. *President Insurance Co. of America* [43] it was said that due diligence must be adequate to the occasion and must be in the work itself and not merely in the selection of agents to do the work, for if it were the latter, carriers might escape all responsibility.

These and other cases all confirm that a carrier does not evade his duty either by choosing competent servants or agents or by delegating performance to others, but I am not persuaded that the cases establish that there cannot be cases in which, on their particular facts, certain persons preparing a ship for sea are neither the servants or the agents nor the delegates of the carrier. It does not seem to me that the construction of article III, rule 1, of the Hague Rules presents any difficulty. The words are clear. The duty is defined. The duty is imposed upon the carrier. It is for him to discharge it. The rule is mandatory. The duty is unqualified. The only question in the present case is whether it was performed.

Indepedent contractors engaged to do work on the ship may themselves arrange for sub-contractors to do certain work. Are all those who are employed by independent contractors and their sub-contractors to be regarded as delegates of the carrier? If so, the obligation of the carrier becomes an obligation to make the ship as seaworthy as the exercise of due diligence can make it. That, however, is not the contractual obligation in this case. That would be in effect to impose upon the carrier all the obligations of a warranty of seaworthiness subject only to non-liability for latent defects. That also is not the contractual obligation in

[41] (1895) 68 Fed. 919.
[42] (1897) 82 Fed. 665.
[43] (1901) 110 Fed. 420.

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this case. If the carrier is to be liable for the negligence of all persons who have been engaged in doing anything to the ship, it would seem impossible to exclude those who have been engaged in building a new ship for a carrier. If everybody who has a hand in preparing a ship for a voyage so as to make her seaworthy is a delegate of the carrier, why should not every person who prepares a ship for her first voyage also be a delegate? And what persons are more intimately concerned in preparing a ship for such a voyage than those who build her? If it is said that the carrier is entitled to rely upon the expert skill of the shipbuilder, that is but to recognise that as a question of fact there may be circumstances in which the exercise of due diligence entitles a carrier to place dependence upon the skill of others without making those others his delegates for the exercise of the due diligence which he has contracted to exercise. As Wright J. pointed out in *Angliss'* case, a carrier may be a charterer of a ship or a purchaser of a ship, and in such cases the builders of the ships and the builders' men could not possibly be regarded as the servants or agents of the carrier. Nor could they possibly be regarded as the delegates of the carrier. If in the present case the position had been that the *Muncaster Castle* had been purchased by a purchaser in March, 1953, prior to the sailing to Australia, and if the purchaser had received assurances that the special survey and the load-line survey had been properly carried out, I cannot think that the purchaser would be responsible for the negligence of the fitter. In such a situation it would be a question of fact as to whether any special steps should have been taken by the purchaser in the exercise of his obligation of due diligence as a carrier. On the facts of this case it is shown that no visual examination of the inspection covers would have revealed any unevenness in their positioning.

The speech of Viscount Simonds in *Davie's* case points a warning against any ardent resort to analogies. In this field analogies will only furnish a guide or a corrective if there is some duty or obligation which is of like nature to that now being considered. For this reason I do not find guidance in such cases as *Grote* v. *Chester & Holyhead Railway Co.*[44] or *Francis* v. *Cockrill*[45]: the duties owed in the former case to a passenger on a railway that crossed a bridge, and in the latter to one who paid money to occupy a seat on a stand, differed from the duty resting upon the carrier in the present case. The duty of an employer to an employee bears a closer resemblance. Hence, it is indeed significant to note that an employer, being under a duty to take reasonable care to provide a reasonably safe tool for his employee, is not liable for the bad workmanship, undiscoverable by him, of the employees of the manufacturer of a tool which the employer purchases.

Some other situations in which there is a duty to take reasonable care provide illustrations of the fact that such

[44] (1848) 2 Exch. 251. [45] (1870) L.R. 5 Q.B. 501.

measure of care may be taken without attracting responsibility for the negligence of someone whose work and services have been sought. Thus, in *Phillips* v. *Britannia Hygienic Laundry*,[46] while the defendants' motor-lorry was being driven in a public highway, a wheel came off and damaged the plaintiff's van. The wheel came off owing to a defect in the axle. The defendants had sent the lorry to the makers of it, a firm of known competence, to be overhauled and repaired. The makers were negligent in not having replaced the defective axle. The lorry was only received back from the makers two days before the accident. It was held that the defendants were not liable for the negligence of the makers, and that the plaintiff could not recover, inasmuch as he had failed to establish knowledge or negligence on the part of the defendants. In his judgment in that case Bailhache J. said[47]: "The remaining point is that there is a common law duty "on the owner of a motor-vehicle to have it reasonably fit for the "road. In my judgment that is not a correct statement of the "duty. Correctly stated the duty is to take reasonable care that "the motor-vehicle shall be fit for the road. That is quite a "different thing from the duty to have it reasonably fit for the "road. If the duty were to have it reasonably fit for the road "it might well be that, although the owner of the vehicle had "entrusted his repairs to a competent repairer, he would be liable "to a person who suffered injury upon the high road if the "competent repairer were negligent. If, on the other hand, "the duty is, as I hold it is, to take reasonable care to have his "vehicle fit, then that duty is discharged by the owner of "the vehicle who puts it into the hands of a competent repairer "with instructions to do what is necessary to put it in a fit state "to use on the road." (See also *Stennett* v. *Hancock*.[48])

In the well-known case of *Haseldine* v. *C. A. Daw & Son Ltd.*[49] it was held that where there was an obligation on a landlord to take care that a lift was reasonably safe, a landlord fulfilled that obligation by employing a competent firm of engineers to make periodical inspections of the lift, to adjust it and to report on it. Scott L.J. said[50]: "The invitor is bound "to take that kind of care which a reasonably prudent man in "his place would take—neither more nor less." Goddard L.J. said[51]: "Towards an invitee the occupier has the duty of taking "care that the premises are reasonably safe." I need not quote the classic passage from the judgment of Willes J. in *Indermaur* v. *Dames*,[52] but he there points out that whether reasonable care has been taken is to be determined as a matter of fact. It seems to me that, by employing a first-class firm of lift engineers to make periodical inspections of the lift, to adjust it and to

[46] [1923] 1 K.B. 539; 39 T.L.R. 207.
[47] Ibid. 556.
[48] [1939] 2 All E.R. 578.
[49] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.
[50] [1941] 2 K.B. 343.
[51] Ibid. 374.
[52] (1866) L.R. 1 C.P. 274.

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furnish reports upon it, the landlord did all that a reasonable man could do towards seeing that it was safe, especially when it is remembered that he also had the advantage of quarterly inspections by the insurance company's engineer. But it is argued that, if the engineers were negligent, it cannot be said that the occupier has discharged his duty. With this I cannot agree. An occupier or any other person may have, either by contract or by law, such a degree of duty imposed on him that he cannot discharge it by employing a contractor to do work for him, but where the duty is to take care that the premises are safe, I cannot see how it can be discharged better than by the employment of competent contractors. Indeed, one may well ask how otherwise could the duty be discharged.

If other obligations than those of a carrier under the Hague Rules or other situations than that relating to carriage of goods by sea are being referred to, it must at all times be remembered that in the present case we are concerned with a definitely defined obligation. It is only if other obligations are comparable that cases are helpful which illustrate that there may be some circumstances in which the obligation to take reasonable care or to exercise due diligence may be discharged by placing dependence upon experts or those possessed of technical skill (or special knowledge or experience). Thus, *Haseldine* v. *Daw* [53] illustrates a situation in which a duty was discharged in that way, whereas *Woodward* v. *Mayor of Hastings* [54] illustrates a situation in which a duty to be discharged called for no such dependence. There was no "esoteric quality" in the nature of the work which the cleaning of snow from a step demanded.

Though a consideration of other obligations which exist in other circumstances may yield valuable illustrations of principle, I consider that the present case falls to be decided according as to whether the carriers delegated the performance of their duty or whether they themselves performed and discharged their duty. The negligent fitter was not their servant, and there is no room for the application of the principle respondeat superior. I see no reason why, on the particular facts of this case, it was not proper to hold that the carriers did exercise reasonable care to make the ship seaworthy.

I would, therefore, dismiss the appeal.

ORMEROD L.J. (read by WILLMER L.J.): I have had the opportunity of reading the judgment which has just been delivered by Morris L.J., and the one about to be delivered by Willmer L.J. I am in full agreement with the views there expressed, and have not, therefore, a great deal to add.

The question at issue is a short one, although it has involved a good deal of argument and the citation of numerous authorities. The facts as found by the judge are not in issue and the question

[53] [1941] 2 K.B. 343. [54] [1945] 1 K.B. 174.

to be decided is whether the respondents have discharged the burden, which is undoubtedly upon them, of proving that they exercised due diligence to make their ship seaworthy.

[His Lordship stated the facts and continued:] It is common ground that the two covers in question were not properly screwed down, with the result that although they remained watertight on the outward voyage, they allowed water to enter the hold when the ship was homeward bound. The learned judge found, and the appellants do not dispute, that it was the ordinary and prudent practice for the covers to be replaced by a fitter without supervision, and that once the nuts holding down the inspection covers have been hardened up, no visual inspection would detect any unevenness of the cover or any insufficiency in the hardening up. On these facts the judge came to the conclusion that the respondents had exercised due diligence to make the ship seaworthy, and it is from this decision that the cargo owners have appealed. The appellants in their pleadings and at the trial made other allegations of unseaworthiness, but the insufficient screwing down of the storm-valve covers is the only ground which has been considered in this appeal. It is not in dispute that the ship was unseaworthy in this respect, and that the appellants' loss resulted therefrom.

The bill of lading was expressed to have effect subject to the provisions of the rules in the schedule to the Australian Sea Carriage of Goods Act, 1924, which are in identical terms with the corresponding provisions in the British Carriage of Goods by Sea Act, 1924. The relevant articles are article III (1) and (2) and article IV (1). The effect of these articles, so far as they relate to the issues with which this appeal is concerned, is that it is the duty of the carrier to exercise due diligence to make his ship seaworthy and properly and carefully to stow, carry, keep and care for the goods carried. He is not, however, liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the ship seaworthy. The burden of proving the exercise of due diligence is on the carrier. The judge, after finding that the most probable cause of the admission of sea water on the homeward voyage was the defective condition of the two inspection covers, went on to say[55]: "This finding is sufficient to support the "plaintiffs' first allegation of unseaworthiness; but I am also "satisfied that unless the defendants are in law responsible for "the negligence of the fitter, as I have found it, they have "discharged the onus of proving the exercise of due diligence "so far as concerns the inspection covers." These words express in a succinct manner the sole question in issue. The appellants' contention is that the obligation to exercise due diligence, which is placed upon the shipowner by article III, rule (1), is a personal obligation which cannot be delegated. It was argued that the

[55] [1959] 1 Q.B. 86.

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responsibility would remain on the shipowner if, as in this case, there was a want of care on the part of an employee of an independent contractor appointed to do work on the ship which, in the ordinary way, would not and probably could not be performed by the shipowner. It is not disputed by the respondents that they would be responsible for unseaworthiness due to a lack of care on the part of their own employees, or by an agent employed by them for the purpose of seeing that the work of inspection and repair was done. If, for example, Atkinson had been negligent in the performance of his duties of supervision and unseaworthiness of the ship resulted, there can be no doubt that the respondents would have been liable. The appellants, however, go further, as indeed they must if they are to succeed in this appeal, and as I have said have contended with much force that the responsibility still remains in the respondents although the negligence was that of an employee of the independent contractor. If I am not constrained by authority to hold otherwise, I have little difficulty in coming to the conclusion that the respondents have discharged the burden which is upon them.

If the appellants' contention is sound, it means that a shipowner must warrant the seaworthiness of a ship except in the rare case of a latent defect which no reasonable examination could discover. It is to be remembered that, according to the relevant article, the duty on the carrier, before and at the beginning of the voyage, is to exercise due diligence to make the ship seaworthy. It is not his duty to ensure that due diligence has been exercised. It is his diligence which is in question, the responsibility for exercising which remains in him, although much of the work falls to be performed by his servants and agents. But it is straining the language of the article much too far to hold that when work of repair and inspection, which cannot be done by the shipowner, is given under contract to a firm of shipbuilders, admittedly of the highest repute, the shipowner can be said to be failing in his duty to exercise due diligence if, as in this case, unseaworthiness results by reason of the negligence of a fitter employed by the contractor, the effects of which are not discoverable by any reasonable inspection. By entering into a contract with a reputable firm of ship repairers for the doing of the necessary work under the supervision of a competent and experienced agent, the respondents acted in performance of their duty exercising due diligence. They did not, in my judgment, delegate such performance to the ship repairers. If the appellants are right in their contention, the results would be far-reaching. It might well be necessary, for instance, for the repairers to purchase one or more components to replace worn or damaged parts of the mechanism of the ship. If the appellants are right, the employers' obligation would, it seems, extend to liability due to faulty workmanship in these components, although they were of approved design and purchased from manufacturers of repute. They might even be held liable for defective workmanship in the

building or earlier repair of the ship, although such repair was done before the ship came into their ownership and was not discoverable by any reasonable inspection.

The appellants contended that there was a continuous stream of authority both in the English and the American courts to support their submission. These have already been examined carefully by Morris L.J., and I am in full agreement with the conclusions at which he has arrived with regard to them. I do not propose, therefore, to enter into a further examination of them, and content myself with the observation that in so far as any of these authorities are binding on this court, they do not support the appellants' contention that the shipowners are in breach of their obligation, even although the lack of diligence complained of is that of an employee of an independent contractor.

There is not, therefore, in my judgment, any sufficient authority to lead me to a conclusion other than the one I have already expressed. But there is authority which supports that conclusion. The learned judge in coming to his conclusion relied chiefly on *W. Angliss & Co. (Australia) Pty.* v. *P. & O. Steam Navigation Co.*,[56] which was one of the earliest decisions under the Act of 1924. It was a case where the plaintiff's goods were damaged by oil fuel or the fumes thereof from an oil fuel bunker owing to a defective deck bar. Wright J. found that the design of the bar and its fitting was inadequate, but that, having regard to the then state of knowledge and experience of the use of oil fuel, there was no failure of due diligence on the part of those concerned. But he held also that there was bad workmanship both in riveting and fitting the bar which was the fault of individual workmen employed by the builders, and could not have been detected by reasonable care on the part of those whose duty it was to inspect the work. Having found these facts, the judge went on to state the legal position and the history and development of the Act, and went on to say[57]: " . . . I think that the " new Acts have intended to emphasise the specialisation which " has developed in modern times and to emphasise the distinction " between carrier and shipbuilder and limit the carrier's obligation " to due diligence in his capacity as carrier. He is to be liable " for all such duties as appertain to a prudent and careful " carrier acting as such by the servants and agents in his " employment. If he has a new vessel built he will be liable if " he fails to engage builders of repute and to adopt all reasonable " precautions. He may be held bound to require, for instance, " the builders to satisfy one of the well-known classification " societies, such as Lloyd's, or to engage skilled naval architects " to advise him and skilled inspectors to supervise the work. In " the same way, if he buys a ship he may be required to show " that he has taken appropriate steps to satisfy himself by

[56] [1927] 2 K.B. 457.
[57] Ibid. 461.

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" appropriate surveys and inspections that the ship is fit for the " service in which he puts her. But I do not think in any case " that the carrier can be held guilty of want of due diligence " simply because the builders' employees have put in some bad " work which, though concealed, renders the vessel unfit.

" In the present case the defendants employed an inspector " to supervise the work. I have held that that inspector used due " diligence. It may well be that, if he had negligently passed bad " work which he saw, or even, perhaps, which he ought to have " seen, the carrier would be liable for want of due diligence on " the part of one to whom he had delegated the task of inspecting " the work, although such supervision, it may be, cannot be " other than general or go to every detail of the workmanship. " Similarly, the carrier might perhaps be held liable if the naval " architect whom he employed to supervise the design, applying " current standards, failed to detect a definite error in design, " although I do not think that he would be so liable for an error " on the part of one of the classification societies, such as " Lloyd's, which occupy a public and quasi-judicial position. He " might also be liable if, either personally, or by his scientific " advisers, he chose a special form of construction which involved, " according to current standards, a known risk—for example, if " he chose to dispense with a cofferdam so as to increase his " cargo space although the best opinion thought a cofferdam " necessary. Again, the need of repairing a ship may cast on the " carrier a special duty to see, as far as reasonably possible, by " special advisers for whom he is personally responsible, that the " repairs adequately make good the defects."

The decision has been followed frequently in other cases, and as McNair J. put it in his judgment[58]: " I have no doubt that " the innumerable disputes between shippers and cargo owners " have been settled on the basis of this judgment." I find it difficult to see any distinction between the case where the employee of the shipbuilder has been negligent, and the present case where the negligence is that of an employee of the repairers. If the decision in the *Angliss* case be right, then it is, in my view, ample authority to support the respondents' contention in this appeal.

The decision has recently been the subject of consideration by the House of Lords in *Davie* v. *New Merton Board Mills Ltd.*,[59] who decided that the respondent employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering. In the course of the argument the appellant relied considerably on some observations of Lord Wright in *Wilsons & Clyde Coal Co.* v. *English*.[60] Reference has already been made to the relevant passages in the speech of Lord Wright, and I do not propose to

[58] [1959] 1 Q.B. 86, 91.
[59] [1959] A.C. 604.
[60] [1938] A.C. 57.

repeat them except to draw attention to one passage [61]: "But in "truth the employer's obligation, as it has been defined by this "House, is personal to the employer, and one to be performed by "the employer per se or per alios. If I may take an analogy or "instance of a similar personal obligation, I note that the "Carriage of Goods by Sea Act, 1924, requires a shipowner to "exercise due diligence or to take reasonable care to provide a "seaworthy ship. The shipowner is almost certainly not an "expert naval architect, engineer, or stevedore. So far as I "know it has never been claimed that this obligation is fulfilled "by the shipowner taking reasonable care to appoint a competent "expert; the shipowner is absolutely held to the fulfilment of the "obligation. It is the obligation which is personal to him, and "not the performance."

Viscount Simonds in *Davie's* case was, I think, of the opinion that the decision of Wright J. in the *Angliss* case was right, but that Lord Wright, in making the observation to which I have referred in *Wilsons'* case, did so "with an imperfect recollection "of what he himself had decided in the earlier case." He then went on to say [62]: "And much as I distrust analogies, I would "add that there is a striking resemblance between the shipowner "who is held not to be liable for the bad workmanship, undis-"coverable by him, of the shipbuilder's employees, and the "employer who claims not to be liable for the bad workmanship, "equally undiscoverable, of the employees of the manufacturer "who supplied at second-hand the tools with which he has "provided his workman." Lord Morton did not refer either to the *Angliss* case or to *Wilsons'* case but he accepted the views expressed by Viscount Simonds in his review of the authorities. Lord Reid found himself able to reconcile the views of Wright J. in the *Angliss* case with those of Lord Wright in *Wilsons'* case. He said [63]: "Lord Wright had the nature of the vicarious "liability of a shipowner sufficiently in mind to enable him to "select this as an appropriate analogy to the vicarious liability of "an employer to his servant, and it seems to me impossible that "he could at the same time have forgotten his judgment in "*Angliss*, and equally impossible that he would have said no "more than he did in *Wilsons & Clyde* if he had come to think "that his judgment in *Angliss* was wrong. He certainly thought "that a master (or a shipowner) would in some cases be "vicariously liable for the negligence of a person who was not in "law his servant. But he thought that a shipowner would not "be vicariously liable for the shipbuilder's negligence: and by "parity of reasoning he must have taken the same view about a "master's liability in respect of plant which he had purchased. "I cannot avoid the conclusion that, if the facts of the present "case had been put before him in 1938, he would have decided "in favour of the present respondents."

[61] [1938] A.C. 57, 80.
[62] [1959] A.C. 604, 623.
[63] Ibid. 634.

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Lord Tucker expressed his agreement with the views of Viscount Simonds and Lord Reid, as did Lord Keith, who referred with approval [64] to the judgment of Wright J. in the *Angliss* case.

Analogies, of course, are dangerous, and it may be that too much reliance should not be placed on the decision in *Davie's* case in considering the present appeal. But there can be no doubt in reading the opinions of their Lordships in that appeal that they all expressly or by implication approved the decision in the *Angliss* case and were of the opinion that nothing that was said by Lord Wright in *Wilson's* case was intended to express any different view. I have already said that in my view the proper construction of the relevant articles is that there is no liability in this case on the shipowners. There is no contrary view expressed in the authorities as I read them, but there is, on the other hand, the judgment in the *Angliss* case and its recent approval by their Lordships in *Davie's* case.

I agree that the appeal should be dismissed.

WILLMER L.J. The facts of this case are simple and are not now in controversy. The question is whether, on the facts found by the learned judge and now accepted, the shipowners discharged the burden, which lay upon them, of proving that they had exercised due diligence to make their ship, the *Muncaster Castle* seaworthy. It is admitted that the vessel was in fact unseaworthy in that the inspection covers of the storm valves in No. 5 hold were so ineffectively screwed down that during the course of the relevant voyage sea water was enabled to enter the hold, whereby the plaintiffs' cargo was damaged.

[His Lordship stated the facts and continued:] On these facts the shipowners claimed that they had discharged their obligation to exercise due diligence to make the ship seaworthy, and on this, the only remaining issue in the case, the judge found in their favour. It is from this finding that the cargo-owners now appeal. The Australian Sea Carriage of Goods Act, 1924, like the corresponding Act in this country, provides that there shall not be implied in any contract for the carriage of goods by sea to which the Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship. Carriage of goods to which the Act applies is made subject to the provisions of the Hague Rules, which, as in the English Act, are set out in a schedule. It is common ground that the carriage of the plaintiffs' cargo in the present case was subject to the provisions of the Hague Rules. Of these the two most material provisions for the purposes of this case are those contained in article III, rule 1, and article IV, rule 1. These have already been read, and I do not pause to read them again.

The argument for the cargo-owners is that the shipowners'

[64] [1959] A.C. 604, 651.

obligation under article III, rule 1, to exercise due diligence to make the ship seaworthy is one which is personal to him, and one for which he cannot evade responsibility by delegating its performance to some other person, whether that other person be a servant, an agent or an independent contractor. The principle contended for cannot be expressed better than in the words of Lord Wright in *Wilsons and Clyde Coal Co.* v. *English*,[65] as follows: "The Carriage of Goods by Sea Act, 1924, requires a "shipowner to exercise due diligence or to take reasonable care "to provide a seaworthy ship. The shipowner is almost certainly "not an expert naval architect, engineer, or stevedore. So far as "I know, it has never been claimed that this obligation is fulfilled "by the shipowner taking reasonable care to appoint a competent "expert; the shipowner is absolutely held to the fulfilment of the "obligation. It is the obligation which is personal to him, and "not the performance." Here, it is argued, the shipowners delegated to the ship repairers, Messrs. Alexander Stephen, the performance of their obligation to exercise due diligence to make their ship seaworthy, and having so delegated must accept their delegates' performance as their own. Accordingly, since owing to the negligence of the fitter the obligation was not performed, the shipowners cannot be heard to say that they discharged their personal obligation to exercise due diligence to make the ship seaworthy.

In rejecting this contention the judge was clearly of the view that the facts of the present case were covered in principle by the decision of Wright J. in *Angliss* v. *P. & O. Steam Navigation Co.*[66] That decision has never been overruled, and has more than once been followed; and McNair J. took the view that it has, since 1927, been accepted by the profession as stating the legal position authoritatively and accurately, forming the basis for the settlement of innumerable disputes between shipowners and cargo-owners during the last thirty years. In that case the ship in question had been specially built for the shipowners by competent shipbuilders, and the actual question in issue was as to the liability of the shipowners for damage caused or contributed to by bad workmanship on the part of some of the builders' workmen. In the course of his judgment, however, Wright J. took the opportunity to review the scheme of the, then new, Hague Rules, with particular reference to the shipowners' obligation to exercise due diligence to make the ship seaworthy. Counsel on both sides, in the present case, have found in what Wright J. said a good deal of material to support their respective arguments. The fact is that the present case raises a question not specifically answered in the *Angliss* case. The precise question in issue in the present case has never hitherto been the subject of express decision.

It is, however, argued on behalf of the cargo-owners that the

[65] [1938] A.C. 57, 80, 81.

[66] [1927] 2 K.B. 456.

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principle for which they contend is supported by a long and consistent line of authorities, commencing with decisions, both English and American, under the American Harter Act, and including a number of dicta by judges of the highest eminence with regard to the effect of the Hague Rules. In examining decisions under the Harter Act it is well to remember (1) that under that Act the old absolute warranty of seaworthiness remained unaffected, and (2) that reliance on any of the exempting provisions was made conditional upon the shipowner proving the exercise of due diligence to make the ship seaworthy. Subject to that, however, it remains true to say that the words calling for interpretation here, namely, "due diligence to make the ship "seaworthy," are common to both the Harter Act and the Hague Rules. In *Dobell & Co.* v. *S.S. Rossmore Co. Ltd.*[67]—a case in which the unseaworthiness complained of was in fact due to an act of negligence on the part of the ship's carpenter—Lord Esher M.R. stated the shipowner's duty under the Harter Act in terms which appear wide enough to support the principle now contended for. He said[68]: "The words of the third section, "which limit the owner's liability if he shall exercise due dili- "gence to make the ship in all respects seaworthy, must mean "that this is to be done by the owner by himself or the agents "whom he employs to see to the seaworthiness of the ship." The other two members of the court expressed a substantially similar view.

We were referred to a number of American decisions of the same period, to show that the approach to the problem of construing the Harter Act was the same on both sides of the Atlantic. Thus, in *The Irrawaddy*[69] it was said that the purpose of the Act was to relieve the shipowner from liability for latent defects not discoverable by diligence on the part of anyone. In *The Mary L. Peters*[70] it was said that what was required under the Act was due diligence on the part of the owner or of those who represented him in the inspection and repair of the ship before sailing. In *The Colima*[71] it was held that the Act required due diligence not only by the owner but also by such agents as he might employ, i.e., due diligence in the work itself. A similar view was expressed in *Norddeutsche Lloyd* v. *President Insurance Co. of America.*[72]

Reliance was also placed upon the views expressed by the editors of the 12th and 13th editions of Scrutton on Charterparties and Bills of Lading, which were the first two editions to be published after the passing of the Carriage of Goods by Sea Act, 1924, as showing the initial impact of the relevant provisions of the Hague Rules upon the legal opinion in this country. At pp. 106–107 of the 12th edition it is said: "Neither of these

[67] [1895] 2 Q.B. 408.
[68] Ibid. 413.
[69] (1897) 171 U.S. 187; 64 Davies 192.
[70] 68 Fed. 919.
[71] 82 Fed. 665.
[72] 110 Fed. 420.

"Clauses" (i.e., article III, rule 1, and article IV, rule 1) "nor the provision in the Act" (whereby the absolute undertaking of seaworthiness was abolished) "will generally be of "much practical value in face of the dilemma that must con- "stantly arise on the facts. In most cases if the vessel is "unseaworthy due diligence cannot have been used by the owner, "his servants or agents; if due diligence has been used the vessel "in fact will be seaworthy. The circumstances in which the "dilemma does not arise (e.g., a defect causing unseaworthiness "but of so latent a nature that due diligence could not have "discovered it) are not likely to occur often." Again at p. 499 of the 12th edition, note (*z*) is in the following terms: "In "appearance the undertaking to use due diligence to make the "ship seaworthy is less onerous than the old common law under- "taking that the ship is in fact seaworthy. In reality there is no "great gain to the shipowner by the substitution. For the "dilemma indicated on p. 106 must constantly arise, and the "relief to the shipowner by the substitution will occur only in "cases where the unseaworthiness is due to some cause which "the due diligence of all his servants and agents could not dis- "cover, e.g., in the case of 'latent defects not discoverable by "'due diligence.'"

The first case to arise for decision in this country, in which the construction of the relevant rules was considered, was that of *Angliss & Co. Pty.* v. *P. & O. Steam Navigation Co.*,[73] already referred to. The actual decision in that case was that the owners of a new ship specially built for them were not guilty of want of due diligence where the unseaworthiness complained of was caused or contributed to by certain bad workmanship in the construction of the ship on the part of some of the shipbuilders' workmen. What is relied on, however, is Wright J.'s approach to the problem which he had to consider. He said[74]: "The obligation of the carrier to exercise due diligence to make "the ship fit is clearly not limited to his personal diligence. The "carrier may be a company and, in any case in the complication "of modern affairs and by reason of the widely scattered situation "of seaports, he must act by agents or servants which is the "phrase employed in article IV, rule 2 (*q*). The question is: "How wide is the category of agents or servants with reference "to the obligation now being considered."

Since that date there have been several dicta to the same effect by Lord Wright, notably in *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*,[75] *Northumbrian Shipping Co.* v. *Timm & Son Ltd.*,[76] and *Smith Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*,[77] in addition to the dictum, already quoted, in *Wilsons and Clyde Coal Co.* v.

[73] [1927] 2 K.B. 456.
[74] Ibid. 460.
[75] [1934] A.C. 547.
[76] [1939] A.C. 403.
[77] [1940] A.C. 1001.

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English.[78] These dicta have already been referred to, and I do not therefore pause to quote them again.

We were next referred to a dictum of Lord Roche in delivering the judgment of the Privy Council in *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.*,[79] a case under the Canadian Water Carriage of Goods Act, 1910, where the relevant negligence was that of a compass adjuster. The Canadian court had found that, having regard to the negligence of the compass adjuster, the shipowners were unable to establish that they had exercised due diligence to make the ship seaworthy, and there was no appeal on this issue, the appeal to the Privy Council being concerned only with a claim by the shipowners to limit their liability. What was said in the Privy Council was therefore clearly obiter, but coming from so authoritative a source it must necessarily be treated with a considerable measure of respect. Lord Roche is reported as saying[80]: "The condition is not fulfilled merely "because the shipowner is personally diligent. The condition "requires that diligence shall in fact have been exercised by the "shipowner or by those whom he employs for the purpose—see "*Dobell* v. *S.S. Rossmore Co.*[81] Therefore . . . want of dili- "gence in the compass adjuster who adjusted the compasses or "in the captain who said he checked or verified the adjuster's "work would be material, and a finding adverse to the ship- "owner could be arrived at upon the ground of want of diligence "in those persons." The importance of this dictum, which was cited with approval by the Privy Council in the very recent case of *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*,[82] lies in the fact that a compass adjuster would not ordinarily be a servant in the regular employment of the shipowner, but could fairly be regarded as belonging to the category of independent contractor.

Reference was also made to some words used by McNair J. himself in *International Packers Ltd.* v. *Ocean Steamship Co. Ltd.*,[83] where he is reported as saying, with reference to the shipowner's obligation to exercise due diligence to make the ship seaworthy, that he "cannot escape on proof that he had "employed a competent independent contractor who was in fact "negligent." The judge himself referred to this dictum[84] of his judgment in the present case, and said that the words imputed to him were either a slip or a mistake in reporting. Counsel for the cargo-owners contended, however, that the statement by McNair J., as reported, falls exactly into line with the previous current of authority, and sought to rely on it as supporting his argument.

Finally, reliance was placed on a decision of Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.*[85] In that case the claim

[78] [1938] A.C. 80.
[79] 58 Ll.L.Rep. 33.
[80] Ibid. 40.
[81] [1895] 2 Q.B. 408.
[82] [1959] A.C. 589, 602.
[83] [1955] 2 Lloyd's Rep. 218, 286.
[84] [1959] 1 Q.B. 86, 93.
[85] [1952] 2 Lloyd's Rep. 105.

was for loss of life resulting from the total loss of the defendant shipowners' vessel, and the construction of the Hague Rules was not immediately in issue. It was, however, necessary to consider the cognate question whether the shipowners had exercised proper care to see that their ship was seaworthy, and in relation to that question Devlin J. said [86]: "It is a universal principle (and not "special doctrine imported into this type of case) that if a "man owes a duty to another person to act carefully, he cannot "rid himself of liability by appointing somebody else, however "competent, to do it for him. A person so appointed becomes "his agent pro hac vice in the discharge of the duty; and the "principle respondeat superior applies to him just as much as it "applies to a whole time servant of the employer."

In the light of these decisions and dicta it was argued that there has been a consistent stream of authority over the years in support of the principle contended for, namely, that a shipowner cannot evade his responsibility for the exercise of due diligence to make the ship seaworthy by delegating the performance of his obligation to someone else, whether to a servant, to an agent, or to an independent contractor such as a ship repairer. Accordingly, the decision of the learned judge in the present case, whereby the shipowners were held free from liability for the bad workmanship of the repairers' fitter, amounts, so it was contended, to a novel and wholly unjustifiable departure from a well-worn principle, such as this court should be slow to approve, especially having regard to the observations made by Lord Dunedin and Lord Atkin in *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[87] Oddly enough, the observations of their Lordships in that case were strenuously pressed upon us by both sides. For the shipowners on their side have contended that the decision of Wright J. in *Angliss'* case, properly understood, is a decision wholly in their favour, and one that should not now be disturbed after it has stood unchallenged for over thirty years.

I hope that I have adequately summarised the argument so forcibly presented to us on behalf of the cargo-owners. I certainly appreciate its force, and it is only after careful consideration that I have come to the conclusion that it is not well founded. But I am persuaded that in coming to the conclusion which he did McNair J. was guilty of no error of principle, and that on the particular facts of this case he came to a correct decision in absolving the shipowners from liability for the bad workmanship of the repairers' fitter.

I base my conclusion both on principle and on authority. In the first place, as a matter of construction, and unhampered by authority, I find it impossible to extract the principle contended for by the cargo-owners from the words of the Act, and of the rules scheduled thereto, without doing violence to the language used. It is not to be forgotten that by the Australian Act, as by

[86] [1952] 2 Lloyd's Rep. 105, 129. [87] [1931] A.C. 726, 733, 749; 47 T.L.R. 542.

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our own act, the old absolute undertaking of seaworthiness has been abolished. Yet, as pointed out by McNair J., acceptance of the construction sought by the cargo-owners to be put on article III, rule 1, would be in effect to substitute for the new qualified obligation something barely distinguishable from the old absolute undertaking, except in the necessarily rare cases of true latent defect. The obligation now imposed is to exercise due diligence, not to see that due diligence has been exercised—still less is there any warranty that due diligence has been exercised. An obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care—a concept not unfamiliar in English law, and one to be sharply distinguished from the obligation, to which certain relationships give rise, to see that care is taken. Moreover, as appears from the wording of article IV, rule 1, it is due diligence "on the part of the carrier" that is in question under the Hague Rules. These words are no doubt wide enough to render the carrier liable for lack of due diligence on the part of his own servants, whatever the task on which they may be engaged. Again, where an independent contractor is engaged by a carrier to perform on his behalf any part of the ordinary business of carrying goods, e.g., a firm of stevedores employed to load cargo, I can well understand that failure on the part of such contractor to exercise due diligence could be held to be a failure on the part of the carrier. Similarly, where a shipowner appoints some independent person to act for him, i.e., to be his representative, such as a firm of ship's agents, or a surveyor or engineer appointed to supervise the building or repair of a ship, he may become liable for any want of due diligence on the part of such person, as being equivalent to his own want of due diligence. Such persons could properly be regarded in law as his servants pro hac vice, though not persons in his regular employment. But that is far removed from saying that every time a shipowner engages some outside person or independent contractor to perform some work on a ship which goes outside the carrier's own business of carrying goods, he renders himself liable for any lack of due diligence on the part of such person or contractor. Where the matter in question is one of building, or rebuilding, or repairing a ship, or of the supply of equipment or spare parts, I can see no reason in principle why the court cannot properly be invited to conclude, as a jury question, that the carrier has exercised due diligence, upon proof (a) that he has engaged a reputable contractor or supplier, (b) that he has provided for the work to be properly superintended by his own representative, and (c) that such representative has in fact exercised due diligence. To hold the contrary would, as it seems to me, lead to absurd results which cannot have been in the contemplation of those who framed the rules. The carrier, even though he may only be a purchaser at second hand, would have to be held liable for any defective workmanship in the original building of the ship, or in any repairs carried out at any time in

the ship's history, and equally for any defective equipment or spare parts supplied at any time in the ship's history, notwithstanding that the defects might be latent to everybody but the original builder, repairer or supplier, and notwithstanding that such person might be far removed from the carrier by a chain of contractors and sub-contractors. It would, in my judgment, be absurd to construe the rules in such way as to render it thus virtually impossible for a shipowner ever to discharge his obligation.

In my judgment the fallacy in the argument on behalf of the cargo-owners lies in the use of the word "delegation" to cover every occasion when the shipowner engages some other person to do some work upon his ship. I see a distinction between employing someone else to carry on one's own business and engaging someone else to perform something which is his business. Any master delegates to his own servants the work of carrying on his own business. Equally I think he may be said to delegate when he employs some outside person to act as his representative. In applying articles III, rule 1, and IV, rule 1, of the Hague Rules the difficult question which has to be determined is whether, on the facts of the particular case, the person who has failed to exercise due diligence is one who can fairly be said to be the carrier's representative. The superintendent or surveyor whom the carrier employs to supervise the repair of a ship may fairly be said to be the carrier's own representative, to whom he has delegated the performance of his own obligation to exercise due diligence to make the ship seaworthy. But I find it difficult to see how in principle a carrier can be said to be delegating to the firm of repairers whom he employs his own obligation to exercise due diligence. In so far as he can be said to delegate to the repairers at all, he delegates performance of the actual job of doing the repairs and making the ship seaworthy.

If the matter were res integra, therefore, and uncomplicated by authority, I should find it impossible to accede to the argument on behalf of the cargo-owners, or to hold, as a matter of construction of the rules, that whenever some contractor's workman puts in bad workmanship in carrying out work on the ship, that is necessarily conclusive to show a want of due diligence on the part of the shipowner. Do the authorities compel me to hold otherwise? In my judgment they do not; on the contrary, they appear to me to lead to the same result.

Any examination of the authorities must, as it seems to me, begin with *Angliss'* case,[88] which properly understood is in my view wholly in favour of the shipowners' case. I have already stated what was the actual decision in that case. If that decision be right, I am unable to see any distinction in principle between bad workmanship on the part of the original builders' men and bad workmanship on the part of repairers' men at a later period in the ship's history.

[88] [1927] 2 K.B. 456.

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As I read the report of *Angliss'* case, the same argument as has been adduced before us was put forward before Wright J. and decided by him adversely to the cargo-owners. Immediately following the passage in his judgment which I have already quoted, Wright J. went on as follows [89]: "It is contended by the "plaintiffs that, as the primary obligation on the carrier is to "provide a seaworthy ship, the carrier cannot delegate any part "of that obligation so as to relieve him of his personal liability, "and he must accordingly be accountable for lack of due "diligence on the part of the shipbuilders and their workmen, "who are to be deemed to be his agents, to make the ship sea-"worthy and fit, and that, therefore, the defendants must be "held liable for the bad workmanship of which I have found the "shipbuilders' men guilty and which I have not excluded as a "contributing cause of the actual damage. I do not think that "this contention is sound." The contention which Wright J. is there declaring to be unsound is the contention that the carrier cannot delegate any part of his obligation so as to relieve him of his personal liability.

I think it is clear that had the question of faulty workmanship on the part of repairers' men been before Wright J. in *Angliss'* case, his conclusion would have been the same as it was in relation to faulty workmanship on the part of the builders' men. I can see no other possible interpretation of the sentence already quoted by my Lord where the judge says [90]: "Again the need of "repairing a ship may cast on the carrier a special duty to see, "as far as reasonably possible, by special advisers for whom he "is personally responsible, that the repairs adequately make good "the defects." On the cargo-owners' argument there could be no point in referring to the carrier's duty to appoint "special "advisers" or to his personal liability for any errors on their part. For such a "special adviser," whether negligent or diligent, would be quite irrelevant if the carrier is in any event to be held liable for bad workmanship on the part of the repairers' men. According to Wright J., the carrier may be in breach of his obligation if he does not appoint a "special adviser." Yet, on the cargo-owners' argument, even if he does, and even if such "special adviser" is in every way diligent, the carrier has still not fulfilled his obligation where there is in fact bad workmanship. Clearly Wright J.'s view was that the carrier would be liable (a) if he failed to appoint a special adviser to supervise the repairs, or (b) if such special adviser failed to exercise due diligence, but would not be liable if such special adviser, exercising due diligence, failed to detect, e.g., bad workmanship on the part of the repairers' men. This, I think, is in accordance with his statement [91] that the carrier "is "to be liable for all such duties as appertain to a prudent and

[89] [1927] 2 K.B. 456, 460.
[90] Ibid. 462.
[91] Ibid. 461.

" careful carrier acting as such by the servants and agents in his " employment."

The decision in *Angliss'* case has never been overruled, nor, so far as I am aware, has it been the subject of any adverse comment. It was followed and applied by Bucknill J. in *The Australia Star*,[92] where the facts were somewhat similar. It was referred to with obvious approval by Singleton J. in *Smith & Sons* v. *P. & O.*,[93] though in the event nothing turned on it, since on the facts the repairers in that case were found to be free from fault. It was again referred to and treated as authoritative by Devlin J. in *Waddle* v. *Wallsend Shipping Co. Ltd.*,[94] though once again the actual decision of that case turned on another point. In the American case of the *Waterville Victory*,[95] where the facts appear from the report to have been substantially the same as those in *Angliss'* case, the same result was reached, and the shipowner was held not to have failed in his duty to exercise due diligence notwithstanding defective workmanship on the part of the builders' men.

But what is perhaps most important is that the decision of Wright J. in *Angliss'* case was carefully considered by the House of Lords in the recent case of *Davie* v. *New Merton Board Mills Ltd.*,[96] where it was treated with obvious approval. In that case the question was whether an employer was liable for injury caused to one of his workmen by the defective condition of a tool supplied for the use of the latter. The tool had been purchased by the employer from a reputable supplier, who had in turn obtained it from a reputable manufacturer. The defect in the tool was such that it could not have been detected by anyone but the original manufacturer. In these circumstances the House of Lords unanimously decided that the employer was not liable for the injury sustained by the workman. The argument on behalf of the workman was based largely on the speech of Lord Wright in *Wilsons and Clyde Coal Co.* v. *English*,[97] and reliance was placed particularly on the dictum therein which I have already quoted, and in which Lord Wright sought an analogy in the liability of a carrier under the Carriage of Goods by Sea Act, 1924. In dealing with this argument in *Davie's* case Viscount Simonds said,[98] ". . . the analogy is an unfortunate one, for in the earlier case of " *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Naviga-* " *tion Co.* the same learned judge had to construe the same section, " and I venture to quote a substantial passage of his judgment " because it is very apposite to the present case." Viscount Simonds then proceeded to set out the passage in Wright J.'s judgment in *Angliss'* case[99] which I have already quoted, and continued: " My Lords, I think, with great respect, that when in " *Wilsons'* case the learned judge referred to the analogy of the

[92] (1940) 67 Ll.L.Rep. 110, 116.
[93] (1938) 60 Ll.L.Rep. 423.
[94] [1952] 2 Lloyd's Rep. 105.
[95] (1957) Amer.Marine Cas. 320.
[96] [1959] A.C. 604.
[97] [1938] A.C. 57.
[98] [1959] A.C. 623.
[99] [1927] 2 K.B. 460.

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" Carriage of Goods by Sea Act, 1924, he did so with an imperfect " recollection of what he had himself decided in the earlier case." Clearly Viscount Simonds thought that the decision in *Angliss'* case was right, and that in so far as the dictum in *Wilsons'* case differed from what Lord Wright had said in the earlier case it went too far. Lord Morton of Henryton did not specifically refer to *Angliss'* case, but he expressed his agreement with Viscount Simonds' examination of the cases cited in argument. Lord Reid thought that what Lord Wright said in *Wilsons'* case could be reconciled with his previous decision in *Angliss'* case, but on the footing that what was said in *Wilsons'* case related only to cases where performance of the shipowners' obligation was delegated to a skilled servant. In *Davie's* case Lord Reid said [100]: " In " choosing this analogy [the Carriage of Goods by Sea Act, 1924] " I think that [Lord Wright] must have had in mind his own " carefully reasoned judgment in *W. Angliss & Co. (Australia)* " *Pty. Ltd.* v. *P. & O. Steam Navigation Co.* and, reading the " words ' personal obligation ' and ' absolutely ' in the peculiar " sense which he gives to them in his speech in *Wilsons and* " *Clyde*, I see no contradiction between this passage and that " judgment." Later, Lord Reid said [101]: " Lord Wright had the " nature of the vicarious liability of a shipowner sufficiently in " mind to enable him to select this as an appropriate analogy to " the vicarious liability of an employer to his servant, and it " seems to me impossible that he could at the same time have " forgotten his judgment in *Angliss*, and equally impossible that " he would have said no more than he did in *Wilsons and Clyde* " if he had come to think that his judgment in *Angliss* was " wrong." Lord Tucker was content to express his agreement with Viscount Simonds and Lord Reid in their analyses of what was said in *Wilsons and Clyde* and their conclusions thereon. Lord Keith, who also agreed, referred specifically to *Angliss'* case and quoted a long passage from the judgment of Wright J. in support of his own conclusion.

In these circumstances I think it must now be taken that the decision in *Angliss'* case has the approval of the House of Lords, and therefore should be followed by this court. If so, for reasons already given, I can see no ground in principle for distinguishing it from the present case. It is difficult to see why it is not decisive in favour of the shipowners here. The authorities cited in support of the argument for the cargo-owners, on the other hand, appear to me to be far from decisive. Many of the cases referred to turn out on examination to be cases where the lack of due diligence was that of one of the shipowners' own servants, and the dicta relied upon were clearly obiter. They cannot weigh in the balance against the actual decision in *Angliss'* case, which, as already stated, appears to me to be indistinguishable in principle from the present case.

[100] [1959] A.C. 632. [101] Ibid. 634.

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But that is not the end of the matter, for in the course of the argument before us a large number of cases were cited in which consideration was given to the responsibility of a person, upon whom the law imposed a duty to exercise reasonable care, for damage resulting from the negligence of an independent contractor employed by him. I do not find it necessary to burden this judgment by any prolonged examination of these authorities. They were referred to by way of analogy only, but so far as they go they weigh heavily in favour of the argument for the shipowners. So long as we remember that we are proceeding only by way of analogy I think it is useful to examine briefly the principles on which the court has acted in cases where it has been sought to fix liability upon a person under a duty to exercise reasonable care for the faults of an independent contractor. As already stated, I can see no distinction in principle between an obligation to exercise due diligence, such as article III, rule 1, of the Hague Rules imposes on a carrier, and an obligation to exercise reasonable care, such as the law imposes, for instance, upon a bailee in favour of the bailor, upon a master in favour of his servant, or upon an invitor in favour of an invitee. Cases arising out of all these relationships were cited to us, and basing himself upon these cases, counsel for the shipowners formulated his proposition as follows. Where the law imposes an obligation to exercise reasonable care, as opposed to an obligation to see that care is taken, it is always a question of fact whether such reasonable care has been exercised. In considering this question the court will pay regard to whether what has to be done is something which normally forms part of the obligor's own ordinary trade or business. If it does, then, if what has to be done is negligently done, the obligor is liable, whether he has done it himself or by his servants or by engaging an independent contractor to do it for him. If, however, what has to be done is no part of the obligor's ordinary trade or business, but is something calling for the exercise of specialised knowledge or experience, then the obligor discharges his duty by engaging a properly skilled person to do it for him, and is not liable if that person does it negligently, assuming of course that such negligence is not apparent to the obligor himself.

It seems to me that this proposition is well justified by the authorities which were cited to us. Thus, in *Searle* v. *Laverick*,[102] the bailee of a carriage, who owed a duty to exercise reasonable care to see that the building in which the carriage was housed was safe, was held not liable for damage resulting from the collapse of the building due to the negligence of a competent independent contractor whom he had engaged to erect it for him. Similarly in *Haseldine* v. *Daw*,[103] the occupiers of a building were held not liable to an invitee for personal injuries sustained in consequence of the defective condition of a lift, which

[102] (1874) L.R. 9 Q.B. 122. [103] [1941] 2 K.B. 343.

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they had engaged a competent independent contractor to keep in repair for them. This case may usefully be contrasted with *Woodward* v. *Mayor of Hastings*,[104] where the negligence of the independent contractor occurred in the course of doing something which did not call for the exercise of any special skill, and the decision went the other way. Again, in *Phillips* v. *Britannia Hygienic Laundry* [105]—a case which went to the Court of Appeal on another point—and in *Stennett* v. *Hancock*,[106] the owner of a vehicle was held not liable to another road user for damage occasioned by a defect in the vehicle, the repair of which he had entrusted to an independent contractor.

The principle for which counsel for the shipowners contended was neatly and, I think, correctly summed up by Salmon J. in the recent case of *Green* v. *Fibreglass Ltd.*[107] where most of the relevant authorities are collected. It also formed the basis for Lord Reid's decision in *Davie's* case, as appears from the final paragraph of his speech.[108] *Davie's* case itself is of considerable importance, not only for its approval of the decision in *Angliss'* case, but also as showing that, in regard to the master and servant relationship, there is a limit beyond which the law will not go in imposing liability on an employer for the negligence of a so-called independent contractor. It is to my mind clear from the reasoning underlying the speeches of the various members of the House that, if *Davie's* case had fallen to be determined in accordance with the duty imposed upon the carrier under the Hague Rules, instead of that imposed by the law of master and servant, the result would have been the same.

It seems to me that the principle underlying the decision of these cases from other branches of the law must be a guide in approaching the question—essentially a question of fact—whether in a given case a carrier under the Hague Rules has discharged the burden, which lies upon him, of proving that he has exercised due diligence to make the ship seaworthy. Clearly the carrier must act through servants and agents and for any failure on their part to exercise due diligence he must accept responsibility. Due diligence may require him to appoint some outside person, that is, an expert adviser or a surveyor, to act as his representative and advise him in connection with some technical matter. Here again I apprehend that this would be a true case of delegation of his own obligation to exercise due diligence, and he would remain responsible for any lack of due diligence on the part of such person. There may well be cases in which the employment of an independent contractor can be regarded as a delegation of the carrier's duty to exercise reasonable care, e.g., where the task to be performed is something falling within the carrier's own ordinary business as a carrier. As already suggested, the employment of a firm of stevedores to perform the work of loading

[104] [1945] K.B. 174.
[105] [1923] 1 K.B. 539.
[106] [1939] 2 All E.R. 578.
[107] [1958] 2 Q.B. 245, 250; [1958] 3 W.L.R. 71; [1958] 2 All E.R. 521.
[108] [1959] A.C. 645.

or discharging the ship is an instance which comes to mind. But I do not think it follows that every time an independent contractor is employed the carrier must be regarded as delegating to such contractor his own duty to exercise due diligence to make the ship seaworthy. Where the work to be done is of a specialised nature, outside the course of the carrier's ordinary business, it seems to me quite unreal to say that the carrier is delegating his duty to exercise due diligence; on the contrary, the very fact of employing a skilled and competent contractor may amount of itself to a performance of the duty. The question must be one of fact, depending on the nature of the work to be performed.

In the present case it could be said that the work of replacing the inspection covers after examination of the storm valves was a task well within the competence of one of the engineer members of the ship's crew, and as such something within the ordinary course of the carrier's business, rather than a matter calling for the exercise of any specialised technical skill. It is fair to say that the appeal was not argued on this ground, and upon consideration I do not think it would be a valid argument on the facts of this case. The work of replacing the inspection covers was merely incidental to the work of opening up the storm valves for inspection, which, being part of the survey through which the ship was being passed, was a task properly entrusted to the competent contractors whom the shipowners engaged. In the same way the task of replacing the wheel of a car is one that is doubtless within the competence of the ordinary car owner. Yet no one, I venture to think, would suggest that it was a task not properly to be left to a competent garage to whom the owner may have entrusted the car for the purposes of a repair necessitating the removal of a wheel. In my judgment this case must be approached on the basis that the replacement of the inspection covers of the storm valves was part of the specialised and technical work which Messrs. Alexander Stephen were properly engaged to do.

The employment of competent contractors to carry out the work that has to be done is in my judgment merely one step in the exercise of due diligence. All the circumstances in relation to the particular repair must be looked at. It seems to me that the right approach to the problem is that made by Hilbery J. in *Cranfield Bros. Ltd.* v. *Tatem Steam Navigation Co. Ltd.*,[109] a case arising under the Canadian Water Carriage of Goods Act, 1936, where the damage was caused by a defective rivet which had escaped detection. Hilbery J. said: "The shipowner does "not discharge his duty of exercising due diligence to have his "ship seaworthy merely by establishing to the court that she "passed her classification survey, or merely by showing to the "court that he has appointed someone who by qualification should "be a skilled person to examine it; but both those things are

[109] (1939) 64 Ll.L.Rep. 264, 267.

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"elements to be considered, in my view, in considering whether "the shipowner has exercised due diligence to make the ship "seaworthy. . . . Again, of course, it is an element to be "considered whether there has been a sufficiently frequent dry-"docking of the vessel for examination and report. That is "another element to be considered; and it is an element to be "considered to see into whose hands the owners have put the "vessel for their periodical examinations and reparations—to see "whether they are properly skilled people for the work."

In the present case the shipowners, in my judgment, exercised due diligence in arranging for the classification and loadline surveys to be carried out. Having regard to the technical nature of the work to be done I think they also exercised due diligence by entrusting the vessel to a competent firm of repairers. On the facts of this case I regard this as an act in furtherance of their obligation, not as a delegation of their obligation, to exercise due diligence. Furthermore, they arranged for their own managers' superintendent, Mr. Atkinson, to supervise the work and see that the requirements of the classification surveyors were carried out. This again I regard as an act in furtherance of their obligation to exercise due diligence. Had they not appointed some competent person to superintend the work, they would, I think, have been guilty of a want of due diligence. But in the case of Atkinson I have no doubt that they did, properly and wisely, delegate to him the duty of acting for them throughout, which would involve the continuing exercise by him of due diligence on their behalf. Had Mr. Atkinson shown a want of due diligence—had he, for instance, failed to detect bad workmanship which ought to have been detected—the shipowners would have been liable for his want of due diligence as for their own, and in such case it would have been no answer to say that the contractor employed to carry out the repairs was a competent one. Nor would it help the shipowners, I think, to say that the classification surveyor also failed to detect the bad workmanship. But here, on the facts found by the learned judge, there was no fault on the part of Mr. Atkinson. The fault was entirely that of the fitter employed by the repairers, and it was a fault which, as found by the learned judge, could not reasonably have been detected by following the ordinary and prudent practice. In these circumstances, on the facts of this case, it appears to me that it would be contrary to common sense, and would be doing violence to the plain meaning of the words of article III, rule 1, of the Hague Rules, as well as flying in the face of authority, to say that these shipowners were guilty of a want of due diligence to make their ship seaworthy.

For these reasons I am of the opinion that the learned judge came to a correct conclusion, and I would dismiss the appeal.

I should, however, like to add one word of caution. It is a commonplace that there is nothing static about what does, and what does not, amount to negligence. Reasonable care—and

equally, due diligence—requires that men must learn from their mistakes. It may be that in future, in the light of experience gained in this case, it will not be regarded as good practice to leave a repairers' fitter unsupervised when he is performing tasks such as that of replacing these inspection covers. It does not follow necessarily from our decision in this case that, if a similar casualty happens in the future, arising from a similar cause, the shipowners concerned, having regard to the experience now gained, will be able to show that they have exercised due diligence without proof of something more than has been proved in this case.

Appeal dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Clyde & Co.; Botterell & Roche.*

A. W. G.

[PRIVY COUNCIL.]

KIRIRI COTTON CO. LTD. . . . . APPELLANTS;
AND
RANCHHODDAS KESHAVJI DEWANI . . RESPONDENT.

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Dec. 14.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Restitution—Illegal payment—Landlord and tenant—Payment by tenant of premium for lease—Whether recoverable—Whether parties in pari delicto—Rent Restriction Ordinance, No. 10 *of* 1949 (*Laws of Uganda*, 1961, *c.* 115), *s.* 3 (2).

Restitution—Mistake of law, money paid under—Illegal payment—Principles applicable.

Contract—Illegality—Contract prohibited by statute—Payment of premimum for lease—Whether recoverable.

The appellant company, in consideration of granting to the respondent a sublease of a flat in Kampala, Uganda, "for "residence only" for a term of seven years and one day, asked for and received from him a premium of Shs. 10,000, contrary to the provisions of section 3 (2) of the Uganda Rent Restriction Ordinance, 1949. Neither party thought that they were doing anything illegal. The Ordinance made no provision for the recovery of illegal premiums, and the respondent, having gone into occupation of the flat under the sublease, thereafter claimed the return of the Shs. 10,000 as money received by the appellant company for the use of the respondent:—

Held, that the duty of observing the law was firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant, and the appellant company and the respondent were

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

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not therefore in pari delicto in receiving and paying respectively the illegal premium, which, therefore, in accordance with established common law principles, the respondent was entitled to recover from the landlord. The omission of a statutory remedy did not, in cases of this kind, exclude the remedy by money had and received.

The dictum of Lord Ellenborough in *Langton* v. *Hughes* (1813) 1 M. & S. 593 at 596, that "what is done in contravention of an "Act of Parliament, cannot be made the subject-matter of an "action," must be confined to cases where a party is seeking the aid of the court in order positively to enforce an illegal contract, and had no application to a case such as the present where it was sought to recover money paid under an illegal transaction.

Dicta of Lord Mansfield in *Lowry* v. *Bourdieu* (1870) 2 Doug. K.B. 468 at 472, and in *Browning* v. *Morris* (1778) 2 Cowp. 790 at 792 applied.

Smith v. *Bromley* (1760) 2 Doug.K.B. 696; *Moses* v. *Macferlan* (1706) 2 Burr. 1005; and *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 62–64; 58 T.L.R. 308; [1942] 2 All E.R. 122 considered.

Rex v. *Godinho* (1950) 17 E.A.C.A. 132 at 134 disapproved.

It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat.

Order of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 32 of 1958) from a judgment and order of the Court of Appeal for Eastern Africa (April 18, 1958) affirming a judgment and decree of the High Court of Uganda (September 24, 1957) whereby it was ordered that judgment be entered for the present respondent for Shs. 10,000 in an action brought by him against the appellant company for the return of an illegal premium.

The following facts are taken from the judgment of the Judicial Committee: The plaintiff (respondent) Ranchhoddas Keshavji Dewani was an Indian merchant living at Kampala in Uganda. The defendants (appellants) were the Kiriri Cotton Co. Ltd., which owned a block of flats in Salisbury Road, Kampala. The plaintiff claimed the sum of 10,000 shillings as money received by the defendant company for the use of the plaintiff. The High Court of Uganda (Lyon J.) gave judgment for the plaintiff for that amount, with costs. The Court of Appeal for Eastern Africa (O'Connor P., Forbes J.A. and Keatinge J.) affirmed the decision. The defendant company appealed to Her Majesty in Council.

The facts were simple. The plaintiff came to Kampala in March, 1953, and looked for somewhere to live. At the end of May, 1953, he took a flat in Salisbury Road, but he had to pay 10,000 shillings premium. He now said that that premium was illegal because it was in contravention of the Rent Restriction Ordinance, and he claimed the return of it.

The oral evidence was so short that it could be set out in full. Only the plaintiff gave evidence. He said:

" I came to Kampala, Uganda, in 1953—March. I lived with " a brother for 1½ months. I took a flat but I had to pay key " money. I was searching for some time.

" I got a flat at Kololo but after 2–3 days I had to leave as I " had trouble with a co-tenant. Then I got in touch with C. B. " Patel, after having difficulty. I borrowed 10,000/– from the " company as my brother was a director.

Cross-examination: " I paid the money by borrowing the " money."

It was apparent from that evidence, as the trial judge said, that during the negotiations for the flat the plaintiff was at a disadvantage. He was having difficulty in obtaining accommodation—and he only got the flat by paying a premium of 10,000 shillings, which he borrowed for the purpose. He took it under a sublease dated September 17, 1953. This was prepared by lawyers. It contained provisions whereby the defendant company, in consideration of the sum of 10,000/– paid by the plaintiff by way of premium, subleased to him Flat No. 1 on the first floor for residence only, having three rooms, one kitchen, one bathroom and one lavatory. The term was seven years and one day from May 31, 1953. The rent was 300/– a month payable monthly in advance. And there were several covenants on either side.

The Rent Restriction Ordinance, 1949, of Uganda, provided by section 3 (2): " Any person whether the owner of the property " or not who in consideration of the letting or subletting of a " dwelling-house . . . to a person asks for, solicits or receives " any sum of money other than rent . . . shall be guilty " of an offence and liable to a fine not exceeding Shs. 10,000 " or imprisonment for a period not exceeding six months or to " both such fine and imprisonment: . . . "

1959. Nov. 2, 3. *F. Elwyn Jones Q.C., E. P. Wallis-Jones* and *C. B. Patel* for the appellants.

L. G. Scarman Q.C. and *C. F. Dehn* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Gray* v. *Southouse* [1]; *Cutler* v. *Wandsworth Stadium Ltd.* [2]; *Tompkins* v. *Pincent* [3]; *Kearley* v. *Thomson* [4]; *Barclay* v. *Pearson* [5]; *Baylis* v. *Bishop of London* [6]; *Holt* v. *Markham* [7]; *Morgan* v. *Ashcroft* [8]; *Transvaal and Delagoa Bay Investment Co. Ltd.* v. *Atkinson* [9]; *King* v.

[1] [1949] 2 All E.R. 1019.
[2] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.
[3] (1701) 1 Salk. 141; sub nom. *Tomkins* v. *Pincent*, 2 Ld.Raym. 819.
[4] (1890) 24 Q.B.D. 742; 6 T.L.R. 267.
[5] [1893] 2 Ch. 154; 9 T.L.R. 269.
[6] [1913] 1 Ch. 127; 29 T.L.R. 59.
[7] [1923] 1 K.B. 504.
[8] [1938] 1 K.B. 49; 53 T.L.R. 786; [1937] 3 All E.R. 92.
[9] [1944] 1 All E.R. 579.

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Earl Cadogan [10]; *Williams* v. *Hedley* [11]; *Smith* v. *Cuff* [12]; *Atkinson* v. *Denby* [13]; *Woods* v. *Wise*.[14]

Dec. 14. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above, and continued: Their Lordships desire to point out at once that neither party thought they were doing anything illegal. The lease was for more than seven years and it was thought that, on a lease for that length of time, there was nothing wrong in asking for a premium or receiving it.

This was an easy mistake to make, as will be seen if one reads section 3 (1) and (2) of the Rent Restriction Ordinance:

"3.—(1) No owner or lessee of a dwelling-house or premises "shall let or sublet such dwelling-house or premises at a rent "which exceeds the standard rent.

"(2) Any person whether the owner of the property or not "who in consideration of the letting or subletting of a dwelling-"house or premises to a person asks for, solicits or receives any "sum of money other than rent or any thing of value whether "such asking, soliciting or receiving is made before or after the "grant of a tenancy shall be guilty of an offence and liable to a "fine not exceeding Shs. 10,000 or imprisonment for a period not "exceeding six months or to both such fine and imprisonment:

"Provided that a person acting bona fide as an agent for "either party to an intended tenancy agreement shall be entitled "to a reasonable commission for his services:

"And provided further that nothing in this section shall be "deemed to make unlawful the charging of a purchase price or "premium on the sale, grant, assignment or renewal of a long "lease of premises where the term or unexpired term is seven "years or more."

Anyone reading the last proviso to that section—without more—might well think that a premium could be charged on the lease of this flat for seven years and one day. He would readily assume that the word "premises" included a flat. But he would be wrong. For if he took pains to look back to the definition section 2, he would find that in this Ordinance, the word "premises" refers only to business premises and not to residential flats at all. And so this proviso does not apply to this flat—because by the very terms of the sublease it was let "for residence only." Their Lordships ought perhaps to set out the material words of the definition clause which produces this result—it says that "'dwelling-house' means any building or "part of a building let for human habitation as a separate "dwelling" and "'premises' means any building or part of a

[10] [1915] 3 K.B. 485, 492.
[11] (1807) 8 East 378.
[12] (1817) 6 M. & S. 160.
[13] (1862) 6 H. & N. 778; 7 H. & N. 934.
[14] [1955] 2 Q.B. 29; [1955] 2 W.L.R. 734; [1955] 1 All E.R. 767.

" building let for business, trade or professional purpose or for " the public service."

It was owing to the failure of the lawyers to refer to those definitions—or at any rate to appreciate the importance of them—that the mistake arose.

Their Lordships also think it right to point out that there was no evidence to show whether the premium of 10,000/– was extortionate or not. Their Lordships were told that no standard rent had been fixed for this flat because it was a new flat. It is obvious that if the standard rent were to be fixed at, say, 450/– a month for seven years, there would be nothing extortionate in a premium of 10,000/– down and a rent of 300/– a month thereafter: for it would come in the long run to much about the same.

Nevertheless, no matter whether the mistake was excusable or inexcusable, or the premium fair or extortionate, the fact remains that the landlord received a premium contrary to the provisions of the Ordinance: and the question is whether the tenant can recover it back—remembering always that there is nothing in the Uganda Ordinance, comparable to the English Acts, enabling a premium to be recovered back.

This omission in the Ordinance was considered to be decisive by the Court of Appeal for Eastern Africa in a case a few years ago called *Rex* v. *Godinho*.[1] The court was then differently constituted from what it is now. The judges argued in this wise[2]: " We do not know the reason, but the Uganda legislature " in its wisdom has included in the Ordinance no provision " comparable to section 8 (2) of the Rent Restriction Act of " 1920. . . . Without this statutory right of recovery, the giver " of the illegal premium is left in the position of one who, " although he himself has committed no substantive offence, has " aided and abetted the commission of an offence by another. " In these circumstances he could not go to a civil court with " clean hands, and the principle stated by Lord Ellenborough in " *Langton* v. *Hughes*[3] would have application: ' What is done in " ' contravention of an Act of Parliament, cannot be made the " ' subject-matter of an action.' "

In considering the validity of this reasoning, their Lordships would point out that the observation of Lord Ellenborough was made in a case where a party was seeking the aid of the court in order positively to enforce an illegal contract. It should be confined to cases of that description. His observation has no application to cases such as the present, where a party is seeking to recover money paid or property transferred under an illegal transaction. In such cases the general principle was stated by Littledale J. in *Hastelow* v. *Jackson*[4]: " If two parties enter " into an illegal contract, and money is paid upon it by one to " the other, that may be recovered back before the execution " of the contract, but not afterwards." In accordance with this

[1] (1950) 17 E.A.C.A. 132.
[2] Ibid. 134.
[3] (1813) 1 M. & S. 593, 596.
[4] (1828) 8 B. & C. 221, 226.

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principle, so long as the illegal transaction has not been fully executed and carried out, the courts have in many cases shown themselves ready to entertain a suit for recovery of the money paid or property transferred. These were cases in which it appeared to the court that, even though the transaction was illegal, nevertheless it was better to allow the plaintiff to resile from it before it was completed, and to award restitution to him rather than to allow the defendant to remain in possession of his illegal gains; see *Taylor* v. *Bowers*,[5] which was approved by their Lordships' Board in *Petherpermal Chetty* v. *Muniandi Servai*.[6] But so soon as the illegal transaction has been fully executed and carried out the courts will not entertain a suit for recovery (see *Herman* v. *Jeuchner*[7]) unless it appears that the parties were not in pari delicto (see *Lowry* v. *Bourdieu*,[8] by Lord Mansfield).

It is clear that in the present case the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the plaintiff. In order to recover the premium, therefore, the plaintiff must show that he was not in pari delicto with the defendant. That was, indeed, the way he put his claim in the pleadings. After setting out the lease, the payment of the premium and the entry into occupation, the statement of claim proceeded simply to say: "By "virtue of the provisions of subsection (2) of section 3 of the "Rent Restriction Ordinance, the receipt of the said sum of Shs. "10,000 by the defendant from the plaintiff . . . was illegal but "the plaintiff is entitled to recover the same since he (the "plaintiff) was not in pari delicto with the defendant.

"The plaintiff claims the sum of Shs. 10,000 as money "received by the defendant for the use of the plaintiff."

The issue thus becomes: Was the plaintiff in pari delicto with the defendant? Mr. Elwyn Jones, for the appellant, said they were both in pari delicto. The payment was, he said, made voluntarily, under no mistake of fact, and without any extortion, oppression or imposition, and could not be recovered back. True, it was paid under a mistake of law, but that was a mistake common to them both. They were both equally supposed to know the law. They both equally mistook it and were thus in pari delicto. In support of this argument the appellant referred to such well-known cases as *Harse* v. *Pearl Life Assurance Co.*[9]; *William Whiteley Ltd.* v. *The King*[10]; *Evanson* v. *Crooks*[11]; and particularly to *Sharp Brothers & Knight* v. *Chant*.[12]

Their Lordships cannot accept this argument. It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter.

[5] (1876) 1 Q.B.D. 291.
[6] (1908) L.R. 35 I.A. 98.
[7] (1885) 15 Q.B.D. 561; sub nom. *Hermann* v. *Zeuchner*, 1 T.L.R. 445.
[8] (1780) 2 Doug.K.B. 468, 472.
[9] [1904] 1 K.B. 558; 20 T.L.R. 264.
[10] (1909) 26 T.L.R. 19.
[11] (1911) 28 T.L.R. 123.
[12] [1917] 1 K.B. 771, 776; 33 T.L.R. 235.

Ignorantia juris neminem excusat. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers* v. *Ingham*.[13] If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not in pari delicto and the money can be recovered back; see *Browning* v. *Morris*,[14] by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not in pari delicto and the money can be recovered back; see *Harse* v. *Pearl Life Assurance Co.*,[15] by Romer L.J. These propositions are in full accord with the principles laid down by Lord Mansfield relating to the action for money had and received. Their Lordships have in mind particularly his judgment in *Smith* v. *Bromley*[16] in notis, which he delivered when he sat at Guildhall in April, 1760: and his celebrated judgment three or four weeks later, on May 19, 1760, in *Moses* v. *Macferlan*,[17] when he sat in banco. Their Lordships were referred to some cases 30 or 40 years ago where disparaging remarks were made about the action for money had and received: but their Lordships venture to suggest that these were made under a misunderstanding of its origin. It is not an action on contract or imputed contract. If it were, none such could be imputed here, as their Lordships readily agree. It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. This was explained by Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[18] All the particular heads of money had and received, such as money paid under a mistake of fact, paid under a consideration that has wholly failed, money paid by one who is not in pari delicto with the defendant, are only instances where the law says the money ought to be returned.

In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant "key-money." Section 3 (2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation

[13] (1876) 3 Ch.D. 351, 355.
[14] (1778) 2 Cowp. 790, 792.
[15] [1904] 1 K.B. 558, 564.
[16] (1760) 2 Doug. 696.
[17] (1760) 2 Burr. 1005.
[18] [1943] A.C. 32, 62–64; 58 T.L.R. 308; [1942] 2 All E.R. 122.

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of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the person who "asks for, solicits or "receives any sum of money," but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor (see *Johnson* v. *Youden* [19] and section 3 of the Rent Restriction (Amendment) Ordinance, 1954), but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to "jump the "queue," or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.

Seeing then that the parties are not in pari delicto, the tenant is entitled to recover the premium by the common law: and it is not necessary to find a remedy given by the Ordinance, either expressly or by implication. The omission of a statutory remedy does not, in cases of this kind, exclude the remedy by money had and received. That is amply shown by the numerous cases to which their Lordships were referred, such as those arising under the statutes against usury, lotteries and gaming, in which there was no remedy given by the statute but nevertheless it was held that an action lay for money had and received. It was accepted, too, by Parker J. in his considered judgment in *Green* v. *Portsmouth Stadium Ltd.*[20]: and his decision was only reversed by the Court of Appeal [21] because they thought the statute there was of a different kind. It was not intended to protect bookmakers from the demands of race-course owners, but was rather for the regulation of race-courses. There was nothing in that case to show that the plaintiff was not in pari delicto with the defendants.

Their Lordships find themselves in full agreement with the judgment of the High Court of Uganda and of the Court of Appeal for Eastern Africa, and will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Hale, Ringrose & Morrow; A. F. & R. W. Tweedie.*

C. C.

[19] [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.
[20] [1953] 1 W.L.R. 487.
[21] [1953] 2 Q.B. 190; [1953] 2 W.L.R. 1206; [1953] 2 All E.R. 102.

[COURT OF APPEAL.]

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Ormerod, Willmer and Harman L.JJ.

Practice and Procedure—Vexatious litigant—Matters to be taken into consideration—"Instituted . . . legal proceedings"—Meaning—Multifarious proceedings over 24 years arising out of same claim—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 51 (1).

Statute—Retroactive effect—Appeal—Whether new law applicable—Procedural point or substantive right—Vexatious litigant—New Act extending power of High Court to cover continuing proceedings already instituted by vexatious litigant—Whether Court of Appeal can vary High Court order to accord with new Act—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 27 (1), 51 (1)—*Supreme Court of Judicature (Amendment) Act,* 1959 (7 *&* 8 *Eliz.* 2, *c.* 39), *s.* 1 (1).

Court of Appeal—Jurisdiction—New Act after hearing below—Whether applicable on appeal—Procedural or substantive point—Act against vexatious litigants—Supreme Court of Judicature (Consolidation) Act, 1925, *ss.* 27 (1), 51 (1)—*Supreme Court of Judicature (Amendment) Act,* 1959, *s.* 1 (1).

In 1935 V. issued a writ against a company claiming damages of £158,982 for alleged breach of contract and/or wrongful dismissal. In 1937 the action was withdrawn, following a consent judgment, and a sum in court was paid out to V. He denied that he had consented to that course, and during the succeeding 25 years, with long gaps of inactivity, he sought, by appeal to the Court of Appeal and petition for leave to appeal to the House of Lords, by writs in the Chancery Division and various consequential interlocutory proceedings, by originating summons and consequential summons in the Companies Court, to pursue his claim against the company and later against its liquidator, proceeding on two subsequent occasions to the stage of petition to the House of Lords.

By the year 1959 all those proceedings had been disposed of by the courts; but a new action, begun in 1957, claiming the same sum of £158,982, was continuing against the estate of P. who had guaranteed the debts of the company when it went into voluntary liquidation.

On April 9, 1959, the High Court made an order, on the application of the Attorney-General under section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] that no legal proceedings should without the leave of the High Court or a judge thereof be instituted by V., on the ground that he had habitually and persistently and without any reasonable ground

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 51: "(1) If, on an application made by "the Attorney-General under this "section, the High Court is satisfied "that any person has habitually and "persistently and without any reason- "able ground instituted vexatious "legal proceedings, whether in the "High Court or in any inferior court, "and whether against the same per- "son or against different persons, the "court may, after hearing that per- "son or giving him an opportunity of "being heard, order that no legal "proceedings shall without the leave "of the High Court or a judge there- "of be instituted by him in any "court, and such leave shall not be "given unless the court or judge is "satisfied that the proceedings are "not an abuse of the process of the "court and that there is prima facie "ground for the proceedings."

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instituted vexatious legal proceedings. V. appealed against that order.

On May 14, 1959, the Supreme Court of Judicature (Amendment) Act, 1959,[2] came into force, extending by section 1 (1) the power of the High Court to make orders covering continuing proceedings instituted by a vexatious litigant in any court before the making of an order under section 51 (1).

On the hearing of V.'s appeal, the Attorney-General, by a cross-notice, asked the Court of Appeal to vary the order of the High Court of April 9, by adding thereto an order that any legal proceedings instituted by V. in any court before the making of that order should not be continued by him without leave:—

Held, (1), dismissing V.'s appeal, that whether the words "instituted . . . legal proceedings" in section 51 (1) were to be construed widely or narrowly, there was in this case ample material before the High Court to justify their taking a broad view and exercising their discretion to declare V. vexatious (post, pp. 142, 147, 148).

Per Ormerod and Willmer L.JJ. The words "instituted . . . "legal proceedings" in section 51 (1) should not be construed so widely as to extend to the taking of any step in an action, nor so narrowly as to cover only the commencement of an action by writ. An appeal to the Court of Appeal and a petition for leave to appeal to the House of Lords might be the institution of separate proceedings (post, pp. 142, 146).

(2), dismissing the cross-notice, that as the change in the law brought about by the Act of 1959 was such as to affect a substantive right already vested in V., namely, the right to continue without leave proceedings already instituted by him, the Court of Appeal had no power to vary the order of the High Court to bring it into accord with the new Act, for the power of the Court of Appeal under section 27 of the Act of 1925 to exercise the jurisdiction of and to vary an order of the High Court in accordance with a subsequent change in the law was limited to enactments affecting procedure only (post, pp. 145, 147, 148).

Quilter v. *Mapleson* (1882) 9 Q.B.D. 672 distinguished.

Colonial Sugar Refining Co. v. *Irving* [1905] A.C. 369; 21 T.L.R. 513, and *In re a Debtor* [1936] 1 Ch. 237; 52 T.L.R. 70 applied.

Order of Divisional Court [1959] 1 W.L.R. 622; [1959] 2 All E.R. 200 affirmed.

APPEAL from Divisional Court.

CROSS-NOTICE of contention pursuant to leave granted by Court of Appeal on October 26 to serve notice out of time.

In 1935, the litigant, Anthony Vernazza, was dismissed from the employment of a company, Baburizza & Co. Ltd. On July 11,

[2] Supreme Court of Judicature (Amendment) Act, 1959, s. 1: "(1) In subsection (1) of section 51 of the Supreme Court of Judicature (Consolidation) Act, 1925 . . . after the words 'in any court' there shall be inserted the words 'and that any legal proceedings instituted by him in any court before the making of the order shall not be continued by him without such leave'. (2) In subsection (1) of section 31 of the said Act of 1925 (which provides that no appeal shall lie in certain cases) at the end there shall be added the following paragraph, that is to say—'(*l*) from an order refusing leave for the institution or continuance of legal proceedings by a person who is the subject of an order for the time being in force under section 51 of this Act.'"

1935, he issued a writ [1935 V. No. 655] claiming damages of £158,982 for alleged breach of contract of service and/or wrongful dismissal. The action came on for hearing before Swift J. on June 16, 1937. The defendant company had paid into court the sum of £400, and on the advice of the litigant's counsel and by agreement between counsel for both parties, the £400 was paid to the litigant, and no order was made for the payment of costs by him, the action being then withdrawn. Despite that apparent end to the action, the litigant was not satisfied, and on July 28, 1937, he gave notice of appeal. On March 10, 1938, the appeal was heard by the Court of Appeal (Greer, Slesser and Clauson L.JJ.) and was dismissed with costs, leave to appeal being refused. In the course of the discussion Greer L.J. said to the litigant: " We have heard what you say, and you have no grounds " whatever and have established no grounds whatever for setting " aside a settlement which with your knowledge and with your " authority was made by your counsel, and there is an end of this " appeal." Despite those words, the litigant persisted in the matter, and on May 23, 1938, petitioned the House of Lords for leave to appeal; but leave was refused.

That might be thought to have ended the matter and to have satisfied the litigant, but, on June 2, 1938, he started new proceedings in the Chancery Division against Baburizza & Co. by a writ [1938 V. No. 587], asking that the judgment of Swift J. be set aside, apparently on the ground that the compromise of the action had not been entered into with his consent. In the course of those proceedings, a statement of claim had been delivered which, on November 1, was ordered by Farwell J. to be struck out as being vexatious. A second statement of claim was considered on February 8, 1939, by Crossman J., and the litigant was given leave to amend certain parts of the statement of claim while other parts were struck out. On June 20, 1939, a summons to strike out the defence in that action was heard by Farwell J., and on that no order was made except that the litigant should pay the costs of the application. So the matter went on. There were various other proceedings, until June, 1940, for leave to deliver interrogatories which went up by way of petition to the House of Lords. The matter then remained dormant for 17 years until June 25, 1957, when a summons was taken out by the defendants to dismiss the action for want of prosecution. That came before Harman J. in October, 1957, and the action was dismissed for want of prosecution. The litigant appealed to the Court of Appeal and that appeal was dismissed. He then petitioned the House of Lords for leave to appeal and that petition was refused.

Then, on July 24, 1958, he once again commenced proceedings against the defendants by writ [1958 V. No. 705], again asking for the judgment of Swift J. to be set aside, apparently on exactly the same grounds as set forth in his previous action. That was dismissed by Wynn-Parry J. on December 12, 1958, as

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being frivolous and vexatious and an abuse of the process of the court. Apparently, there was no appeal against that decision.

Thus, by July, 1958, there had been two separate actions to set aside the judgment of Swift J., one of which had lain dormant for some 17 years, and both of which had been instituted after Greer L.J. had intimated in the clearest possible terms that there was no ground of appeal from the original order of Swift J. made in the action which was compromised.

In addition, there were other activities by the litigant as follows: Baburizza & Co., the company against which he was proceeding, went into voluntary liquidation in 1937. On February 10, 1938, the litigant proceeded by originating summons in the Companies Court against the company [No. 00145 of 1938], having already sent in his proof of debt which had been rejected by the liquidator. By his originating summons he asked that the liquidator's rejection of his proof of debt be reversed and that the proof be allowed. That matter stood over pending the hearing of the action which had been started in the Chancery Division. Then, on November 12, 1938, he asked for a declaration that the liquidator was guilty of misfeasance and breach of trust. That summons was again stood over.

On March 7, 1944, the litigant applied to have his proof of debt allowed in full. That was adjourned on June 24, 1957, pending the result of the Chancery action. On November 27, 1958, he served notice of motion to restrain the liquidator of the company from interfering in the winding up of the company.

After the Chancery action had been dismissed for want of prosecution in October, 1957, the litigant applied for all the three adjourned summonses in the Companies Court to be heard; and they came before Vaisey J., who, on December 2, 1958, dismissed them all. A notice of motion and a supplementary and amended notice of appeal were subsequently served by the litigant; but his original motion and his appeal were dismissed by the Court of Appeal in June, 1959, on the ground that the litigant had failed to supply the court with the documents as required by the Rules of the Supreme Court.

Another matter in which the litigant was concerned was the following: On the winding up of Baburizza & Co. one Petrinovic had guaranteed the company's liability; and in 1951 he died in the United States, leaving a considerable estate. On July 17, 1952, the litigant entered a caveat in the probate proceedings against his estate; that caveat was removed, and a further caveat was entered and later removed. By February, 1956, the estate duty and interest payable on the Petrinovic estate had reached a very high figure; but his executors, the Chase Manhattan Executor and Trustee Corporation, were unable to pay either duty or interest because they were unable to obtain money from the estate owing to the fact that on March 27, 1957, the litigant issued an originating summons [1957 No. 550] in the Chancery Division

against the executors; and on July 12, 1957, the hearing of that summons was adjourned to enable a writ to be issued in lieu of it. On July 27, 1957, the writ [1957 P. No. 1355] was issued; the statement of claim was delivered on October 31, 1957, again claiming the sum of £158,000 damages against the Petrinovic estate for wrongful dismissal; and on November 15, 1957, the defendants requested further and better particulars of the statement of claim.

Those proceedings were continuing when, on April 9, 1959, the Attorney-General applied to the Divisional Court of the Queen's Bench, asking that the litigant be declared vexatious in accordance with the provisions of section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. The court (Lord Parker C.J., Donovan and Salmon JJ.)[3] made the order asked for, namely, that no legal proceedings should without the leave of the High Court or a judge thereof be instituted by the litigant Vernazza, on the ground that he had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.

On May 14, 1959, the Supreme Court of Judicature (Amendment) Act, 1959, received the Royal Assent. By section 1 (1) the Act gave the High Court the new power to order that no legal proceedings should, without the leave of the High Court or a judge thereof, be *continued* by a litigant, the subject of an order under section 51 (1) of the Act of 1925. On May 21, 1959, the litigant entered a notice of appeal against the order of the Divisional Court; and on October 26, 1959, the Attorney-General moved the Court of Appeal (Morris, Romer and Willmer L.JJ.) for leave to serve on the litigant out of time a notice that on the hearing of his appeal the Attorney-General would ask the Court of Appeal to vary the order of the Divisional Court by adding thereto an order that any legal proceedings instituted by the litigant in any court before the making of the order of April 9, 1959, should not be continued by him unless he obtained the leave of the High Court or a judge thereof, and satisfied the court or judge that such legal proceeding was not an abuse of the process of the court, and that there was a prima facie ground for such proceeding. The Attorney-General on that motion told the court that the serious matter of concern was the litigant's continuing action against the Chase Manhattan Executor and Trustee Corporation.

The court granted leave to the Attorney-General to serve a notice of contention out of time, and at the same time made an order directing the Official Solicitor to inform the litigant that if he did not wish to have counsel of his own choice on the hearing of the appeal, counsel and solicitors would be assigned to him.

W. Arthur Bagnall for the litigant.

Sir Reginald Manningham-Buller Q.C., A.-G. and *J. R. Cumming-Bruce* in support of the cross-notice.

[3] [1959] 1 W.L.R. 622; [1959] 2 All E.R. 200.

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The cases referred to in argument are all referred to in the judgments of the court.

ORMEROD L.J. stated the circumstances in which the case came before the court, as set out above, and continued: In the course of his judgment in the Divisional Court Lord Parker C.J. said [1]: "As long ago as 1935 the respondent [Vernazza] was "obsessed with the idea that he was owed £158,982 0s. 6d. for "services rendered to a company. He brought proceedings "claiming that sum in the King's Bench Division, and those "proceedings came before Swift J. At that time the present "respondent's leading counsel had advised him that he had no "case, but thanks to the generosity of the defendant company, "judgment was entered by Swift J. for the defendants without "costs, on the understanding that they would allow the plaintiff "(the present respondent) to take out and retain the £400 that "was in court. Notwithstanding that, he persisted in this "delusion. He has since brought actions in the Chancery "Division and the Queen's Bench Division, claiming in one form "or another that that consent judgment ought to be set aside, "and that he is still owed this £158,000. During the course of the "history of the matter the company concerned went into voluntary "liquidation, and there followed in the Companies Court some "five summonses; these, it is true, were to a large extent directed "to retaining the status quo and preventing the company from "distributing the assets, but all were taken out under this "delusion that the respondent was owed some £158,000." Then the Lord Chief Justice went on to say that, in his opinion, it was just the sort of case which the section had in mind and in which an order should be made, and, accordingly, an order was made.

The order was made in pursuance of section 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. [His Lordship read the subsection, and continued:] Mr. Bagnall's submission was that the Divisional Court in considering the case had not approached it from the proper angle. What they had done was to take what he described as a sweeping view of the various actions which the appellant had taken since 1935 and had come to the conclusion on a general survey of those matters that this was a case for an order. The submission Mr. Bagnall put forward was, first, that the wording of the Act deals with actions instituted "without any reasonable ground," and which are "vexatious legal proceedings." Therefore he submitted that, in order to be satisfied before an order is made that the conditions of the section have been complied with, it is necessary to consider first from the objective point of view whether the proceedings were instituted without any reasonable ground, and that each separate action should be considered and decided on accordingly. Secondly, the question should be considered as to whether they were vexatious, and that was a subjective matter, and really had

[1] [1959] 1 W.L.R. 622, 623; [1959] 2 All E.R. 200.

to be decided by considering whether the appellant was acting maliciously or otherwise than in good faith.

If I may deal first with that submission, in my opinion it is not the right way to look at the matter. The words of the section are "without any reasonable ground instituted vexatious legal "proceedings." They are referring to legal proceedings, and the question is not whether they have been instituted vexatiously but whether the legal proceedings are in fact vexatious. I suppose most proceedings are vexatious to the persons against whom they are directed, and, therefore, the further question has to be considered whether, though they may be vexatious, they have been brought without any reasonable ground. That is a matter for the court to decide. But if, in the opinion of the court, the proceedings are vexatious and there is no reasonable ground for bringing them, then they are within the category at which this section aims. The second contention made by Mr. Bagnall on the question was that in the present case there was no sufficient evidence that any proceedings which have been brought by this appellant were "persistently" vexatious. He submitted that the proper construction of the words "instituted legal pro- "ceedings" must be the commencement of an action by a writ or other proper procedure, and that nothing else can be regarded as the institution of proceedings. In that sense he said that in this particular case the two actions in the Chancery Division, brought to set aside the judgment of Swift J., were proceedings which have been instituted within the meaning of this section, but that any of the other matters, such as the various summonses in the liquidation, not being actions which had been commenced by writ, were merely incidental to the actions already commenced, or, as he put it, instituted. He said, in those circumstances, that while prepared to agree that the second action which the appellant commenced against the company to set aside the judgment of Swift J. was vexatious, it was the only one properly to be so described, and, therefore, in the circumstances, not sufficient to justify this order being made.

The Attorney-General, on the other hand, submitted that the term "instituted proceedings" carried a very much wider construction than the construction for which Mr. Bagnall contended. His submission was that taking any step in an action was the institution of proceedings. Mr. Cumming-Bruce, in the course of his submission to the court, said that it was a step taken which, if successful, would set in train the machinery of the court with the effect that the court would grant relief or compel the other party to take a procedural step. That, of course, puts an extremely wide construction on the section, and would operate to bring within its ambit even a summons for directions. For my part, I am not prepared, as I have already intimated, to put so wide a construction as that on the words of this section, but I think that the words admit of a wider construction than that for which Mr. Bagnall contends, which is that the words

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"institution of proceedings" mean nothing more than the commencement of an action by a writ.

In this particular case there are various matters which have been referred to which might or might not be said to constitute the institution of proceedings. There are two actions which have been dealt with which, by common consent, are proceedings which have been instituted. There are a number of appeals to this court and, if not appeals to the House of Lords, petitions for leave to appeal to the House of Lords. I think the question whether petitions to the House of Lords for leave to appeal amount to the institution of proceedings is a question which is very much in doubt. The question also arises whether an appeal to this court can be regarded as a separate institution of proceedings other than an institution of proceedings in the original action. It is probably unnecessary to decide that question here, but I lean to the view that an appeal to this court from a decision of the High Court or from any other court is the institution of a separate proceeding. But apart altogether from the question of appeals, there are the summonses to which I have referred which were taken out in the liquidation as part of the attempt by the appellant to obtain the money which he alleged was owing to him by the company.

So far as those proceedings are concerned, Mr. Bagnall says in the first place that they are not proceedings which were instituted but are really matters of procedure. He says, further, that in any event they cannot be regarded as vexatious, because they were proceedings which it was essential that the appellant should undertake in order to keep his rights alive in the liquidation, pending the trial of the action which he had begun to set aside the judgment of Swift J. Of course, if he was justified in commencing that action and justified in conducting it as he did, it may very well be that he was justified in taking out the various summonses in the liquidation to protect his rights. On the other hand, it appears to me that it may very well be said that the action which was started by the appellant on June 2, 1938, after the petition to appeal to the House of Lords in the original action had been refused, was a vexatious action and an action for which there was no ground, that being an action by the appellant which was allowed to proceed for a period of 17 years from 1940 to 1957.

Those are all matters which were present to the mind of the Divisional Court at the time they made their decision. Although Lord Parker C.J. did not say in terms that he took all those matters into consideration, I think he indicated in his judgment that he had all those matters in mind in considering whether or not this appellant came within the definition of a vexatious litigant. I think it is beyond question that there was ample material before the Divisional Court which would justify them in exercising their discretion in the way they did in making this

order. In those circumstances, in my view, there is no justification for the submission on the part of the appellant that the Divisional Court was in error, or that they approached the matter from the wrong angle. Reading the judgment of Lord Parker C.J.,[2] I find nothing which would justify this court in interfering with the order made, and I would dismiss the appeal.

However, that is not the end of the matter, because the respondent [the Attorney-General] has put in a cross-notice asking for the order of the Divisional Court to be varied by including the provisions of the Act of 1959. That Act, which is "An Act "to amend the law relating to the restriction of vexatious "actions," came into force on May 14, 1959, and it provides that there should be inserted in subsection (1) of section 51 of the Act of 1925 after the words "in any court" the words "and "that any legal proceedings instituted by him in any court before "the making of the order shall not be continued by him without "such leave." In other words, where section 51 (1) of the Act of 1925 gave power to the court to make an order to prevent the litigant instituting further proceedings without the consent of the court, the Act of 1959 extended that power and empowered the court to prevent the litigant from continuing any proceedings already instituted without the consent of the court. The Attorney-General has argued that, as the matter has come before the Court of Appeal, this court has power to vary the order on the ground that the Divisional Court would, if it were dealing with the matter now, have power to deal with it in that way. In support of that submission, section 27 (1) of the Act of 1925 was relied on, which reads as follows: "Subject as otherwise provided "in this Act and to rules of court, the Court of Appeal shall "have jurisdiction to hear and determine appeals from any "judgment or order of the High Court, and for all the purposes "of and incidental to the hearing and determination of any appeal, "and the amendment, execution and enforcement of any judg- "ment or order made thereon, the Court of Appeal shall have all "the power, authority and jurisdiction of the High Court . . ." It was submitted that in consequence this court had power to say that by reason of the Act of 1959 the court had power to make an order prohibiting the appellant from continuing any proceedings which he had instituted without leave of the court. It was contended that if the Court of Appeal had the power of the High Court, it had the power to vary the order of the Divisional Court in accordance with the Act of 1959. In support of that contention the Attorney-General referred to *Quilter* v. *Mapleson*.[3] That was an action to recover demised property under a proviso of re-entry for breach of a covenant to insure. The defendant claimed relief under the statute. The plaintiff obtained judgment on July 4, 1881. On August 4 the defendant appealed, and a stay of proceedings was granted and continued, so that the plaintiff never

[2] [1959] 1 W.L.R. 622, 623.

[3] (1882) 9 Q.B.D. 672.

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obtained possession. On January 1, 1882, the Conveyancing and Law of Property Act, 1881, came into operation. After that Act came into operation the appeal came on to be heard, and it was held that section 14 (2) of the Conveyancing and Law of Property Act, 1881, was not confined to breaches taking place after the Act came into operation, but extended also to breaches committed before the Act, and to proceedings pending when the Act came into operation, and that as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant relief to the tenant under that subsection. It was also held that, "assuming the judgment of the court below to have been "correct according to the law as it then stood, the Court of "Appeal could grant to the tenant the relief to which he was "entitled according to the law as it stood at the hearing of the "appeal, since the general orders provide that appeals shall be "by way of rehearing, and give power to the Court of Appeal not "merely to make any order which ought to have been made by "the court below, but to make such further or other order as the "case may require."

On the strength of that case, it was argued that the court in this case had the power to vary the order to bring it into accord with the terms of the Act of 1959. The answer of Mr. Bagnall to that submission was that such may very well be the position with regard to matters of procedure, but it is not the position when the effect of the order would be to take away a right which was vested in a litigant. The argument was that the subject had the right to come to the court and have his complaint heard. To take away that right under section 51 (1) of the Act of 1925 is, in effect, to deprive him of something already vested in him. For this court now to vary that order in accordance with the Act of 1959 would be further to interfere with the rights vested in the appellant.

Reference was made to the judgment of Lord Wright M.R. in *In re a Debtor*,[4] when he said: "Counsel for the debtor relied on "*Quilter* v. *Mapleson*.[5] That, however, was a case merely "dealing with matters of procedure or remedies to which a "different rule applies. It is not necessary to quote any "authority for that distinction save what was said by Jessel "M.R. in *In re Joseph Suche & Co.*[6]: 'It is a general rule that "'when the legislature alters the rights of parties by taking away "'or conferring any right of action, its enactments, unless in "'express terms they apply to pending actions, do not affect "'them. It is said that there is one exception to that rule, "'namely, that, where enactments merely affect procedure and "'do not extend to rights of action, they have been held to apply "'to existing rights, and it is suggested here that the alteration "'made by this section [i.e., section 10 of the Judicature Act,

[4] [1936] 1 Ch. 237, 242; 52 T.L.R. 70.
[5] 9 Q.B.D. 672.
[6] (1875) 1 Ch.D. 48, 50.

" ' 1875] is within that exception. I am of opinion that it is " ' not.' " Later Lord Wright said [7]: " Thus while an appellate " court is able, and bound, to give effect to new remedies which " have been introduced by enactments passed after the order " appealed from was made by the court of first instance, yet with " regard to substantive rights it is well established that the appel- " late court must give effect to the same law as that which was in " force at the date of the earlier proceeding. That is recognised " by Ord. 58, r. 4, which provides that even in cases where the " proceeding in the Appeal Court is a rehearing. ' The Court of " ' Appeal shall have power to draw inferences of fact and to give " ' any judgment and make any order which ought to have been " ' made.' A matter of substantive right which has become res " judicata cannot be upset by a subsequent general change of the " law, in the absence of precise intention to make the change so " retrospective being evidenced in the Act."

The submission of Mr. Bagnall in this case is that this is a substantive right vested in the appellant, and, relying on the words of Lord Wright M.R., he submits that this court should not interfere to vary this order. We were also referred to a decision of the Privy Council in *Colonial Sugar Refining Co. Ltd.*,[8] which dealt with the right of appeal to the Privy Council, although so far as the Australian States were concerned, that right of appeal had been abolished and a right of appeal to the High Court of Australia had been substituted. It was held by the Privy Council that if the right had become vested, that is to say, if at the time of the action there was a right of appeal to the Privy Council, the fact that the Act abolished such appeals did not alter the position and the appellant there had a right of appeal.

In these circumstances, I am of opinion that this cross-notice must fail. It appears to me that this is a case where there is a right vested in the appellant, and that, having regard to the words of Lord Wright M.R., the Court of Appeal should not interfere to vary an order such as this made in accordance with the law as it existed when it was made. It may be—I pass no opinion on it—that the Attorney-General may go again to the Divisional Court and obtain an order in the terms of the Act of 1959. That is a matter which is not at present before this court. I would dismiss both the appeal and the cross-notice.

WILLMER L.J. I am of the same opinion, and I venture to add a few words of my own only because of the importance of the matter which has been discussed.

Mr. Bagnall's argument which, if I may say so, he presented to us in a most persuasive manner, appeared to me to rest on two propositions, one of law relating to the construction of the Judicature Act of 1925, and the other of fact, neither of which I feel able to adopt. So far as the construction of the Act is concerned, he has pointed out, quite rightly, that what section 51 (1)

[7] [1936] 1 Ch. 237, 243.

[8] [1905] A.C. 369; 21 T.L.R. 513.

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of the Act of 1925 is dealing with is a person who has "habitually and persistently and without any reasonable ground "instituted vexatious legal proceedings." But, according to his argument, the words "instituted proceedings" must be given what seems to me a very narrow meaning. Virtually, Mr. Bagnall would restrict those words to the commencement of a fresh action by the issue of a new writ. As I understand his argument, nothing except that is aimed at by the section of the Act.

Mr. Bagnall's second proposition, following on that construction of section 51, is that there have, after all, only been very few separate proceedings, as so defined, which have been instituted by the appellant. He has submitted to us that the commencement of what I may call the 1938 action could not be said to be vexatious or without reasonable cause. The proceedings in the Companies Court and the proceedings in relation to the estate of Mr. Petrinovic, can only, according to Mr. Bagnall's argument, be regarded as by-products of the 1938 action, that is to say, as steps taken merely for the purpose of preserving the status quo until the determination of that action. Thus it is only when one gets to 1958, when the appellant commenced the action in the Chancery Division which was dismissed by Wynn-Parry J., that Mr. Bagnall says there is any question of a vexatious action being commenced. That being so, the litigant has only once instituted proceedings vexatiously and, therefore, it cannot be said that he is a person who has "habitually and persistently" done so, and consequently the section of the Act does not apply.

As I said at the beginning, I do not feel disposed to accept either of the propositions on which that argument rests. It seems to me that the construction of the section which we are invited to adopt by Mr. Bagnall is much too narrow. At the same time, I share the view already expressed by my Lord that the alternative construction suggested to us by the Attorney-General and by Mr. Cumming-Bruce is much too wide. I do not think that this is an occasion which makes it necessary to attempt the almost impossible task of drawing an exact line between that which does and that which does not amount to "instituting" proceedings. Speaking for myself, I should have thought that there is much to be said for the view that, when one institutes an appeal in an action which has already been disposed of, one can fairly be said to be instituting proceedings, even though the title of the action and its number may be the same when it gets to the Court of Appeal as in the court below. If that is a correct view, or anything like a correct view, then it must be clear that in the 20 years or so which have elapsed since the dismissal of the original action there have been numerous occasions when proceedings have been "instituted."

Were they then "vexatious" proceedings? As to that, it seems to me that, ever since March 10, 1938, the day on which the Court of Appeal gave judgment in the original action, and the day on which Greer L.J. made the remarks which my Lord has

already read, there has been no possible reason for the institution of fresh proceedings by Vernazza arising out of his claim against Baburizza & Co. Ltd. That is enough to dispose of the submission of fact which is so important for Mr. Bagnall's argument, namely, that the institution of the 1938 action was not vexatious. It seems to me that there was abundant evidence before the Divisional Court which would justify them in coming to the conclusion that the institution of that action, involving as it did the consequential institution of a number of other proceedings and the prosecution of a number of appeals, gave rise to the institution of vexatious legal proceedings which over the years may fairly be said to have become " habitual " and " persistent." In such circumstances, it appears to me quite impossible to say that the Divisional Court were not well entitled to come to the conclusion that they did.

With regard to the cross-notice put in by the Attorney-General, I confess that at first sight I was much attracted by the argument that it was competent for this court to apply the provisions of the Act of 1959. It appeared to me at first sight that there was much force in the argument that the effect of section 27 of the Act of 1925 is to put this court into the position of the High Court, that is to say, to put us in a position in which we would stand, as it were, in the shoes of the High Court as though the High Court were sitting and giving judgment today. On that basis it seemed to me that it would be our duty to exercise today the powers of the High Court as they exist today. But Mr. Bagnall, in his argument to the contrary, has persuaded me that that is a wrong view. I am satisfied, as a result of his argument, that the change of law effected by the Act of 1959, so far as the powers thereby conferred are concerned, is such as to affect the substantive rights of a man in the position of Vernazza. In such circumstances, the principle stated by Lord Wright M.R. in *In re a Debtor*,[9] to which my Lord has already referred, applies with full force. In the circumstances, I have come to the conclusion that it is impossible for us to do other than apply the law, and give effect to the substantive rights of the appellant, as they stood at the date of the hearing before the Divisional Court. For these reasons, I agree that both the appeal and the cross-notice should be dismissed.

HARMAN L.J. I agree. I desire to reserve my opinion as to what exactly may be meant by the words " institution of legal " proceedings." I am of opinion that even the narrowest view would be enough to constitute the plaintiff's actions vexatious litigation. There have been two writs and three originating summonses which are clearly, on any view, the institution of proceedings. They are all part of the vendetta by means of which for 20 years this man has harassed the company, its liquidator, its

[9] [1936] 1 Ch. 237, 242–243.

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principal shareholder, and his personal representative. The Divisional Court took a broad view of the matter, and I think they were perfectly right to take such a view.

On the other point, I do not feel that Lord Wright's decision is very satisfactory, because there are always two sides to a question. It seems to me that in *Quilter* v. *Mapleson* [10]—Sir George Jessel's case—it was the landlord who had a vested right and who lost it by a subsequent judgment: it is hard to see why it was more procedural than Lord Wright's case [*In re a Debtor* [11]]. All the same, I do not think it would be right for me to say that I should not have followed Lord Wright's opinion in a matter of this kind. I, therefore, agree with my brethren on both points.

Appeal and cross-appeal dismissed.
Leave to appeal to the House of Lords refused to both parties.

Solicitors: *Official Solicitor; Treasury Solicitor.*

M. M. H.

[10] (1882) 9 Q.B.D. 672. [11] [1936] 1 Ch. 237.

[HOUSE OF LORDS.]

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BELFAST CORPORATION . . . . . APPELLANTS;

AND

O. D. CARS LTD. . . . . RESPONDENTS.

Northern Ireland — Statute — Validity — "Take any property without "compensation"—Meaning of "take"—Meaning of "property"—Town and country planning restrictions on development—Injurious affection—Claim for compensation—Statutory provision excluding compensation—Government of Ireland Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 67), *s.* 5 (1)—*Ministries of Northern Ireland Act* (*Northern Ireland*), 1921 (12 *Geo.* 5, *c.* 6), *s.* 3 (1)—*Planning and Housing Act* (*Northern Ireland*), 1931 (21 *&* 22 *Geo.* 5, *c.* 12), *s.* 10 (2)—*Planning* (*Interim Development*) *Act* (*Northern Ireland*), 1944 (8 *&* 9 *Geo.* 6, *c.* 3), *s.* 6 (4).

Conflict of Laws—Confiscatory or political legislation—Town and country planning restrictions—Whether confiscatory—"Take . . . property "without compensation"—Validity of Act of Northern Ireland.

Evidence—Minister, by—Certificate—Whether Ministry considers restriction reasonable — Appropriate evidence — Ministries of Northern Ireland Act (*Northern Ireland*), 1921, *s.* 3 (1).

By section 5 (1) of the Government of Ireland Act, 1920: "In "the exercise of their power to make laws neither the Parliament "of Southern Ireland nor the Parliament of Northern Ireland shall "make a law so as either directly or indirectly to establish or endow "any religion, or prohibit or restrict the free exercise thereof, or

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

"give a preference, privilege, or advantage, or impose any disability "or disadvantage, on account of religious belief . . . or take any "property without compensation."

By section 10 (2) of the Planning and Housing Act (Northern Ireland), 1931: "Property shall not be deemed to be injuriously "affected by reason of the coming into operation of any provisions "inserted in a planning scheme, which prescribe the space about "buildings or limit the number of buildings to be erected, or pre-"scribe the height or character or user of buildings . . . and which "the Ministry, having regard to the nature and situation of the "land affected by the provisions, considers reasonable for the "purpose."

By section 6 (4) of the Planning (Interim Development) Act (Northern Ireland), 1944: "Where (*a*) an interim development "application is refused . . . then, the applicant . . . shall, if he "makes a claim for the purpose be entitled to obtain from the "local authority such compensation in respect of any injurious "affection of his property . . . as he would be entitled to obtain "under the [Act of 1931] if such injurious affection had been "suffered as a consequence of the coming into operation of a "planning scheme . . ."

A local authority in Northern Ireland refused an interim development application under section 2 of the Act of 1944 made by a company for permission to erect factories and shops on its land. The ground of the refusal was that the height and character of the proposed buildings would not be in accordance with the requirements of the site, which was zoned as residential. Consequently, the company claimed compensation for injurious affection:—

Held, (1) that section 6 (4) of the Act of 1944 incorporated section 10 (2) of the Act of 1931 (post, p. 153); (2) that the words "take any property without compensation" in section 5 (1) of the Act of 1920 were not confined to the property of religious bodies, and also that they were governed by the words "either directly or in-"directly"; (3) that the rights which in the aggregate constituted ownership of property could not themselves be called "property," and so the right to use property in a particular way was not itself property; accordingly, the restrictions imposed by these planning Acts could not be described as a purported authorisation to "take "any property without compensation" in contravention of section 5 (2) of the Act of 1920 (post, pp. 154, 161); (4) that, therefore, the company was not entitled to compensation.

Held, further, that in order to satisfy the requirements of section 10 (2) of the Act of 1931 as to proof that the Ministry considered that the restrictions imposed were reasonable, a certificate shall be issued under the Minister's seal and duly authenticated; such a certificate, when tendered, would prove itself under section 3 (1) of the Ministries of Northern Ireland Act, 1921. It was not satisfactory that oral evidence should be given by an official speaking merely on instructions without having any personal knowledge of the matter (post, pp. 158, 163).

Decision of the Court of Appeal in Northern Ireland reversed.

APPEAL from the Court of Appeal in Northern Ireland (Lord MacDermott C.J. and Black J.).

This was an appeal from an order of the Court of Appeal in Northern Ireland dated March 26, 1959, whereby the court allowed the appeal of the respondent company, O. D. Cars Ltd., from the order of the High Court of Justice in Northern Ireland,

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Queen's Bench Division, filed on June 26, 1957, and made on the hearing of a case stated by an arbitrator pursuant to the Acquisition of Land (Assessment of Compensation) Act, 1919, wherein the present respondents were claimants and the present appellants, the Belfast Corporation, were the respondents.

The facts are stated in the opinion of Viscount Simonds.

F. A. L. Harrison Q.C. and *Maurice Gibson Q.C.* (both of the Bar of Northern Ireland) and *James McQuitty* (of the English Bar and the Bar of Northern Ireland) for the appellant corporation.

W. F. Patton Q.C., *R. L. E. Lowry Q.C.* and *R. W. B. McConnell* (all of the Bar of Northern Ireland) for the respondent company.

W. B. Maginess Q.C., *Attorney-General for Northern Ireland*, *C. A. Nicholson Q.C.* and *J. K. Pringle* (all of the Bar of Northern Ireland) as amici curiae.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Croft* v. *Dunphy* [1]; *Edwards* v. *Attorney-General for Canada* [2]; *Caledonian Railway Co.* v. *Walker's Trustees* [3]; *Northern Ireland Road Transport Board* v. *Benson* [4]; *Ulster Transport Authority* v. *James Brown & Sons Ltd.* [5]; *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales* [6]; *France Fenwick & Co. Ltd* v. *The King* [7]; *Robb* v. *Electricity Board of Northern Ireland* [8]; *Govindan Sellappah Nayar Kodakan Pillai* v. *Punchi Banda Mudanayake* [9]; *Chiranjit Lal Chowdhury* v. *Union of India* [10]; *Russell* v. *Reg.* [11]; *Australasian United Steam Navigation Co. Ltd.* v. *Shipping Control Board* [12]; *Bank of New South Wales* v. *The Commonwealth* [13]; *Commonwealth* v. *Alger* [14]; *Mugler* v. *Kansas* [15]; *Northern Transportation Co.* v. *Chicago* [16]; *Walsh* v. *Swasey* [17]; *Village of Euclid* v. *Ambler Realty Co.* [18]; *United States* v. *Causby* [19]; *Riel* v. *The Queen* [20]; *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [21]; *In re an Arbitration between Ellis and Ruislip–Northwood Urban District Council* [22]; *Trustees of the Roman Catholic Separate Schools for Ottawa* v. *Ottawa Corporation* [23]; *Gough's Garages Ltd.* v. *Pugsley* [24]; *Attorney-General* v.

[1] [1933] A.C. 156; 48 T.L.R. 652.
[2] [1930] A.C. 124; 46 T.L.R. 4.
[3] (1882) 7 App.Cas. 259.
[4] [1940] N.I. 133.
[5] [1953] N.I. 79.
[6] [1955] A.C. 241; [1954] 3 W.L.R. 824; [1954] 3 All E.R. 607.
[7] [1927] 1 K.B. 458; 43 T.L.R. 18.
[8] [1937] N.I. 103.
[9] [1953] A.C. 514; [1953] 2 W.L.R. 1142.
[10] [1950] S.C.R. 869.
[11] (1882) 7 App.Cas. 829.
[12] (1945) 71 C.L.R. 508.
[13] (1948) 76 C.L.R. 1.
[14] (1851) 7 Cush. 53.
[15] (1887) 123 U.S. 623.
[16] (1879) 99 U.S. 635.
[17] (1908) 214 U.S. 91.
[18] (1926) 272 U.S. 365.
[19] (1946) 328 U.S. 256.
[20] (1885) 10 App.Cas. 675.
[21] [1920] A.C. 508; 36 T.L.R. 600.
[22] [1920] 1 K.B. 343; 35 T.L.R. 673.
[23] [1917] A.C. 76; 33 T.L.R. 41.
[24] [1930] 1 K.B. 615; 46 T.L.R. 283.

Horner [25]; *London and North Western Railway Co.* v. *Evans* [26]; *Newcastle Breweries Ltd.* v. *Regem* [27]; *Bond* v. *Nottingham Corporation* [28]; *Brophy* v. *Attorney-General of Manitoba* [29]; *United States* v. *General Motors Corporation* [30]; *Springer* v. *Government of the Philippine Islands* [31]; and *New York State* v. *Van de Carr*.[32]

Their Lordships took time for consideration.

Dec. 14. VISCOUNT SIMONDS. My Lords, the facts in this case, which give rise to some difficult questions, can be shortly stated.

The respondents, a limited company registered in Belfast, own in fee farm certain land at Alexandra Park, Belfast. On buildings erected on that land, they have for many years carried on the business of garage proprietors and general motor engineers. On February 9, 1954, they made an application to the appellants, the Belfast Corporation, for permission to erect on the land further industrial and commercial premises, viz., lock-up shops on Antrim Road and factories or warehouses on the back portion. The application was made pursuant to the provisions of section 2 of the Planning (Interim Development) Act (Northern Ireland), 1944, to the appellants as the interim development authority. Such an application is known as an interim development application. I will refer later to this Act.

On March 2, 1954, the appellants refused the application on the grounds (a) as to the lock-up shops, that the height and character of the proposed development would not be in accordance with their requirements for the site, namely, development to be in shops with dwellings over, minimum height 25 feet, and (b) as to the industrial or commercial use of remainder of the site, that the site was zoned as residential and that the character and user of the proposed development would be incompatible with such zoning.

This refusal led to a claim for compensation for injurious affection under the Act which, in accordance with its provisions, was referred to the official arbitrator appointed thereunder. Before I narrate the proceedings which led to this appeal, I must refer to the relevant statutory provisions of the Planning and Housing Act (Northern Ireland), 1931, and the Planning (Interim Development) Act (Northern Ireland), 1944, which I will call the 1931 Act and the 1944 Act. The former Act, after providing for the making of planning schemes to be prepared and adopted by local authorities, and to be approved by the Minister, and sundry other relevant matters, by section 9 enacted that any person whose property is injuriously affected by the coming into

[25] (1884) 14 Q.B.D. 245; 1 T.L.R. 28.
[26] [1893] 1 Ch. 16; 9 T.L.R. 50.
[27] [1920] 1 K.B. 854; 36 T.L.R. 276.
[28] [1940] Ch. 429; 56 T.L.R. 475; [1940] 2 All E.R. 12.
[29] [1895] A.C. 202; 11 T.L.R. 198.
[30] (1945) 323 U.S. 373.
[31] (1927) 277 U.S. 189.
[32] (1905) 199 U.S. 552.

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operation of a planning scheme shall, if he makes a claim for the purpose within the time therein mentioned, be entitled to obtain compensation in respect thereof from the responsible authority. But this right is subject to the limitation contained in section 10, which provides by subsection (1) that where property is alleged to be injuriously affected by reason of any provisions contained in a planning scheme, no compensation shall be paid in respect thereof if or so far as the provisions are also contained in any public, general, or local Act in force in the area or otherwise as therein mentioned, and by subsection (2) (which is the subsection relevant to this appeal and must be set out verbatim) as follows: [His Lordship read section 10 (2) and continued:]

Development under the Act of 1931 made slow progress and was in due course supplemented by the Act of 1944. Section 1 (1) of that Act deems all land which was not the subject of a planning scheme under the earlier Act, or of a resolution to prepare and adopt such a scheme to be subject to a resolution to prepare a planning scheme under the Act. Section 2 directs the Ministry to make a general interim development order with respect to land to which such a resolution applies, and provides that such an order may empower any local authority specified therein to permit the development of land in accordance with the provisions thereof. In accordance with the duty thus placed upon it the Ministry on July 10, 1944, made the Planning (General Interim Development) Order (Northern Ireland), 1944 (S.R. & O. 1944, No. 58), which empowered the appellants to grant permission for the development of land within the county borough of Belfast. I need refer no more to the Act of 1944 except to set out the section under which, as I have already said, the respondents made the claim for compensation now under review. That section provided by subsection (4), so far as material, as follows: [His Lordship read section 6 (4), and continued:] The claim for compensation having been made and refused upon the grounds that I have stated, a number of questions were raised before the arbitrator which led him without proceeding to an award to state a consultative case for the opinion of the court in which he posed two questions as follows: "(1) Whether I am "entitled to award compensation to the claimant for injurious "affection of the said land. (2) Whether the evidence of Mr. "A. P. Fitzgerald is sufficient to satisfy the requirements of "section 10 (2) of the Planning and Housing Act (Northern "Ireland), 1931."

The second question must appear at the present stage of my narrative somewhat cryptic. It is, in my opinion, of a formal character, and I will defer consideration of it until I have disposed of the important matters that arise under the first question. These are, first, a question arising on the construction of the Act of 1944, viz., whether section 6 (4) of that Act incorporates a reference to section 10 (2) of the Act of 1931 as well as to the compensatory provisions of section 9, and secondly, whether

section 10 (2) is a valid enactment having regard to the provisions of section 5 of the Government of Ireland Act, 1920. The far-reaching importance of the second question is obvious.

My Lords, upon the first of these questions I entertain no doubt, and I cannot state the answer to it in a manner more clear and comprehensive than the learned Lord Chief Justice has done. Section 6 (4) of the later Act does incorporate section 10 (2) of the earlier Act. I will not occupy your Lordships' time by further reference to it.

Upon the second question, viz., the constitutional validity of section 10 (2) of the Act of 1931, I must say something more. For, though I agree with much that the Lord Chief Justice has said on this topic, there comes a point at which I must with great respect diverge from him.

The issue turns on the true meaning and effect of section 5 of the Government of Ireland Act, 1920. Subsection (1) of that section is as follows: "In the exercise of their power to make "laws under this Act neither the Parliament of Southern Ireland "nor the Parliament of Northern Ireland shall make a law so as "either directly or indirectly to establish or endow any religion, "or prohibit or restrict the free exercise thereof, or give a "preference, privilege, or advantage, or impose any disability or "disadvantage, on account of religious belief or religious or "ecclesiastical status, or make any religious belief or religious "ceremony a condition of the validity of any marriage or affect pre-"judicially the right of any child to attend a school receiving "public money without attending the religious instruction at that "school, or alter the constitution of any religious body except "where the alteration is approved on behalf of the religious body "by the governing body thereof, or divert from any religious "denomination the fabric of cathedral churches, or, except for "the purpose of roads, railways, lighting, water, or drainage "works, or other works of public utility upon payment of com-"pensation, any other property, or take any property without "compensation.

"Any law in contravention of the restrictions imposed by this "subsection shall, so far as it contravenes those restrictions, be "void."

It was first urged on behalf of the appellants that the last five words of the first paragraph of this subsection referred only to the property of religious bodies or institutions. This point was decided against them 20 years ago in *O'Neill* v. *Northern Ireland Road Transport Board*,[1] and I do not doubt that that case was rightly decided. An argument founded on the historical genesis of these words, which was in any case of little weight, could not prevail against their plain meaning.

Next, I must refer to an argument (though I am not clear which side could be assisted by it) that the words "either directly

[1] [1938] N.I. 104.

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" or indirectly " do not govern the last five words. But grammatically they clearly do, and I see no reason for not allowing grammatical laws to prevail. In any view it is of no importance to this case.

I come then to the substantial questions: what is the meaning of the word " take " ? what is the meaning of the word " property " ? what is the scope of the phrase " take any property " without compensation " ? My Lords, I would declare my indebtedness not only to the counsel for the parties but also to the Attorney-General for Northern Ireland and those assisting him for the help that they have given the House in the consideration of these questions. With their aid your Lordships have explored the federal constitutions of the United States of America, of Canada and of Australia, in which are to be found words similar, but perhaps not very similar, to the words now under review. But, my Lords, I doubt whether at the end of that journey the path is brightly illuminated.

I should like, however, before I venture upon it, to consider for a moment the simple language of the constitutional Act with which we are concerned. I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction upon the user of property by its owner that that authority had " taken " that owner's " property." He would not make any fine distinction between " take," " take " over " or " take away." He would agree that " property " is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights which in the aggregate constituted ownership of property could itself and by itself aptly be called " property " and to come to the instant case, he would deny that the right to use property in a particular way was itself property, and that the restriction or denial of that right by a local authority was a " taking," " taking " away " or " taking over " of " property."

I do not seek to qualify in any way what has been said in such cases as *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co. Ltd.*[2] I have no right to do so. It is, no doubt, the law that the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms. But this principle, upon which learned counsel for the respondents so vigorously insisted, seems to me to have no bearing upon the question what is the meaning of the phrase " take property without compensation " in a constitutional instrument such as the Government of Ireland Act. If, indeed, I must have recourse to any broad principle of law for the construction of these few simple words, I should remind myself that from the earliest times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only

[2] [1919] A.C. 744; 35 T.L.R. 552.

by the common law maxim sic utere tuo ut alienum non laedas, but by positive enactments limiting his user or even imposing burdens upon him. I do not therefore approach this question of construction with any predisposition to enlarge the scope of the vital words. For, my Lords, I would here point out that, if such restrictions as the Acts of 1931 and 1944 impose cannot be enforced without the payment of compensation, the practical effect must be to deprive the Parliament of Northern Ireland of the power to legislate, not only in this particular field in a manner recognised as necessary to its proper fulfilment in Great Britain, but in numerous other fields also in which it has been widely realised that the rights of the individual must be subordinate to the general interest. Learned counsel for the respondents were constrained to admit that their success in this argument might lead to the invalidation of numerous Acts whose validity has been hitherto unchallenged. It would not be easy to reconcile this result with the power accorded to the Parliament by section 4 of the Act to make laws for the peace, order and good government of Northern Ireland. It is right, however, that in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, as it appears to me, a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents. The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution from the manner in which great judges among the English-speaking peoples overseas have dealt with kindred problems. I do not think that any better examples can be found than in the passages cited by the Lord Chief Justice from the judgments of Holmes J. and Brandeis J. Thus, when Brandeis J. says in the passage quoted by the Lord Chief Justice from his judgment in *Pennsylvania Coal Co.* v. *Mahon*[3]: "Every restriction upon the use of property imposed "in the exercise of the police power deprives the owner of some "right theretofore enjoyed, and is, in that sense, an abridgment "by the State of rights in property without making compensa-"tion. But restriction imposed to protect the public health, "safety or morals from dangers threatened is not a taking. The "restriction here in question is merely the prohibition of a noxious "use," that very learned judge indicated in clear terms the distinction which should guide us in determining whether or not legislation which diminishes the owner's free enjoyment of his own property is a "taking" of that property. It is clear that such a diminution of rights can be affected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed.

I will say only one thing more about the American cases. The

[3] (1922) 260 U.S. 393, 417.

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day may come when it will be necessary to consider the relevance to the constitution of Northern Ireland of the observation of Holmes J. in the case already cited [4]: "The general rule "at least is, that, while property may be regulated to a certain "extent, if regulation goes too far it will be recognised as a "taking." If the question is one of degree, I am clearly of opinion that the day did not arrive with section 10 (2) of the Act of 1931.

My Lords, the distinction drawn between "regulating" and "taking" of "regulatory" and "confiscatory" will at once bring to mind the controversy to which placitum (xxxi) of section 51 of the Australian Constitution has given rise. Upon decisions of the High Court of Australia on this placitum the respondents strongly relied. At one stage learned counsel said he was prepared to rest his case on the *Minister of State for the Army* v. *Dalziel*,[5] the facts in which case were widely different from those we have now to consider. No doubt the language there under review "the acquisition of property on "just terms" was not dissimilar to that in our constitutional Act, and these words have led to much the same controversy as have the Fifth and Fourteenth Amendments in the United States of America. Nor do I doubt that the same considerations are relevant to the determination of their meaning. Nor would I cast the least doubt upon the decision in *Dalziel's* case,[5] or anything that was said by the learned judges who decided it. But, having said so much, and fully recognising the distinction that may exist between measures that are regulatory and measures that are confiscatory, and that a measure which is ex facie regulatory may in substance be confiscatory, I must add that, if, as I suppose it is, the question is one of degree and the dividing line is difficult to draw, yet I have no doubt that such an enactment as the Act of 1931, and in particular section 10 (2), falls well on the regulatory side of it. The respondents get no help from Australia.

I have used the expression "in substance confiscatory" and that takes me to Canada. In the consideration of the constitutional validity of legislation of the Federal or (as the case might be) of Provincial Parliaments the expression "pith and sub-"stance" came to be commonly used in order to determine whether an enactment was truly within the legislative power of the one Parliament or the other under the British North America Act. It is an expression that has had its uses not only in Canada—see *Gallagher* v. *Lynn*.[6] But I think that it can give little assistance to your Lordships in considering the meaning of our five words, to which I now return. For there is one aspect of the case which deserves particular attention, since by it the Lord Chief Justice was influenced to consider the section invalid. Having held (and, as I think, rightly held) that much that is entirely reasonable may be done under the powers conferred by

[4] 260 U.S. 393, 415.
[5] (1944) 68 C.L.R. 261.
[6] [1937] A.C. 863; 53 T.L.R. 929; [1937] 3 All E.R. 593.

section 10 (2), and that those powers are capable of being exercised reasonably, the learned judge says: "But, if such "powers are capable of being exercised reasonably, it is impos- "sible to say that they may not also be exercised unreasonably." And after giving examples of unreasonable exercise he concludes: "If, then, a planning authority exercises any of the powers to "which section 10 (2) relates in a manner which fails to satisfy "what I have called the second test by being unreasonable and "thereby causes loss or damage which constitutes a taking and "to meet which no right to compensation is available, there will, "in my opinion, be a breach of section 5 (1)" [i.e., of the Government of Ireland Act]. My Lords, it appears to me that the short answer to this contention (and I hope that its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. It is not for the "planning authority" but for the Ministry to determine whether a proposed exercise of the powers is reasonable. That is an administrative duty, to be exercised not arbitrarily but for the purposes of the Act. If it is not so exercised, it is open to challenge, and there is no need for express provision for its challenge in the statute. If I understand the learned Lord Chief Justice, he would not consider the section invalid if the duty of deciding upon the reasonableness of the exercise of a power was given not to the Ministry but to the judiciary. But I find it difficult to suppose it to be the purpose or theory of any constitution that a purely administrative function of this character should be given to the judiciary rather than to the executive. Matters of policy which are determined by the Government and carried out in detail by the aid of an experienced administrative staff cannot be confided to the judiciary. Their function begins if and when for any reason administrative action lays itself open to challenge. The measure itself is not open to such challenge unless it is plainly and on the face of it within the prohibition. That condition is not satisfied merely because the powers it confers upon the executive may be exercised unreasonably. I am therefore of opinion that the ground upon which specifically the Lord Chief Justice held the section to be invalid was not sound.

I would answer the first question posed by the arbitrator: No, provided that the arbitrator is satisfied by proper evidence that the Ministry considers the provisions reasonable.

I must now return to the second question upon which the arbitrator asked the opinion of the court, viz., whether the evidence of Mr. A. P. Fitzgerald was sufficient to satisfy the requirements of the relevant section, i.e., that "the Ministry "having regard to the nature and character of the land affected "by the provisions considers reasonable for the purpose" the provisions inserted in the planning scheme to which the sub-section refers.

The relevant facts appear to be that a Mr. Ronald Green,

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assistant secretary to the Ministry of Health and Local Government, by letter of January 3, 1955, told the solicitor of the appellants that Mr. A. P. Fitzgerald would attend the hearing of the claim before the arbitrator and would be prepared to state that "the decision on the application of O.D. Cars Ltd. made by the "corporation . . . was reasonable and was based on considerations "which, if included in a scheme formulated under the above-"mentioned Acts, would be approved by the Ministry."

Mr. Fitzgerald duly attended the hearing. He proved that he was authorised by the Ministry to give evidence on its behalf, that he had no personal knowledge of the facts of the case, that he was not present at discussions which he said had taken place at the Ministry with regard to the matter, but that he was authorised by the Ministry to state and did state that as a result of such discussions the Ministry considered that the decision of the appellants on the application of the respondents was reasonable, and was based on considerations which, if included in a scheme formulated under the relevant Acts, would be approved by the Ministry. The question is whether this evidence satisfied the statutory requirement. I think that there are really two questions here, one of substance, the other of form. Upon the question of substance I find no legitimate ground of criticism. It appears to me that, since section 6 (4) of the Act of 1944 is designed to meet precisely the case where no planning scheme has yet been prepared and submitted for approval, the Ministry satisfies the conditions of section 10 (2) of the earlier Act if it considers provisions to be reasonable which it would consider reasonable having regard to the nature and situation of the land thereby affected if a scheme had been made embracing that land. It is not possible to be more specific than the situation envisaged by the later Act admits. The question of form, however, remains. In a matter of this importance strict adherence to form is requisite. It is not, to my mind, satisfactory that, if oral evidence is necessary, it should be given by a witness who, admittedly knowing nothing about it, speaks on instructions. I should therefore, without meaning any disrespect to Mr. Fitzgerald, say that his evidence should be disregarded. But this does not end the matter. I do not think that it was necessary or, indeed, proper for the appellants to prove that the Ministry thought the provisions in question reasonable by the introduction of an officer of the Ministry to give oral evidence. It is not a matter for cross-examination of this or that official of the Ministry or of the Minister himself. Nevertheless, the statutory fact must be strictly proved, and it appears to me that the proper course is that a certificate should be issued to the required effect under the Minister's seal and duly authenticated. Such a certificate when tendered would prove itself under section 3 (1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921.

I answer the second question posed by the arbitrator in the

negative. With these answers the case will go back to him for his further determination and answer.

My noble and learned friend, Lord Cohen, who is unable to be here this morning, has asked me to say that he concurs in the opinion that I have just given, and with that which my noble and learned friend, Lord Radcliffe, will shortly give.

LORD RADCLIFFE. My Lords, I am in full agreement with what has been said by my noble and learned friend on the Woolsack. That being so, I do not think that it would serve any useful purpose if I travelled again over the same ground.

It is no disrespect to the learning and weight of the judgment of the Lord Chief Justice in the Court of Appeal in Northern Ireland if I say that my principal reason for disagreeing with his conclusion is that I do not believe that the present case raises the issues that he has dealt with quite in the form in which he considers them. The fundamental question, as I see it, is whether the prohibition of taking any property without compensation contained in section 5 (1) of the Government of Ireland Act, 1920, bars the enactment by law of such restrictions on the user or development of property as are referred to in section 10 (2) of the Planning and Housing Act (Northern Ireland), 1931, unless compensation is provided. In my opinion, it does not, because it seems to me that the word "taking" when used in this context does not extend to cover the act of imposing restrictions of that kind.

I do not see how you can give a meaning to this phrase, "taking without compensation," except by reference to the general treatment of the subject in the law of England and Ireland before 1920. A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking." Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both.

Side by side with this, however, and developing with increasing

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range and authority during the second half of the nineteenth century came the great movement for the regulation of life in cities and towns in the interests of public health and amenity. It is not an adequate description of the powers involved, so far at any rate as the United Kingdom is concerned, to speak of them as "police powers." They went far beyond that. Their chief sphere was in the delegated legislation conceded to local authorities, though in some cases they arose from the direct legislation of Parliament itself. Achieved by one means or the other, there is no doubt at all that the effect of them was to impose obligations and restrictions upon the owner of town land which impaired his right of development, prohibited or restricted his rights of user and, in some cases, imposed monetary charges upon him or compelled him to expend money on altering his property. Generally speaking, though not without exception, these obligations and restrictions were treated as not requiring compensation, though, of course, in a sense they expropriated certain rights of property.

A perusal of the Public Health Act, 1875, will be sufficient to make the point. It shows how extensive interference could be, even at that date. Only in a few special cases is compensation provided for the consequence of interference. No one, so far as I know, spoke of this as a "taking of property" or treated the general principle of "no taking without compensation" as applicable to the case. For instance, by-laws, which have to be "reasonable," i.e., not manifestly unjust, if the courts are to sustain them, were upheld, even though seriously restricting the user of property without affording any compensation for the restriction (see *Slattery* v. *Naylor*,[7] a case from Australia).

When town planning legislation came in eo nomine in 1909 the emphasis had no doubt shifted from considerations of public health to the wider and more debatable ground of public amenity. It may possibly have been for this reason, I do not know, that the Act of 1909 included a comprehensive, though not exhaustive, "injurious affection" section, the effect of which was to give property owners whose rights were interfered with in the cause of town planning a right to compensation for any damage that they suffered, subject to counterclaims for betterment and certain exclusions. This "injurious affection" embraced an altogether wider category of injury than the "injurious affection" that had been the subject of compensation under the Lands Clauses Act, 1845. In fact, as we know, section 59 (2) of the Housing, Town Planning, etc., Act, 1909 (which did not itself extend to Ireland), excluded compensation for injurious affection in respect of several of the same heads of restriction as those which are found in section 10 (2) of the 1931 Act in Northern Ireland. I do not think that this last circumstance has any bearing on the present issue: the Westminster legislature with its full sovereignty might be able to exclude compensation in cases where the Northern

[7] (1888) 13 App.Cas. 446; 4 T.L.R. 426.

Ireland Parliament under its constitutional limitations could not. What is important, I think, is to recognise that though interference with rights of development and user had come to be a recognised element of the regulation and planning of towns in the interest of public health and amenity, the consequent control, impairment or diminution of those rights was not treated as a "taking" of property nor, when compensation was provided, was it provided on the basis that property or property rights had been "taken," but on the basis that property, itself retained, had been injuriously affected.

These considerations lead me to the following conclusions: (1) The taking of property referred to in section 5 (1) of the Government of Ireland Act, 1920, ought not to be treated as applying to the imposition of restrictions on user and development under town-planning powers. (2) It is within the competence of the Parliament of Northern Ireland to decide on what occasions and to what extent compensation is to be afforded for injury suffered under such restrictions. (3) Section 10 (2) of the Act of 1931 is accordingly a valid enactment.

Viewing the matter from this aspect, I do not think that the requirement that compensation can only be excluded if the Ministry concerned passes the restrictions as reasonable for the purpose raises any relevant issue. If compensation could validly be excluded anyway in such cases, the legislative power cannot have been less validly exercised because the town-planning authority's liberty to exclude compensation has been limited by such a provision. It may be in itself a very salutary limitation: but that is not a matter for the court.

It follows, too, that the question whether the provision "ousts "the jurisdiction of the court" in any relevant sense—a question to which the learned Lord Chief Justice gave much attention in in the later passages of his judgment, and upon which he ultimately founded his decision of the appeal—does not, in my opinion, arise.

I do not imply by what I have said that I regard it as out of the question that on a particular occasion there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a "taking" of the land affected for the benefit of the public. It is not very easy to imagine such a restriction being imposed by a responsible authority or surviving the test of the Ministry's approval, the more so as the Act deals separately with open spaces as a subject of acquisition, not without compensation. But given that such a case might hypothetically occur, the question for us is whether that possibility in itself is sufficient to invalidate section 10 (2), the natural subject of which is restrictions and not "takings." I do not think that it is. It seems to me the wrong way to treat the constitutional provision. To my mind, it does more justice to its intent if a restriction which is in substance a taking, should one ever occur, is attacked ad hoc as not within the true meaning and scope of

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section 10 (2) than that the whole subsection should be thrown on the scrap-heap as constitutionally an outlaw.

The second question raised by the official arbitrator's case stated relates to formalities only, except so far as it may incidentally throw light on the question whether section 10 (2) of the Planning and Housing Act (Northern Ireland), 1931, is introduced into interim development by section 6 (4) of the Planning (Interim Development) Act (Northern Ireland), 1944. The case stated is accepted by both sides as a consultative case: therefore, if it is right to conclude that the evidence given by Mr. A. P. Fitzgerald is insufficient to prove the consent of the Ministry of Health and Local Government, the hearing before the arbitrator must be continued and the necessary evidence called for or tendered.

This question of the form of evidence required is not an easy one, but, on the whole, I take the same view as that which has been taken in the Divisional Court and the Court of Appeal in Northern Ireland on this issue, if not for quite the same reasons.

What has to be before the tribunal, if effect is to be given to section 10 (2), is the view or judgment of " the Ministry " that certain planning provisions are reasonable for the purpose. The Ministry itself is an impersonal legal entity, and it is only by some use of metaphor that such mental processes as views can be attributed to it. The question is not how they can be or why they have been formed, but how they can be proved so that a tribunal can act upon them. For this purpose I do not think that one should look for the Minister himself or some senior official to attend in person so as to satisfy the court by oral testimony that " the Ministry " in fact holds the required opinion. Indeed, I should not regard cross-examination as open on the issue whether the Ministry should hold such an opinion, given that it declares that it does. The natural and, I think, the proper way to record the view of the Ministry in such a context is to bring into existence a certificate over the Ministry's proper seal, authenticated as the statute requires, and to tender that before the arbitrator. If so tendered, it will prove itself by virtue of section 3 (1) of the Ministries of Northern Ireland Act (Northern Ireland), 1921, " unless the contrary is shown."

It was one aspect of the respondent's argument that until a planning scheme in the proper sense had come into operation no such Ministry view as that required by section 10 (2) of the Act of 1931 could be formed or expressed. I do not agree with this, if one once arrives at the conclusion, as I believe that all your Lordships do, that section 6 (4) of the Act of 1944 necessarily involves the hypothesis that the provisions of section 10 (2) are adapted to the situation where a projected development has been restricted under interim development control. A certificate given under those conditions in the present case would be to the effect that the Ministry considered that the provisions prescribing height, character and user of buildings and sites, which by virtue of the

Planning Acts (Northern Ireland), 1931 and 1944, and the Planning (General Interim Development) Order (Northern Ireland), 1944, and the refusal by the appellants of the respondent's application to proceed with development had been imposed upon the respondent's land, were, having regard to the nature and situation of the land affected, reasonable for the purpose.

I do not think that the evidence actually tendered by Mr. Fitzgerald ought to be treated as adequate to prove the Ministry's view. It is true that he was introduced by a letter from Mr. Green, an assistant secretary: but the letter itself is neither a certificate nor evidence of the essential fact to be proved, since its purport was to say that the necessary evidence would be afforded by Mr. Fitzgerald when he appeared. What Mr. Fitzgerald said, when he did appear, was to the effect that he had no personal knowledge of the facts of the case, and had taken no part in the Ministry's discussions, but was sent to report what the Ministry's view was. No one can be expected to be altogether satisfied with this. His evidence of the relevant fact is only hearsay, and his own status is reduced to that of a messenger. I do not mean to imply any disrespect to him in the situation in which he was placed, but it seems to me that, if his Ministry does wish to communicate its opinion through a messenger, he ought to be allowed to carry with him a formal warrant of its view over the proper seal.

LORD KEITH OF AVONHOLM. My Lords, I agree.

Appeal allowed.

[It was ordered that the respondents should pay to the appellants three-quarters of their costs in the courts below, and that there should be no order as to costs in this House.]

Solicitors: *Leer & Co. for John Young, Belfast; Simpson, Palmer & Winder for N. & F. Tugham & Walmsley, Belfast; Linklaters & Paines for the Chief Crown Solicitor, Belfast.*

F. C.

[COURT OF CRIMINAL APPEAL.]

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Lord Parker C.J., Hilbery and Pearson JJ.

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Criminal Law—Corruption—Public body—Intention—Relevance of motive—Meaning of "corruptly"—Public Bodies Corrupt Practices Act, 1889 (52 & 53 *Vict. c.* 69), *s.* 1.

The appellant was charged with corruption contrary to section 1 (2) of the Public Bodies Corrupt Practices Act, 1889,[1] in that he corruptly offered a gift to the mayor of the Borough of Castleford in order that the mayor should use his influence in favour of the appellant with the council of the borough. At his trial the appellant admitted that the offer of a gift was made to the mayor but contended that it was not a genuine offer and was made for the purpose of exposing corruption which he, the appellant, thought existed at the time; that if the mayor had accepted the offer he would then have exposed him, and that he did not in fact want any favour to be shown to him. He was convicted and appealed against his conviction on the ground that the judge had misdirected the jury by stating that the motive for making the offer was irrelevant, and that the word "corruptly" in the section meant "with the intention to corrupt the person to whom "the offer was made":—

Held, (1) that the judge's direction was correct and that the intention of the appellant to offer a gift in order to get the mayor's agreement in principle to the transaction was sufficient to support the conviction.

(2) That the word "corruptly" as used in the Act denoted that the person making the offer did so deliberately and with the intention that the person to whom it was addressed should enter into a corrupt bargain.

Dictum of Willes J. in *Cooper* v. *Slade* (1857) 6 H.L.Cas. 746, 773 applied.

APPEAL against conviction.

The appellant, John Smith, together with one Leslie Lockyer, was indicted at Leeds Assizes on July 22, 1959, for corruption contrary to section 1 (2) of the Public Bodies Corrupt Practices Act, 1889, in that he on January 27, 1959, corruptly offered a gift, namely, a part of the sum of £500, to Adam James, mayor and alderman of the Borough of Castleford, as an inducement to him to use his influence in the consideration of the sale of a portion of land by the council of the borough to the appellant.

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

[1] Public Bodies Corrupt Practices Act, 1889, s. 1 (2): "Every person "who shall by himself or by or in "conjunction with any other person "corruptly give, promise, or offer any "gift, loan, fee, reward, or advan- "tage whatsoever to any person, "whether for the benefit of that per- "son or of another person, as an "inducement to or reward for or "otherwise on account of any mem- "ber, officer, or servant of any public "body as in this Act defined, doing "or forbearing to do anything in "respect of any matter or transaction "whatsoever, actual or proposed, in "which such public body as afore- "said is concerned, shall be guilty "of a misdemeanour."

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Both the appellant and Lockyer were convicted and sentenced to 12 months' imprisonment. By leave of the court Smith appealed against his conviction on the ground that the gift was not corruptly offered by him, because although he admittedly intended that it should be offered to the mayor or some councillor as a bribe, he never intended to carry the matter any further; that his intention was to get the mayor or other councillor to accept the idea that he, the appellant, would pay money in exchange for favours, and that then he would be in a position to expose the mayor or councillor; and that at no time did he intend the matter to go through so that he would in fact obtain any favour from the council.

The facts are more fully stated in the judgment.

P. Stanley Price Q.C. and *D. M. Savill* for the appellant.
W. A. B. Goss for the Crown.

In addition to the case referred to in the judgment, the following were cited in argument: *Bewdley Election Petition* [2]; *Bradford Election Petition (No. 2)* [3]; *Sage* v. *Eicholz* [4]; *Brannan* v. *Peek*.[5]

LORD PARKER C.J. delivered the following judgment of the court: This is a curious case, and some of the facts need to be stated. The appellant's wife apparently had a plot of land adjoining their house which, it was thought, would be suitable together with other land, if it could be obtained, as a petrol filling station. The appellant was minded to persuade the Castleford Borough Council to let him have part of their adjoining land for that purpose. There is no doubt that on January 27, 1959, when Lockyer, who was an insurance agent, came to collect a premium, the appellant drew up an I.O.U. for £500 and handed it to Lockyer, and there is no doubt that when Lockyer left the house the appellant knew that Lockyer would offer it as a bribe to some councillor. That is what he said. Lockyer, in fact, went to the town hall and obtained an interview with the mayor and offered him what is said to be the lion's share of that £500. The mayor did not agree to any such thing, and eventually the appellant and Lockyer were charged.

That is really only half the story because this appellant, on any view, is an extraordinary man. For years and years he has been convinced that there is corruption among the police. Then his mind turned to corruption amongst the magistrates, and at this time his mind was on corruption among members of the Castleford Borough Council. He wrote a number of letters just after the time when this offer was made by Lockyer inviting

[2] (1869) 19 L.T. 676.
[3] Ibid. 723.
[4] [1919] 2 K.B. 171; 35 T.L.R. 382.
[5] [1948] 1 K.B. 68; 63 T.L.R. 592; [1947] 2 All E.R. 572.

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members of the press, the police, and goodness knows whom, to come down because he was going to expose some fraud. His case was that, although he intended Lockyer when he left the house to take the I.O.U. to the mayor or some councillor and to offer it, or part of it, as a bribe, he never intended to carry the matter any further. In other words, his intention was to get the mayor or other councillor to accept in principle the idea that he, the appellant, would pay money in exchange for favours, and that then he would possibly hand over marked notes or, at any rate, be in a position to expose the mayor or councillor; and that he never intended the matter to go through so that he would obtain in fact any favour from the council. That was his case.

When the trial judge came to sum up, that case in effect was withdrawn from the jury. It was never left to the jury to consider what the appellant might have done in the long run. The judge ruled that whatever the appellant's motive, if he did intend to get the mayor's agreement to accept money for a favour to be shown an offence had been committed.

Section 1 (2) of the Public Bodies Corrupt Practices Act, 1889 (hereinafter called "the Act"), provides that: "Every person "who shall by himself or by or in conjunction with any other "person corruptly give, promise, or offer any gift, loan, fee, "reward, or advantage whatsoever to any person, whether for the "benefit of that person or of another person, as an inducement to "or reward for or otherwise on account of any member, officer, or "servant of any public body as in this Act defined, doing or "forbearing to do anything in respect of any matter or transaction "whatsoever, actual or proposed, in which such public body as "aforesaid is concerned, shall be guilty of a misdemeanour."

The trial judge, after reading that subsection to the jury and pointing out that the object of the subsection was to protect people in public life from having the temptation of being offered gifts to do something in carrying out their public duties, went on in these terms: "The next thing to note is the word 'corruptly.' "You will notice the words 'corruptly give or offer.' What does "the word 'corruptly' mean? This is law and I am telling you "this as law, 'corruptly' there means with the intention to "corrupt. In other words, if I offer you a reward in order that "you should do something which may help me, or if I am offering "and hoping that the offer will induce you to act in the way in "which I want you to act, I am doing it corruptly. Motive does "not matter; it may be that I do it because I am anxious to help "myself; it may be that I am anxious to help a widow, who, "perhaps, is starving and whom I think I can help by getting a "public official, a person in public life, to do something which "would help her. In one sense I suppose it could be said that "any such act sprang from the best possible motive, the "endeavour to help. It does not matter; when I offer you that "gift I do it with the intention that you should so receive a "reward for doing something in connection with your public

" duties. This is the meaning of the word ' corrupt '—intent to " corrupt, the intention to corrupt the person to whom the offer is " made."

It is that direction which is challenged on this appeal and is said to be wrong. It is, perhaps, a matter to some extent of words. I do not think that Mr. Stanley Price, who has argued this matter with great care for the appellant, would object to that definition of " intent to corrupt " if by that is meant to corrupt in the full sense, namely, an intention not merely that the mayor would accept the offer in principle, as in the present case, but also that money would thereafter be paid and accepted and a favour be received, in other words, if the intention was throughout that the transaction should go through to the benefit of the appellant. Read in that sense, Mr. Stanley Price would not object to the definition, but in the sense in which it was used by the judge, it is quite clear that he was saying that the undoubted intention of this appellant to offer the I.O.U. in order to get the mayor's agreement in principle to the transaction was in itself an intention to corrupt which was sufficient to support the conviction.

It should be observed that section 1 (1) of the Act provides that: " Every person who shall by himself or by or in conjunction " with any other person, corruptly, solicit or receive, or agree to " receive, for himself, or for any other person, any gift, loan, fee, " reward, or advantage whatever as an inducement to, or reward " for, or otherwise on account of any member, officer, or servant " of a public body as in this Act defined, doing or forbearing to do " anything in respect of any matter or transaction whatsoever, " actual or proposed, in which the said public body is concerned, " shall be guilty of a misdemeanour."

In the present case, as I have said, the admitted intention was that the mayor would agree to receive money and, accordingly, the intention undoubtedly was that the mayor should agree to something which itself constituted an offence and, indeed, constituted an offence of corruption within the very same section. The sole question, for the purposes of this case, as it seems to the court, is whether the word " corruptly " in its context means deliberately offering money, or whatever it may be, with the intention that it should operate on the mind of the person to whom it is made so as to make him enter into what I may call a corrupt bargain, or whether it means that the intention must be that the transaction should go right through and that the offeror should obtain the favour for which he sought. It seems to this court that the word " corruptly " here used (and it is a word which appears throughout the Act and other Acts dealing with corruption) is used in the former sense, namely, that it denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain.

The real argument to the contrary, and it is an argument which has been pressed upon this court, quite rightly, is that if

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that is all that " corruptly " means, then it really adds nothing to the words that are already there in section 1 (2) of the Act. That, to a large extent, may be true, but it seems to this court that the word " corruptly " in the sense to which I have referred may well be necessary in section 1 (2) in the case of rewards or fees given for services or favours already rendered. The matter has arisen in dealing with election petitions under the Corrupt Practices Prevention Act, 1854. It is unnecessary to read it in detail but, broadly speaking, it provided, by section 2, that every person who should give or offer money to a person to vote in a particular way would be guilty of an offence. Secondly, that anybody who " corruptly " did such an act on account of a voter having voted in a particular way should also be guilty of an offence. In regard to the offer to vote in a particular way, the word " corruptly " is not used, but in so far as it is dealing with the past, the reward for voting in a particular way, the word " corruptly " does appear.

The matter came before the House of Lords in *Cooper* v. *Slade* [1] in 1857. Three questions were referred by Lord Cranworth L.C. to the judges. There was a division of opinion but, in the opinion of the majority, the word " corruptly " where used in connection with a reward to somebody who had voted was held in effect to add nothing. Willes J., who was one of the majority, said [2]: " In answer to the third question, I am of opinion that " there was evidence that the defendant corruptly paid money to " Carter on account of his having voted at the election. I think " the word ' corruptly ' in this statute means not ' dishonestly,' " but in purposely doing an act which the law forbids as tending " to corrupt voters, whether it be to give a pecuniary inducement " to vote, or a reward for having voted in any particular manner. " Both the giver and the receiver in such a case may be said to act " ' corruptly.' The word ' corruptly ' seems to be used as a " designation of the act of rewarding a man for having voted in a " particular way as being corrupt, rather than as part of the " definition of the offence."

The minority view, which was expressed by, amongst others, Coleridge J., was to the effect that " corruptly " did add something. He said [3]: " As a general rule, no doubt, the party's " knowledge of the law is immaterial, or perhaps is to be con- " clusively presumed; but here the statute expressly makes the " operating motive in the mind of the party material, and it adds " that that motive must be corrupt; which is as much as to say, " that it may operate honestly and without intent to interfere with " the purity of election." Although the view of the majority was that the word " corruptly " added nothing, the words in the present case are different and there is certainly force in the view that the word " corruptly " may be necessary in dealing with the case

[1] (1858) 6 H.L.Cas. 746.
[2] Ibid. 773.
[3] Ibid. 785.

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of a reward for services rendered. Accordingly, it is wrong to say that the word "corruptly" cannot be given some meaning additional to what is provided by the words of the section without it.

The view which we have formed is, we think, confirmed by the passage I have already quoted from Willes J. in *Cooper* v. *Slade*.[4] I will read it again: "I think the word 'corruptly' "in this statute means not 'dishonestly,' but in purposely doing "an act which the law forbids as tending to corrupt voters." It seems to this court that those words apply in the present case. The mischief aimed at by the Act, as the judge told the jury, was to prevent public officers or public servants being put in a position where they are subject to temptation. Accordingly, to adopt the words of Willes J., the appellant even on his own case was here purposely doing an act which the law forbids as tending to corrupt voters. It seems to this court, therefore, that on the facts of this case the direction given by the trial judge was perfectly correct, and that there are no grounds for quashing this conviction. Accordingly, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

[4] 6 H.L.Cas. 746, 773.

[QUEEN'S BENCH DIVISION.]

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[1956 S. Nos. 226 and 227.]

Negligence—Duty of care to whom—Shock—Death of husband—Negligence of driver of motor-vehicle—Wife injured and rendered unconscious in same accident—Wife later told of husband's death—Liability of driver to wife for shock.

Damages—Remoteness of damage—Expenses of third party—Expenses of friends for services to plaintiff after motor-car accident—No legal liability on plaintiff to pay friends—Liability of driver to plaintiff.

Damages—Remoteness of damage—Novus actus interveniens—Wife told by third party that husband was dead—Shock—Whether caused by negligence causing death of husband.

Fatal Accidents Acts—Damages—Payment of debt of estate—Estate consisting of business and insurance policies—Estate bankrupt when insurance policies disregarded—Father pays debts—Whether amount of debts to be deducted from damages.

The plaintiff and her husband, while on holiday in France, were being driven in a motor-car by the defendant. Owing to his negligence there was an accident in which the plaintiff's husband was killed

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

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outright and the plaintiff herself was injured and rendered unconscious. She was taken to hospital, and when she recovered consciousness she was told that her husband had been killed. As a result she suffered shock. She brought two actions against the defendant, one for damages for personal injuries and the other under the Fatal Accidents Act, 1846 to 1908, on behalf of herself and her two children for damages for the loss of their dependency. In her action for personal injuries the plaintiff sought to recover £110 expenses incurred by her brother-in-law and his wife when they flew out to France to assist her back to England, and to make arrangements for her husband's body to be brought back to England for burial. The plaintiff also claimed general damages for shock caused by her husband's death. The defendant contended that he was not liable to the plaintiff for the £110 expenses since the plaintiff herself was not under any legal obligation to pay those expenses to her brother-in-law and his wife; they had not been asked by the plaintiff to perform the services and there was no implied contract to pay. The defendant further contended that the plaintiff could not recover damages for shock at her husband's death since she did not see him killed, and thus was not within the ambit of the duty owed by him; moreover, that she was told of her husband's death by a third party some time later, and that this was a novus actus interveniens:—

Held, (1) that the expenses were recoverable if three conditions were satisfied:—(a) the services were reasonably necessary as a consequence of the tortfeasor's act; (b) the expenses were reasonable in amount and would have been incurred had the friends not assisted, and (c) the plaintiff undertook to pay the sum awarded to the friends. All three conditions were satisfied here and, accordingly, the plaintiff was entitled to recover the £110 (post, p. 176).

Allen v. *Waters & Co.* [1935] 1 K.B. 200; 51 T.L.R. 50; and *Dennis* v. *London Passenger Transport Board* (1948) 64 T.L.R. 269; [1948] 1 All E.R. 779 considered.

(2) That the defendant owed a duty to the plaintiff to drive with reasonable care and was in breach of that duty; the plaintiff, therefore, having a cause of action for the negligence of the defendant, was entitled to add damages for shock, caused by hearing of her husband's death, to the amount recoverable in the action; the fact that a period of time elapsed before the news was heard made no difference, provided that the news was a consequence which flowed directly from the breach of duty (post, p. 177).

In re Polemis and Furness Withy & Co. Ltd. [1921] 3 K.B. 560; 37 T.L.R. 940 applied.

Hambrook v. *Stokes Brothers* [1925] 1 K.B. 141; 41 T.L.R. 125; and *Bourhill* v. *Young* [1943] A.C. 92; [1942] 2 All E.R. 396 distinguished.

The deceased's estate, which passed to the plaintiff, consisted of a butcher's business and insurance policies. The debts of the business exceeded the money due by £549 but the deceased's father took over the business, paying nothing for it, but discharging all the debts. Had the plaintiff kept the business she would have had to pay the debts out of the insurance policy moneys. Without the policies the estate was bankrupt. It was contended that the plaintiff had benefited from the deceased's estate to the extent of £549, and that this sum should be deducted from the damages awarded under the Fatal Accidents Acts:—

Held, that no sum was deductible from the amount awarded under the Fatal Accidents Acts unless there was a balance in favour of the estate after disregarding the factors which by law had to be

disregarded. In this case, disregarding the insurance moneys, the estate was bankrupt. Accordingly, the defendant was not entitled to deduct £549 from the damages (post, p. 180).

ACTION.

In the first action the plaintiff, Mrs. Betty Schneider, sued the defendant, Lazarus Eisovitch, for damages for personal injuries sustained in a motor accident on May 14, 1955; in the second action she sued the defendant as widow and administratrix of the estate of her deceased husband, Raphael Samuel Schneider, who was killed in the same accident, for damages under the Fatal Accidents Acts, 1846 to 1908, for herself and her two children. By an order dated July 31, 1957, the district registrar of the Brighton District Registry ordered the two actions to be consolidated. At the trial liability was admitted in both actions.

The facts are fully set out in the judgment.

Martin Jukes Q.C. and *F. B. Purchas* for the plaintiff.
Eric Myers for the defendant.

In addition to the cases referred to in the judgment, the following were cited in argument: *Owens* v. *Liverpool Corporation* [1]; *Lampert* v. *Eastern National Omnibus Co. Ltd.* [2]

Cur. adv. vult.

Dec. 8. PAULL J. read the following judgment: There are two actions before me: one by Betty Schneider in her own right, and the other by her as the widow and administratrix of her late husband, Raphael Samuel Schneider. In each case the defendant is Lazarus Eisovitch.

In May, 1955, Mr. and Mrs. Schneider and Mr. and Mrs. Eisovitch were on holiday together in France, having arranged to go to the south of France together in a motor-car belonging to one Taylor, the brother of Mrs. Schneider's husband. On May 14, 1955, the defendant was driving that motor-car along the road between Lyons and Paris with his wife and Mr. and Mrs. Schneider as passengers. For some reason which is unknown to me, but which apparently involved a small child coming on to the road, the motor-car left the road and crashed into a tree and a ditch alongside the road. As a result of that crash Schneider was thrown out of the car and instantly killed and the plaintiff was rendered unconscious. It is not disputed that that accident was caused by the negligence of the defendant. The plaintiff was taken to a hospital nearby in a place called Villefranche and did not recover consciousness until after she was in hospital. Her injuries were surprisingly slight considering the way in which the accident happened. She had a Colles fracture of the left wrist;

[1] [1939] 1 K.B. 394; 55 T.L.R. 246; [1938] 4 All E.R. 727.

[2] [1954] 1 W.L.R. 1047; [1954] 2 All E.R. 719.

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she had two small cuts on her leg each involving one stitch and very severe bruising all over the left side of her head and round the left eye. In addition she had a severe blow on the temporal bone which probably was the cause of the concussion from which she suffered. Having recovered consciousness she was informed of the fact that her husband had been killed and there is no doubt whatsoever that the shock of that information coming on the top of the shock she suffered owing to her physical injuries has had quite serious consequences.

When Taylor heard of the accident and heard that his brother had been killed and his sister-in-law was lying in a French hospital apparently seriously injured, he and Mrs. Taylor at once flew out to her assistance. It is admitted by Mr. Myers, who appeared on behalf of the defendant, that that visit was not made because Mr. Taylor's motor-car was smashed (that would have been seen to by a motoring organisation or the insurance company concerned) but because Taylor felt that the situation, so far as his sister-in-law was concerned, was such that help must be afforded to her in the double task of bringing back her husband's body to England and returning to England herself. Mr. and Mrs. Taylor remained in Villefranche for some five days and then accompanied the plaintiff back to England. I have no doubt that in the circumstances it was necessary for someone to help the plaintiff and that if Mr. and Mrs. Taylor had not flown out on their own initiative, either the plaintiff would have telegraphed asking them to come, or, alternatively, the plaintiff would have had to make arrangements for a nurse to accompany her home and also to employ somebody to see about the arrangements for transporting the coffin to England. The plaintiff could not speak French and was therefore in an impossible position, injured as she was, without some assistance being given to her.

Having arrived home the plaintiff came under the care of Dr. Paul. She was, in Dr. Paul's words, in quite a bad physical condition. The wrist had to be re-broken and re-set. The physical signs of injuries, however, cleared up in about three to four months. The mental signs did not. The whole of the episode produced considerable shock due to two factors, the accident itself and the subsequent knowledge obtained in hospital that her husband had been killed while sitting alongside her. The result of that shock was perpetuated by her day-to-day feeling of loss and the consequent upheaval in her life.

She developed neuro-dermatitis (that is, dermatitis brought about by mental shock) affecting her face, ears, scalp and neck, and later her chest. The original attack died down fairly shortly but continued to exist in a mild form with flare-ups every now and again. It went on longer than might be expected and was worse than would be expected, even taking into consideration the shock of the accident and the shock of her husband's death. She became depressed; the depression continued, varying in intensity, and has lately got worse. In addition to Dr. Paul, she has seen

a dermatologist and has also been under a psychiatrist, Dr. Doris Small. Both gave evidence before me.

In order to understand the plaintiff's mental condition, it is necessary to go into the history of the plaintiff and her late husband. The plaintiff is a naturally somewhat highly-strung woman who married Mr. Schneider in June, 1953, the plaintiff being 38 and her late husband being 45. Both she and her late husband had been married previously, both the earlier marriages having been dissolved. The accident happened within two years of the marriage. During that time the marriage had been a happy one, and I have no doubt that the plaintiff must have felt that she had achieved happiness and security. Her husband was a kosher butcher who had started business on his own account after the war in 1946, and the plaintiff in the early days of their marriage helped to look after the desk side of the business, she having been accustomed before marriage to that sort of work. From shortly before the birth of their son in April, 1954, the plaintiff ceased to work in the shop. Shortly after that birth the plaintiff and her husband adopted a girl three years older than their son. The plaintiff, her husband, the two children, and the plaintiff's mother, were the family living together, the plaintiff keeping house.

After the husband's death, his father, who also had been a kosher butcher but had lost his Ministry of Food licence during the war and since the war had helped in his son's shop, took over his son's business. For a time the plaintiff helped in the desk and during that time her mental condition improved. Then the business was sold, and the plaintiff had no outside interests. There is no doubt that the plaintiff, without a husband to help her, has found life difficult. The psychiatrist, Dr. Small, in her report uses the phrase that the plaintiff has developed a considerable unconscious hostility towards her mother upon whom she is emotionally dependent. As far as I can gather, all that means is that without a man's help she finds life difficult when she, two young children and an elderly mother all live together and she has no outside interests to take her mind off her tragedy.

With this statement of facts I come to the questions raised in the action for damages for her own injuries. Two interesting problems arise. These are: (1) Is the plaintiff entitled to recover the expenses of Mr. and Mrs. Taylor, amounting to £110? (2) To what extent ought I to take into account in assessing general damages the element of shock and its consequences?

(1) Mr. Myers for the defendant contends that I cannot allow any part of the expenses of Mr. and Mrs. Taylor. He points out that there was no request by the plaintiff to them to come to her assistance. There could not be. They left England when the plaintiff was either unconscious or nearly so. There can, therefore, says Mr. Myers, be no implied contract to pay their expenses. That is admitted by the plaintiff, who says that she agrees that the Taylors cannot demand payment from her, but that she feels

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under a moral duty to repay them out of any damages. If I allow the expenses, she undertakes to pay the money over to Mr. and Mrs. Taylor. Mr. Myers says that that is not enough; the law only recognises legal liabilities and can only recoup the plaintiff in respect of sums she has in law to pay for any assistance given to her. In any event, says Mr. Myers, there was no necessity for them to go to the plaintiff's assistance.

At first, I felt that there was a great deal to be said in favour of Mr. Myers' argument. How can one make the defendant pay a sum incurred voluntarily by a third party? The more I have thought about the matter, however, the more uncertain I have become that this is right. The plaintiff, particularly as she speaks no French, had of necessity to have help. She was entitled to hire help. When Mr. and Mrs. Taylor arrived she could have refused their services, while still treating them as friends, and hired an English speaking nurse to accompany her home and an English speaking man to arrange the innumerable details necessary before her husband's body could be brought back to England. To accept instead the voluntary services of Mr. and Mrs. Taylor was, to say the least, reasonable and if she had said at the time: "If you help me and save me the expense of hiring services I will "repay you your fares," there would have been a legal liability to pay. Must the rights of a plaintiff lying seriously ill depend on whether or not those words are used? Can the defendant now object to pay simply because those words were not uttered? That must depend upon whether the liability of the defendant is limited to reimbursing only strictly legal liabilities of the plaintiff, or whether among the consequences for which the defendant must pay can be included a friend's out-of-pocket expenses for rendering necessary assistance. If I am negligently knocked down and rendered unconscious, may I not recover from the person responsible a sum paid to reimburse a friend who voluntarily hired and paid for a car to take me to a hospital while I was unconscious? Yet legally I could refuse to pay.

Mr. Jukes has drawn my attention to two cases which I think assist me. In *Allen* v. *Waters & Co.*[1] a landlord negligently failed to keep premises in proper repair. A tenant's wife was injured and the London County Council claimed against the tenant the cost of the wife being an in-patient in one of their hospitals. The tenant and his wife sued the landlords in negligence and the tenant claimed the sum claimed by the London County Council. A question arose whether in the particular circumstances the London County Council had a legal right to the sum claimed. The county court judge had included the amount in the damages awarded. Lord Hanworth M.R. and Romer L.J. thought the London County Council had the right to recover the sums. Goddard J. thought they had not. I do not think that the headnote is accurate in respect of the first finding which reads

[1] [1935] 1 K.B. 200; 51 T.L.R. 50.

as follows: " (By the whole Court of Appeal) that whether or not " the hospital expenses were recoverable by the council from the " tenant, more than six months having elapsed since the dis- " charge of the patient from hospital, the county court judge was " entitled in assessing the special damages to take these expenses " into account and to award their amount for payment over to " the council." What the Master of the Rolls said was that it was immaterial that the plaintiff had not actually paid the sum to the hospital since there was a legal liability to pay the sum. In that judgment Romer L.J. concurred. Goddard J., however, went further. Having found that there was no legal liability on the part of the plaintiff to pay the London County Council since the London County Council had not claimed it from the plaintiff within six months of the claim arising, he goes on to say [2]: " Whether or not the hospital charges can properly be included " in the damages awarded to the husband does not seem to me " to be a question to be determined by the decision of the county " council at any particular time not to call on him to pay because " he is unable to or, at least, unable to unless he can recover the " money from somebody else. I do not think that the right view " depends on whether the remedy against the husband is barred, " or the people who have the right to recover the hospital charges " have or have not yet determined to sue for them, but whether " in sending the woman to hospital a reasonable and proper thing " was done. If it was, and if an expense has been incurred by " doing so, I think it is right that the wrongdoer should bear that " cost. Any sum which is now recovered by the husband will be " held by him for the hospital and will have to be paid by him to " the hospital." A little lower down he goes on [3]: " For these " reasons I think that the money is properly recoverable and that " the county court judge was right, in the result, in making the " order which he did."

I do not think that the words of Goddard J. cover this case, as in that case there was originally a legal liability subject to a time limit within which the sum had to be claimed; but at least it shows that in his judgment these matters are not to be judged by the test of strict legal liability.

The other case is *Dennis* v. *London Passenger Transport Board* [4] where it was held that although the plaintiff had received the equivalent of his wages by way of pension and sick pay he could nevertheless recover his wages if he undertook to repay the sick pay and the pension, as when he received the sick pay and the pension he was told he would be expected to return the money if he recovered compensation from a third party. In the course of his judgment, Denning J. said [5]: " . . . a wrongdoer is not to be " allowed to reduce damages by the fact that other people have " made up to the plaintiff his wages," and held that the plaintiff

[2] [1935] 1 K.B. 200, 215.
[3] Ibid.
[4] 64 T.L.R. 269; [1948] 1 All E.R. 779.
[5] [1948] 1 All E.R. 779.

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could recover his wages on an undertaking to repay the sums received, although there was no legal liability to repay.

In my judgment, strict legal liability is not the be-all and end-all of a tortfeasor's liability. A plaintiff cannot claim a sum of money because he would like to pay a friend for his services. That would alter the character of the services given. The services must be treated as friendly services given freely by a friend. But to pay out-of-pocket expenses in respect of necessary services freely given does not alter the character of the services. I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the plaintiff must show first that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable, bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted, and, thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends. On the whole, after some doubt as to the second of these three conditions, I think the sum claimed does fulfil the three conditions. The special damage therefore will include the £110 claimed in respect of the expenses of Mr. and Mrs. Taylor and will amount in all to £244 15s. 0d.

The next problem arises from the element of shock. There were three factors which went to producing in the plaintiff the mental condition to which I have referred, which in turn produced the recurrent attacks of neuro-dermatitis. These factors were (1) the shock of the accident itself which resulted in the physical injuries to the plaintiff; (2) the shock of discovering in hospital that her husband who had been with her had been killed by the same accident; (3) the continuing mental strain of having to adjust her life after her husband's death. I have no doubt that (1) is allowable; I have no doubt that (3) is not allowable, but what about (2)?

Mr. Myers says that this cannot be allowable as it was the result of what someone told her. It was not, says Mr. Myers, the accident itself since the plaintiff was rendered instantly unconscious and he referred to the well-known cases of *Hambrook* v. *Stokes Bros.*[6] and *Bourhill* v. *Young.*[7] Mr. Jukes, on the other hand, says that these cases have no application to the present case which concerns not whether there was a duty towards the plaintiff, but the consequences of an admitted breach of duty towards her, and referred to the equally well-known case of *In re Polemis and Furness Withy & Co. Ltd.*[8] The plaintiff in this case cannot rely on the duty of the defendant towards the plaintiff's husband, and one starts by considering what precisely was the duty of the defendant towards the plaintiff. The duty was

[6] [1925] 1 K.B. 141; 41 T.L.R. 125.

[7] [1943] A.C. 92; [1942] 2 All E.R. 396.

[8] [1921] 3 K.B. 560; 37 T.L.R. 940.

to drive his motor-car with reasonable care. If at any moment he did not do so, there was a breach of that duty. If no damage ensued there was no cause of action since both breach and consequent damage must be present to establish a cause of action. Damage may consist of mental shock which may be caused without any collision at all. Equally, a collision may result in mental shock without any physical injury. It cannot be doubted, and is not challenged by Mr. Myers, that if the plaintiff had not herself been injured but had seen her husband killed, the resultant shock would have been actionable. It would be a direct consequence of the defendants negligent act. If the plaintiff had been conscious after the accident but had gained the first knowledge of her husband's death by someone screaming "Raphael is dead," and then seen that fact for herself, would liability depend on whether the hearing or the sight produced the shock? Would not each equally have been a direct and natural consequence of the negligent act? Approached in this way, it seems to me to follow that once a breach of duty is established the difference between seeing and hearing is immaterial. Hearing can be just as direct a consequence as seeing. The fact that, owing to unconsciousness in this case, a period of time elapsed before the news was heard, makes no difference provided that the news was a consequence which flowed directly from the breach of duty towards the plaintiff; any more than it makes any difference that an operation takes place after an interval of time. The fact that the defendant by his negligence caused the death of the plaintiff's husband does not give the plaintiff a cause of action for the shock caused to her; but the plaintiff, having a cause of action for the negligence of the defendant, may add the consequences of shock caused by hearing of her husband's death when estimating the amount recoverable on her cause of action.

Mr. Jukes contended that this means that the plaintiff can recover in respect of her mental condition and neuro-dermatitis as it has gone on up to today on the ground that it is all part of the shock caused by her husband's death. I do not think that is so, although, of course, her husband's death has all the time played a part in that condition. Her mental condition and her neuro-dermatitis improved while she worked in the shop for her father-in-law and got worse after the shop was sold, caused, as I have said, by home difficulties. It is extremely difficult to divide up the consequences of the shock; one cannot hope to achieve more than a very rough and ready division, but I must do my best. In all, I award to the plaintiff the sum of £894 15s. To assist the parties in case there is an appeal, that sum is made up as follows: special damage (to include the £110) £244 15s. physical injuries £250; consequences of shock £400. If I had found against the plaintiff on the issue of shock from the knowledge of her husband's death, the £400 would have been £125. If I had found in the plaintiff's favour in respect of the

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whole of her mental condition and neuro-dermatitis to date, I should have increased the £400 to £850.

The second of these two actions is the action brought under the Fatal Accidents Acts and is a claim by the plaintiff on behalf of herself and the two children to whom I have referred.

I agree with Mr. Myers that the business carried on by the deceased husband was very much a family concern. There was no security of tenure with regard to the shop which belonged to his mother. She charged him £5 a week, which at one period was reduced to half that sum and then was increased again some time later. In law he was merely a weekly tenant whose business could be closed at any moment by his mother. His father, as I have said, lost his Ministry of Food licence to trade during the war and spent at least part of each day, if not the whole, in assisting in his son's shop. For this he was paid no wages, but I have no doubt whatsoever that in practice he was paid partly by his taking such meat, chickens, etc., as he wanted at no cost, and partly by dipping his hand into the till from time to time to the knowledge of his son.

According to the accounts of the business prepared by the accountant the profits of the business averaged out at somewhere between £500 and £700 per annum. During the last 2½ years of Mr. Schneider's life they were £744 for the year to the end of November, 1953; £83 for the year to the end of November, 1954, and £390 for the half year between November, 1954, and May, 1955. Mr. Myers says that these figures show that it was a dying business—it was not paying its way. I do not take that view. Before any one can start business as a kosher butcher he has to obtain a licence from the Sheckita, which is the committee of the synagogue responsible for ritual killing. These licences are not given freely. Indeed, there are only three in Brighton and no new licences are granted unless an old licence has expired or is taken away, or the Jewish population increases to such an extent that another kosher butcher is necessary. Brighton not only has a largish Jewish population but has a number of hotels which are kosher, that is, where the proprietor undertakes that all his meat and poultry is brought from a kosher butcher. The prosperity of a kosher butcher in Brighton must depend to a considerable extent on the type of holiday season that Brighton itself has, but I can see no real reason why this business carried on in this family way should not have gone on being reasonably successful. I am quite certain that the accounts do not truly disclose the profit position. To some extent the father's family lived on the business as well as the son's family. The profits in the accounts are necessarily dependent upon how much is estimated for goods taken for the two families and the extent of the money taken out of the till.

I am quite satisfied that the plaintiff is an honest woman.

I was very struck by the fact that when she was being cross-examined as to her injuries and counsel for the defendant suggested that her physical injuries must have cleared up in about six months she replied that that was too long a period, and she thought that all physical signs had disappeared within three or four months. The plaintiff tells me that week by week her husband brought her back £15 for housekeeping. Out of it she paid the household accounts so far as they were paid by cash, but the husband paid such accounts as were paid by cheque. She kept any housekeeping money left over at the end of the week. I do not think she knew how much her husband, or her husband's father took out of the till. Indeed, apart, possibly, from the period when she was helping at the desk, she had no reason to know. My conclusion with regard to the business is that it was a business which at any rate permitted the husband to pay his wife £15 weekly for housekeeping and to draw for himself and his father sufficient money from the till to keep them both satisfied. I see no reason why, if the husband had not been killed, that situation should not have continued. Trade would, of course, have fluctuated but I have no doubt that if trade had got really bad the mother would not have insisted upon the rent and the father (who had other means) would have drawn less or nothing. Of course, one cannot be certain about this and one must make allowance for the fact that it is possible that the business would have become unsuccessful and finally died out, but I think that that is unlikely since no competitors could start without a licence from the Sheckita.

The family appear to have lived reasonably well and I think I must take that into account when assessing the dependency. The husband would have had his share of the goods bought by the wife. On the other hand, I accept Mr. Juke's argument that I should deduct nothing for the keep of the plaintiff's mother since the plaintiff was allowed to keep the money left over from housekeeping and, therefore, in effect kept her mother. On the whole, I assess the dependency at the date of death at £600 per annum. I have then to decide the number of years to apply as the multiplier. Taking into account all the circumstances, I assess that factor at 12 and the result is that the dependency amounts to £7,200.

Mr. Myers submitted that from the sum awarded there must be deducted £549, since after the death of Mr. Schneider, his father took the business over, paying nothing for it, but discharging all the debts, and the debts exceeded the money due by £549, a sum which, says Mr. Myers, the plaintiff would have had to pay if the business had not been taken over. I do not think that that argument is a valid one. If one disregards the various factors which have to be disregarded in assessing an award under the Fatal Accidents Acts such as insurance, the estate was a bankrupt estate, although I hasten to add that it was not

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bankrupt when these factors are taken into consideration. I do not think any sum is deductible from the amount awarded unless there is a balance in favour of the estate after one has disregarded the factors which it is one's duty to disregard.

The only sum to be deducted from the £7,200 is the sum which has been paid in respect of damages due under the Law Reform Act, 1934. I understand that that sum amounts to £500 and I therefore give judgment for the sum of £6,700.

There will therefore be judgment for the plaintiff in her action for personal injuries for £894 15s. Mr. Jukes informs me that the defendant has paid £3,527 into court to the credit of both actions. That payment into court was made on March 19, 1959. The plaintiff will therefore have such of her costs as are attributable to her action for personal injuries up to that date; after that date the costs of that action must be the defendant's. The plaintiff will have judgment in her action under the Fatal Accidents Acts together with the costs of the consolidated action. I further direct that the £6,700 damages awarded under the Fatal Accidents Acts shall be apportioned so as to give £5,500 to the plaintiff and £600 to each of the two children. Those sums are to be paid into the Brighton District Registry and invested as the registrar shall think fit.

Judgment for the plaintiff with costs as above.

Solicitors: *F. H. Carpenter & Oldham, Brighton; Neil Maclean & Co.*

[PRIVY COUNCIL.]

J. C.† 1959 Dec. 16.

SAJAN SINGH . . . . . (Defendant) APPELLANT;

AND

SARDARA ALI . . . . . (Plaintiff) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE FEDERATION OF MALAYA.

Contract—Illegality—Sale of goods—Sale of motor-lorry—Haulage permit necessary for use of lorry—Seller registered as owner—Object to deceive transport authorities—Lorry operated in unlawful manner—Seller subsequently removing lorry from buyer's possession—Claims for return of lorry or its value—Whether claim vitiated by deceit—Whether property in lorry passed to buyer—Road Transport Proclamation (Malaya) dated October 6, 1945—Registration of Motor Vehicles Regulations (Malaya), 1945, reg. 2—Motor Vehicles Commercial Use (Amendment) Regulations (Malaya), 1948, reg. 3.

Trespass—Goods, to—Possessory title—Obtained by illegal contract with defendant—Appropriation of goods by defendant—Whether trespass lies—Motor-vehicle.

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† *Present*: LORD COHEN, LORD DENNING and LORD JENKINS.

Detinue—Plaintiff's property in goods—Obtained by illegal contract with defendant—Appropriation by defendant—Whether detinue lies—Motor-vehicle.

Road Traffic—Registration book—Not document of title—Property in vehicle obtained by illegal contract—Not registered—Whether property passes.

By regulations made by the Commissioner for Road Transport of Malaya pursuant to the powers conferred on him by the Road Transport Proclamation of October 6, 1945, no one could use a motor-vehicle for the carriage of goods without a haulage permit. In 1948 the defendant bought six second-hand motor-vehicles from the British Military Disposals Board and the plaintiff paid the defendant $1,500 as a contribution towards the cost on the understanding that one of the vehicles, a Dodge motor-lorry, should become the property of the plaintiff. In 1950, the plaintiff and a friend of his paid a further $3,500 to the defendant, and the defendant executed a document of sale stating that he had sold the lorry jointly to the plaintiff and his friend. In 1953, the plaintiff purchased his friend's interest in the lorry.

Although the lorry was owned and operated by the plaintiff for the carriage of goods on his own account, the defendant registered the lorry in his own name, describing it as his lorry, and so obtained a haulage pemit for it, authorising its use by himself or his employees. This deception on the public administration of Malaya was carried out in pursuance of an arrangement that had been made as part of the contract between the plaintiff and the defendant, and had as its object the acquisition of a permit in respect of the lorry; had the authorities not been deceived, a permit would not have been issued in respect of the lorry. The policy of the authorities at that time was to restrict the issue of permits to persons who had them before the war. The plaintiff did not fall within that category, whereas the defendant did.

In 1955, the defendant removed the lorry from the plaintiff's possession without his consent and refused to return it. On a claim by the plaintiff against the defendant for the return of the lorry or its value:—

Held, that notwithstanding that the contract for the sale of the lorry was unlawful, yet when in pursuance of the contract the lorry was sold and delivered to the plaintiff, the property in it passed to him; and thereby he derived the right to immediate possession of the lorry, which entitled him to sue the defendant in trespass or detinue, without relying on the unlawful contract; accordingly, the plaintiff's claim succeeded.

Bowmakers Ltd. v. *Barnet Instruments Ltd.* [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579 approved.

Judgment of the Court of Appeal of the Federation of Malaya affirmed.

APPEAL (No. 19 of 1957) from a judgment of the Court of Appeal of the Federation of Malaya (Thomson C.J., Hill and Syed Sheh Barakbah JJ.) (March 15, 1957) reversing a judgment of the Supreme Court of the Federation of Malaya, Settlement of Malacca (Smith J.) (September 19, 1956), and awarding the plaintiff, Sardara Ali of 132, Lorong Panjang, Malacca, damages for trespass to a Dodge motor-lorry, registered number M 2207, the amount of such damages to be the value of the lorry as at the date of the trespass, January 27, 1955, and ordering the defendant, Sajan Singh of Bukit Asahan Estate, Malacca, to pay to

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the plaintiff the value of the lorry so calculated together with interest thereon at the rate of 6 per cent. per annum.

The following facts are taken from the judgment of the Judicial Committee: The plaintiff was a lorry-driver. In 1948, he wanted to acquire a lorry and use it to carry goods on his own account. But he had no chance of obtaining a haulage permit since he never had one before the war—it being the policy of the Road Transport Department at that time to grant haulage permits only to persons who had possessed them before the war. The defendant was a road haulier who had apparently had a haulage permit previously and had every chance of obtaining one. Accordingly, they came to an arrangement whereby the defendant was to acquire a second-hand lorry and to register it in his own name and to obtain a haulage permit for it in his own name, but all the time it was intended that it should belong to the plaintiff and be used by him on his own account.

The transaction was carried out in the following way: In December, 1948, the British Military Disposals Board were offering six second-hand motor-lorries for sale. The defendant bought them in his own name, but the plaintiff paid $1,500 towards the cost on the understanding that one of them should belong to him. This vehicle was a Dodge lorry numbered M 2207. It was registered in the name of the defendant and the haulage permit was issued in his name. On August 4, 1950, the plaintiff with a friend, Nihal Singh, paid another $3,500 to the defendant, and the defendant gave the plaintiff a document in the Punjabi language which, being translated, was as follows:

"I, Sajan Singh (Malacca), have sold a Dodge lorry No. "M 2207 to Nihal Singh and Sardara Ali jointly for $3,500. "Both of them can sell this lorry but can not sell the haulage "permit. The haulage permit is to be returned to Sajan Singh. "If anyone asks for the lorry after my death he can not get it. "Even if (anyone) takes it by force then (he or she) must pay "$3,500. If there is anything concerning the lorry then Nihal "Singh and Sardara Ali can represent Sajan Singh."

In 1953, Nihal Singh sold his share in the lorry to the plaintiff, who was thenceforward the sole person interested on the purchaser's side. He used the lorry as his own. He kept it at his own address, 132, Lorong Panjang, and used that address as his base of operations with it. He received the incomings, and according to his own story (which the trial judge in substance accepted) paid for the petrol and other outgoings. But as the lorry was registered in the name of the defendant, he did it all in the defendant's name. And since the defendant was liable for income tax, insurance, and so forth, the plaintiff delivered accounts to the defendant showing incomings and outgoings and the plaintiff paid to the defendant the amounts due for insurance, taxes, and so forth. In short, the lorry belonged to the plaintiff but was operated in the name of the defendant.

All this method of operation was quite illegal. Although the

plaintiff used the vehicle as his own, it was registered in the name of the defendant, " Sajan Singh, Bukit Asahan Estate, Malacca." The haulage permit, too, was issued in the defendant's name. It was issued subject to the express condition that " the permit " holder shall use the vehicle from a base at Bukit Asahan " Estate, Malacca," and to the condition that " this permit is " personal to the permit holder. It may not be transferred or " assigned ": and to the further condition that " the permit " holder shall not suffer or permit any authorised vehicle to be " driven by a person who is not a bona fide employee of the " permit holder." It was, therefore, quite illegal for the defendant to permit the plaintiff to use it at all on his own account. The two of them were, as the trial judge said, fellow conspirators engaged in practising a deceit on the public administration of the country. For aught that appeared, both of them were equally guilty.

In 1954, the plaintiff and the defendant fell out. The defendant said that the lorry belonged to him and that the plaintiff was only a driver employed by him. The plaintiff said that it was his, and he applied to the Commissioner for Road Transport for a haulage permit in his own name. His solicitors, on December 29, 1954, wrote to the Commissioner for Road Transport and said: " . . . what we are asking for is the removal of the present permit " holder and the reissue of the permit in our client's own name." In the afternoon of January 26, or January 27, 1955, while the plaintiff was absent from his home, the defendant came and took the lorry away. He has always since refused to return it, claiming that it belongs to him.

In June, 1955, the Commissioner for Road Transport refused to grant a haulage permit to the plaintiff. The refusal was in some way connected with government policy about the entry of Malays into the road transport industry. Undeterred by this refusal, the plaintiff continued to claim the lorry. In November, 1955, he brought the present proceedings against the defendant. In his statement of claim he relied on the document of sale of August 4, 1950, and set it out in full. He said that he had paid the defendant $5,000. He further alleged that the vehicle was in his possession until January 27, 1955, when the defendant took it away and had since refused to return it. By his prayer he asked: (i) for a declaration that the plaintiff is the owner of the authorised vehicle; (ii) for the return of the Dodge motor-lorry No. M 2207 as an authorised vehicle, together with the use of the haulage permit; (iii) in the alternative, damages for detinue $5,000; (iv) damages at $400 per month for loss of earnings or profit from January 27, 1955.

The defendant, in his defence, claimed that the lorry belonged to him, and that the plaintiff was employed by him as a driver. He denied having signed the document of sale dated August 4, 1950.

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1959. October 26. *Ralph Millner* for the defendant.
The plaintiff did not appear and was not represented.

The following cases and authorities were cited in argument, in addition to those referred to in the judgment: *Delaney* v. *T. P. Smith Ltd.*[1]; *Gibson* v. *Minet*[2]; *Alexander* v. *Rayson*[3]; *Taylor* v. *Chester*[4]; *Simpson* v. *Nicholls*[5]; *Williams* v. *Paul*[6]; *Feret* v. *Hill*[7]; Spencer Bower on Estoppel by Representation (1923), p. 383.

December 16. The judgment of their Lordships was delivered by LORD DENNING. The plaintiff, Sardara Ali, is a lorry-driver living at No. 132, Lorong Panjang, Malacca. The defendant, Sajan Singh, is a haulier living at Bukit Asahan Estate, Malacca. The two of them entered into an illegal transaction about a lorry. They broke the regulations which governed the transfer and use of motor-vehicles. The question is what are their rights consequent on this illegality.

The regulations in question were made soon after the war by the Commissioner for Road Transport under the powers conferred on him by the Road Transport Proclamation, dated October 6, 1945: and they were affirmed and continued afterwards by the Road Transport (Amendment) Ordinance, 1949. They fell into two groups:

(i) The regulations which required vehicles to be *registered* with the Registrar of Motor Vehicles: under these regulations any person who had a motor-vehicle had to register it and give particulars of his title to it. And it was provided that no person should "sell, exchange, part with the possession of, purchase, "acquire or take possession of any motor vehicle without a permit "in writing from the Registrar." See regulation 2 of the Registration of Motor Vehicles Regulations, dated October 10, 1945.

(ii) The regulations which controlled the *use* of vehicles for the carriage of goods. Under these regulations it was provided that no person should "use a goods vehicle or cause suffer or permit a "goods vehicle to be used for the carriage of goods" unless it was an *authorised vehicle*, that is to say, unless there was a haulage permit authorising it to be so used. The regulations said that a vehicle "shall not be deemed to be an authorised vehicle unless "it is used by the holder of a permit in accordance with the "conditions of such permit." See regulation 3 of the Motor Vehicles Commercial Use (Amendment) Regulations, 1948.

For some years after the war it was very difficult for a newcomer to get a haulage permit. The policy of the Road Transport Department at that time was to grant haulage permits only

[1] [1946] 1 K.B. 393; 62 T.L.R. 398; [1946] 2 All E.R. 23.
[2] (1791) 1 Hy.Bl. 569; 126 E.R. 326.
[3] [1936] 1 K.B. 169; 52 T.L.R. 131.
[4] (1869) L.R. 4 Q.B. 309.
[5] (1838) 3 M. & N. 240; 150 E.R. 1132.
[6] (1830) 6 Bing. 653; 130 E.R. 1433.
[7] (1854) 15 C.B. 207; 139 E.R. 400.

to those persons to whom they had been granted before the war.

[His Lordship then stated the facts as set out above and continued:] At the trial the principal issue was whether the document of sale was a forgery or not. A handwriting expert was called. The judge (Smith J.) held that the document was genuine. He said he was satisfied of the truth of the plaintiff's claim. But he drew attention to the illegality of the transaction. No question of illegality appeared on the pleadings, but in the course of the trial counsel for both parties agreed that the Registrar and Inspector of Motor Vehicles was deceived during the period of the British Military Administration. When the judge came to give judgment, he took notice of this illegality and held that there was a "moral "estoppel" which prevented the plaintiff from recovering. It was the duty of the court, he said, when it realised that a litigant was setting up his own fraud, to refuse him aid. "The principle," he said, "is 'Ex turpi causa non oritur actio' . . . The plaintiff "on his own showing was party to a deceit whereby the Registrar "of Motor Vehicles issued a haulage permit for lorry M 2207 "which he would not have done if he had not been deceived."

The Court of Appeal reversed this decision. Thomson C.J. (with whom Syed Sheh Barakbah J. agreed) said that "The "action was not in contract. It was an action for trespass to "goods." They held that the plaintiff could recover damages for trespass and that the amount should be the value of the lorry at the time of the trespass, that is to say, in January, 1955, but no damages for loss of profits. Hill J. would have gone further and given the plaintiff the declaration he sought, and ordered the defendant to return the lorry or pay the value at the time of seizure.

It is not, perhaps, strictly accurate to say that the action was laid in trespass. It was an action for a declaration coupled with a claim in detinue. In order to get a declaration, it was essential for the plaintiff to show that he was the owner of the lorry, and that it was an authorised vehicle. In order to succeed in detinue, it was essential for the plaintiff to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it; see Bullen & Leake, 3rd ed. (1868), p. 312.[1] And in detinue their Lordships think he succeeded. Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose—and one of them transfers property to the other in pursuance of the conspiracy—then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it

[1] 11th ed. (1959), p. 425.

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absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin: see *Scarfe* v. *Morgan*,[2] *per* Parke B. The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it—he cannot throw over the transfer. And the transferee, having obtained the property. can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property, because of the illegality—it has no power to do so—so it says, in the words of Lord Eldon: "Let the "estate lie where it falls"; see *Muckleston* v. *Brown*.[3] This principle was applied by the Court of Appeal recently in *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*[4] The parties to the fraud are, of course, liable to be punished for the part they played in the illegal transaction, but nevertheless the property passes to the transferee.

Their Lordships do not overlook the fact that the defendant remained registered as the owner of the lorry and that no permission was given for the sale: but this did not prevent the property in it passing to the plaintiff. The registration book is not in Malaya, any more than it is in England, a document of title. The title passed by the sale and delivery of the lorry to the plaintiff. The absence of registration would no doubt put the plaintiff in difficulty if he had to prove his title, but it would not invalidate it: see *Bishopsgate Motor Finance Corpn. Ltd.* v. *Transport Brakes, Ltd.*[5]

In this case, on the facts pleaded and the findings of the trial judge, the plaintiff had a clear cause of action. He had actual possession of the lorry at the moment when the defendant seized it. Despite the illegality of the contract, the property had passed to him by the sale and delivery of the lorry: compare *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*[6] referred to above. When he commenced this action, he had the right to immediate possession. Their Lordships think that in these circumstances he had a claim in detinue. But he had also, as the Court of Appeal has found, a clear claim in trespass. Trespass was not in terms pleaded, but the facts were pleaded. And on the facts the plaintiff was entitled to rely on his possession. The Court of Appeal did not actually direct amendment of the pleadings, but it is clear from their judgment that, had they been asked to do so, they could have done so. Their Lordships think that, on the facts pleaded, they were fully justified in reversing the decision of the trial judge.

The plaintiff would have been entitled to an order for the return of the vehicle or its value. As it had not been returned,

[2] (1838) 4 M. & W. 270, 281; 150 E.R. 1430.
[3] (1801) 6 Ves.Jun. 52, 69; 31 E.R. 934.
[4] [1945] K.B. 65, 70; 61 T.L.R. 62; [1944] 2 All E.R. 579.
[5] [1949] 1 K.B. 322, 338; 65 T.L.R. 66; [1949] 1 All E.R. 37.
[6] [1945] K.B. 65.

he was clearly entitled to its value. That is the order made by the Court of Appeal and their Lordships agree with it.

Their Lordships would only add this: if the law were not to allow the plaintiff to recover in this case, it would leave the defendant in possession of both the lorry and the money he received for it. Their Lordships are glad to have been able to reach the conclusion that, on the facts of the present case, this is not the law.

Their Lordships will therefore report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed.

Solicitors: *Hy. S. L. Polak & Co.*

N. P.

[COURT OF APPEAL.]

WEXLER *v.* PLAYLE (VALUATION OFFICER) AND ANOTHER.

[LVC/1883/1957.]

Rates and Rating — Assessment — Rateable value — Dwelling-house — Ascertainment of gross value by reference to hypothetical 1939 *rent on basis of landlord's covenant to bear "the cost of the repairs . . . "necessary to maintain the hereditament in a state to command "that rent"—Hereditament in state of disrepair at time of valuation—Whether relevant to assessment—Meaning of "state"—Valuation for Rating Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 42), *ss.* 2 (2), 3 (*a*) (*b*).

Lands Tribunal—Evidence—Fresh evidence—Refusal to admit evidence relevant to inquiry after conclusion of hearing and before delivery of reserved decision—Whether discretion judicially exercised—Lands Tribunal Rules, 1956 (*S.I.* 1956, *No.* 1734), *rr.* 31, 34, 45 (1).

The Valuation for Rating Act, 1953,[1] by section 2 (1) and (2),

[1] Valuation for Rating Act, 1953, s. 2: "(1) For the purpose of making "or altering the first valuation lists "made after the passing of this Act, "the gross value for rating purposes "of a hereditament which is either a "dwelling-house or a private garage "or private storage premises (as here-"inafter defined respectively) shall "not be ascertained by reference to "the definition of gross value in sec-"tion 68 of the Rating and Valuation "Act, 1925 (hereafter in this Act "referred to as 'the Act of 1925') "or in section 4 of the Valuation "(Metropolis) Act, 1869 (hereafter "in this Act referred to as 'the Act "'of 1869'), but shall be an amount "equal to the rent specified in the "next following subsection . . . (2) "The said rent is that at which the "hereditament in question might "reasonably have been expected on or "about the thirtieth day of June, "1939, to let from year to year if the "tenant had undertaken to pay all "usual tenant's rates and taxes and "if the landlord had undertaken to "bear the cost of the repairs and "insurance, and the other expenses, "if any, necessary to maintain the "hereditament in a state to command "that rent. (3) For the purposes of "the last preceding subsection it shall "be assumed—(*a*) that the heredita-"ment was subsisting on and about "the said thirtieth day of June in "the state in which it actually sub-"sists at the time of valuation; and "(*b*) that the locality in which the "hereditament is situated was on and "about the said day in the same

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provides that the gross value of a hereditament which is a dwelling-house shall be an amount equal to the rent at which the house in question "might reasonably have been expected on or about "June 30, 1939, to let from year to year, if the . . . landlord had "undertaken to bear the cost of the repairs and insurance, and the "other expenses, if any, necessary to maintain the hereditament "in a state to command that rent." By subsection (3): "it shall "be assumed—(*a*) that the hereditament is subsisting on and about "the said June 30 in the state in which it actually subsists at the "time of valuation."

A tenant claimed that he was entitled to a reduction in the valuation for rating of a flat in London occupied by him since 1948, on the ground, inter alia, that at the time of valuation, namely, March 30, 1957, the flat was in a state of disrepair. While admitting that the defects were readily repairable, he contended that section 2 of the Valuation for Rating Act, 1953,[1] required that the gross value should be fixed by reference to the rent which the flat would have been expected to command on June 30, 1939, if at that date it was in the same state of disrepair as it actually was at the time of valuation in March, 1957, and that on its true construction section 2 (2) contemplated the hypothetical landlord and tenant fixing a rent on the basis that the tenant took the premises in their existing state of repair, and the landlord covenanted to do only such repairs as would prevent them from getting into a worse state. The flat in question had been let in 1934 at a known rent but was vacant on June 30, 1939.

The Lands Tribunal, having found the 1939 rent by taking into account the 1934 rent and the rents of other comparable flats, rejected the tenant's submission on section 2.

The tribunal also refused applications by the tenant, made after the conclusion of the hearing but before the delivery of the tribunal's written decision, for the admission of further evidence relevant to the inquiry as to the merits of comparable flats. On appeal by the tenant:—

Held, (1) that the tribunal had not erred in law. Subsection (2) imported the notion of a reasonable landlord and tenant proceeding on the basis that the landlord's covenant to repair would include an obligation to put the premises into repair before the tenant entered into possession; and the fact that there were at the relevant date repairable and temporary defects in the property ought not to be taken into account in arriving at the hypothetical rent which was the basis of rateable value (post, pp. 198, 202).

Semble. The concluding words of subsection (2) "to maintain "the hereditament in a state to command that rent" govern only the words "the other expenses, if any," which immediately precede them, and not also the earlier words "the cost of the repairs and "insurance" (post, pp. 197, 202, 203).

Per Willmer and Harman L.JJ. *Semble*, the word "state" in subsection (3) (*a*) does not include state of repair, having regard to the use of the word "state" in subsection (3) (*b*), which in its context of "state of the locality" cannot cover state of repair (post, pp. 201, 203).

(2) That in refusing to admit this particular evidence the tribunal had not exercised its discretion unjudicially, since the

[1] "state, as respects the other premises "situated in that locality and (subject "to the next following subsection) as "respects the occupation and use of "those premises, as respects the "transport services and other facili-"ties available to persons living or "working in the locality, and as "respects other matters affecting the "amenities of the locality, as it is at "the time of valuation."

evidence could have been given at the hearing; nor did the form of refusal import a general refusal by the tribunal ever to admit further evidence after a hearing had been concluded and before a a decision was given (post, p. 201).

Decision of Lands Tribunal affirmed.

APPEAL from the Lands Tribunal.

The facts relevant to the appeal, as stated in the Lands Tribunal decision and the case stated, which, together with a schedule relating to comparable flats, formed the case stated, were as follows:

A tenant, Wexler, appealed from a decision of the South-West London Local Valuation Court determining an assessment of £69 gross value, £51 rateable value on a flat, second floor, 13, Park Mansions, Prince of Wales Drive, Battersea.

The flat in question was in a substantial block of flats erected some 60 years ago. It was on the second floor and contained lounge, three bedrooms, kitchen, dining-room, bathroom and separate w.c., the lounge and one bedroom overlooking Battersea Park.

In a return dated October 22, 1934, the flat was shown let at a yearly rent of £110, the landlord being responsible for rates, repairs, insurance and services. It was agreed before the Lands Tribunal that the premises were vacant between March, 1935 and 1944. In a return dated October 7, 1957, the flat was shown as being vacant in June, 1939, but occupied in October, 1957, at a rent of £135 0s. 3d., the tenancy commencing on October 24, 1948, the landlord being responsible for rates, services, insurance and external repairs, while the tenant was responsible for internal repairs.

Before the Lands Tribunal the tenant's main contention was that on the evidence before the tribunal Battersea Park had been the main amenity of the flat; that the coming of the Fun Fair in 1951 had seriously affected the peaceful enjoyment of the Park; and that the amenities of the flat were further affected by a rubbish dump in the Park opposite, which had not been there in 1939.

Regarding the flat itself, evidence given for the tenant was that the water system was such that in 1957 a sanitary notice had been served in respect of "wet, defective and perished condition "of walls and ceiling in kitchen; leaky condition of water tank," and that during 1956 and 1957 there was considerable inconsistency in the electricity supply. A schedule of condition put in for the tenant and compiled after an inspection of the flat on October 8, 1957, showed that the flat was in poor decorative repair; there were sundry cracks in the ceilings and in some of the walls; the window frames required re-setting due to war damage; there were patches of dampness in the kitchen ceiling, presumably due to leakage from the flat above, and there was dampness in the kitchen wall; the hot water tank was defective, and the stove

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apparently out of order. It was agreed that all these defects were reparable. In making his valuation the expert witness for the tenant started from the 1934 rent of £110 which he considered fair. He reduced that by £5 to allow for a general reduction in values between 1935 and 1939, and then made a further reduction of £27 for the state of the hereditament and loss of amenities as between 1939 and 1957 and so arrived at a figure of £73 for gross value plus rates.

For the tenant it was submitted, first, that, in the light of section 2 (3) (*a*) of the Valuation for Rating Act, 1953,[1] when arriving at gross value the actual state of repair at the date of valuation must be taken into account, and reliance was placed on the definition of "gross value" in section 2 (2) of that Act. Secondly, it was submitted that on the authority of *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*[2] the only evidence admissible was that of the rent actually being paid for the flat in 1934; and thirdly, that the changes since 1939—the building being 18 years older, the advent of the Fun Fair with the increase in the traffic, noise, smells and general adverse effect on the enjoyment of the Park for residents, the inconsistency of the electric supply, and the presence of the rubbish heap in the Park—depreciated the value of the flat.

The valuation officer maintained that in estimating the gross value he was entitled to look not only at the rent of the flat in question but also at the rent of other flats, and he put in evidence schedules giving details of the rents passing in 1939 for all the flats in Park Mansions. In his view the Fun Fair had not depreciated the value of the flats, and against any possible lessening of amenity he considered that there should be offset the additional value arising from increasing travelling difficulties tending to add to the value of residences within easy reach of the centre of London and the advantage of overlooking an open space when open spaces were steadily decreasing in the London area.

The valuation officer agreed that with regard to the flat itself, decorating was needed; the hot water tank required replacing; there were defects in the window frames, and there were superficial cracks in the ceilings and walls; but he considered that all these matters were not beyond the landlord to repair; and he relied on the decision of the Lands Tribunal in *Critchlow* v. *Almond* (LVC/173/1957). His valuation produced a gross value of £77.

For the Battersea Borough Council, the rating authority, evidence was given that in arriving at their valuation of £75 gross value, particular regard had been paid to the rents of all the second floor flats in Park Mansions. The rent of any particular flat was checked by looking at other rents of similar properties, if possible, to see whether the particular rent was fair. Guidance

[1] For footnote see p. 187.

[2] [1937] 2 K.B. 445; [1937] 2 All E.R. 298.

from 1938–39 rents was preferred to those of 1934, and the flat in question had been valued as being in a reasonable state of repair. It was considered by the rating authority that the Fun Fair and the Festival Gardens had not affected the rent.

The Lands Tribunal (Mr. H. P. Hobbs) heard the tenant's appeal on October 29 and 30, 1958. On November 10, the tenant applied for a stay of proceedings to enable him to consider with counsel the making of an application for the admission of further evidence; and on December 8 formal application was made by the tenant for the hearing of further evidence arising out of the evidence given on the last day of the hearing by the expert witness for the rating authority, the nature of the evidence being stated as concerning the comparative amounts of natural light reaching Flat No. 18 and Flat No. 13 (the flat in question) and the effect of this on comparability and on the value of No. 13. A further application for the hearing of additional evidence was made by the tenant on December 12, 1958, the date on which the Lands Tribunal gave its written decision. That decision summarised the issues between the parties as follows: First, the ascertainment of the 1939 rent; secondly, whether or not a reduction should be made therefrom by reason of the actual condition of the hereditament at the date of the proposal (which was agreed to be March 30, 1957); and thirdly, whether there should be a reduction for a change of amenities under section 2 (3) (*b*) of the Act of 1953.

The decision cited Scott L.J. in *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee* [3] that "Where the particular hereditament is let at what is plainly "a rack rent or where similar hereditaments in similar economic "sites are so let, so that they are truly comparable, that evidence "is the best evidence, and for that reason is alone admissible; "indirect evidence is excluded not because it is not logically "relevant to the economic inquiry, but because it is not the best "evidence," but the tribunal stated that those words could not be construed as meaning that when a hereditament was let, any inquiry must be restricted to that rent alone. Before any valuer could say that a rent was "plainly a rack rent" it was his bounden duty to examine it and check it by reference to other rents if possible. On the facts of the present case it was sufficient to look at the 1934 rent of the flat in question and the rents of other second floor flats, and having done so, the tribunal agreed with the figure put forward by the expert witness for the rating authority, namely, £75.

The tribunal was unable to agree to the submission for the tenant that under section 2 (3) (*a*) of the Act of 1953 the flat must be valued exactly as it existed at the date of the proposal, and that if a hereditament was out of repair at the particular date the rent should be the rent of the premises out of repair and

[3] [1937] 2 K.B. 445, 468–469.

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conversely, if in repair, the rent should be that of the premises in repair. The reasons for rejecting that submission were: (1) that it was contrary to what happened in everyday life, for in practice a tenant viewing a house or flat with the decorations dirty and worn, some cracks in the walls and ceilings, and generally in a poor state of repair, so long as his tenancy provided that the landlord was to bear the cost of repairs, would require the landlord not only to keep the premises in a good state of repair but also to put the premises in a good and reasonable state of repair and decoration before he entered into possession; and that this was not a matter where the hypotheses of rating required departure from everyday practice. (2) The proposition, if accepted, would create an intolerable situation, for any examination of rental evidence would entail a parallel and detailed examination of the condition of property, decorative and otherwise, as at the date when the tenancy commenced. The present case gave some illustration of the difficulties which could occur, for no witness had been able to produce any reliable detailed evidence concerning the condition of the flat in 1934, the date of the commencement of the rent on which the ratepayer relied. The tribunal agreed with the principles applied by the Lands Tribunal in *Critchlow* v. *Almond* (LVC/173/1957) and *Fowler* v. *Lloyd* (LVC/1401/1957) as follows:

"The definition of gross value postulates a rent whereby the "landlord is responsible for all repairs and maintenance and "whatever the actual conditions may be in fact, I consider that "I have to assume that the landlord has carried out his responsi- "bilities and that the premises are in a reasonable state of repair; "unless there are some structural defects which it would be "unreasonable or impossible for the landlord to repair": *Critchlow* v. *Almond*.

"This tribunal has decided in many cases that so far as "decorative condition is concerned, a landlord is assumed to "honour his hypothetical obligations to an extent which could "reasonably be expected having regard to the fundamental "structural condition of the property. That, however, does not "involve the assumption that new decorations are constantly "kept in first-class order, which the decorations in their condition "at the date of a proposal would justify in the open market. . . . "The rent of such a newly decorated house would not be fixed "rebus sic stantibus, but would be related to a compromise "between its newly decorated condition and its condition some "years later. If, however, the decorations have reached a stage "where 'no reasonable man would take the house' or, more "practically, no reasonable occupier would continue to tolerate "them, the above assumptions do not apply and the rent should "take the existing deplorable state of the decorations into "account": *Fowler* v. *Lloyd*.

The tribunal did not consider that those citations violated the established doctrine of rebus sic stantibus, for its application to a

house meant that the assessment must be the value as a dwelling-house unless without any structural alterations it could be used for some alternative purpose for which there was a demand. The tribunal could not in any event give effect to the tenant's proposition in the present case since there was no evidence before it as to the condition of Flat 13 in 1934.

On the changes in the amenities, and in particular the advent of the Fun Fair, the tribunal decided that an allowance ought to be made for the loss of amenity due to that advent. Having found that the gross value plus rates of the flat in 1939 should be £115, which with the statutable deductions and rates then in force gave a gross value of £75 under 1939 conditions, the tribunal reduced the gross value to £65 with a corresponding rateable value of £48.

On the applications to hear further evidence the tribunal decided that they should be refused on the ground that once a hearing had been concluded that part of the proceedings was definitely finished; and the fact, that a decision was often reserved to enable the tribunal to comply with the requirement that the decision should be given in writing together with a brief statement of the reasons for the decision, should not afford an opportunity for any of the parties concerned to adduce fresh evidence.

In a case stated on March 23, 1959, which together with the decision set out above (so far as relevant to the appeal to the Court of Appeal) formed the case stated for the decision of the court, the following further facts were proved or admitted: (a) That the date of the proposal by the ratepayer was March 30, 1957; (b) the valuation officer and the rating authority admitted that if it was correct in law to value the hereditament in the state of repair in which it was at the date of the proposal a deduction from the inclusive rental of £120 per annum for the state should be made in the valuations submitted on behalf of the valuation officer and the rating authority of £5 and £10 respectively; and (c) that the fall in the inclusive rental value of the hereditament as between 1934 and 1939 was properly represented by a fall of £5.

The tenant appealed; and the question for the court was whether on the findings of fact the Lands Tribunal came to a correct decision in law.

W. G. Glover for the tenant.

Raymond Phillips for the valuation officer.

J. P. Harris for the rating authority, the Battersea Borough Council.

The following cases were cited in the course of argument: *Barratt* v. *Gravesend Assessment Committee* [4]; *Bigsby* v. *Dickinson* [5]; *Evans* v. *Bartlam* [6]; *Clack* v. *Arthur's Engineering Co.* [7];

[4] [1941] 2 K.B. 107; 57 T.L.R. 590; [1941] 2 All E.R. 308.

[5] (1876) 4 Ch.D. 24.

[6] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.

[7] [1959] 2 Q.B. 211; [1959] 2 W.L.R. 916; [1959] 2 All E.R. 503.

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Appenrodt v. *Central Middlesex Assessment Committee*[8]; *Robinson Brothers (Brewers) Ltd.* v. *Houghton and Chester-le-Street Assessment Committee.*[9]

MORRIS L.J. This matter concerns the rating of a flat on the second floor of a block of flats called Park Mansions in Prince of Wales Drive, Battersea. The matter went to the Local Valuation Court who gave their decision on October 9, 1957. Thereafter the tenant, who is the appellant in this court, gave a notice of appeal to the Lands Tribunal on October 28, 1957. The Lands Tribunal heard the appeal and gave their decision on December 12, 1958. Thereafter by a notice dated January 21, 1959, the tenant gave a notice requiring the Lands Tribunal to state a case. Accordingly points of law are now raised for our consideration.

[His Lordship stated the relevant facts as set out in the case, and continued:] The rateable value has to be arrived at by following the provisions of the Valuation for Rating Act, 1953. [His Lordship read section 2 (1), (2) and (3) (*a*) and continued:] It is agreed that for present purposes the time of valuation was March 30, 1957. Subsection (3) (*b*) reads: "that the locality in "which the hereditament is situated was on and about the said "day in the same state, as respects the other premises situated "in that locality and (subject to the next following subsection) as "respects . . . the transport services and other facilities available "to persons living or working in the locality, and as respects "other matters affecting the amenities of the locality, as it is at "the time of valuation," which again, as I have said, means in this case March 30, 1957.

Questions arose as to the way in which to value having regard to the provisions of those subsections (2) and (3). Under subsection (3) a point was taken by the tenant that there now exists in the Park near his flat a Fun Fair which is open in the summer months and which attracts a number of people to the locality. It was contended by him that if the conditions now obtaining were related to June, 1939, the effect should be to diminish the gross and rateable values. The valuation officer was of the opinion that the gross value should be £77 with a rateable value of £58. When the matter went to the Local Valuation Court the determination there was that the gross value should be £69 and the rateable value £51. On appeal to the Lands Tribunal the decision was that the gross value should be reduced to £65 and the rateable value to £48. A reduction was made by the Lands Tribunal because the view was taken that there were considerations arising out of the coming of the Fun Fair to Battersea Park which would diminish the amenity of the flat and should result in a reduction. Accordingly, the Lands Tribunal so decided, and

[8] [1937] 2 K.B. 48; [1937] 2 All E.R. 325.

[9] [1937] 2 K.B. 445; [1937] 2 All E.R. 298.

having so decided, awarded costs of a stated amount to the appellant to be paid by each one of the two respondents, namely, the valuation officer and the Metropolitan Borough of Battersea. We are not concerned with that issue and no point of law arises.

The decision of the Tribunal shows that evidence was given as to the state of the premises, the particular flat, in the month of October, 1957. It is recited that a witness, Mr. Arscott, giving evidence for the tenant, put in a schedule of condition which had been compiled after an inspection of the flat made on October 8, 1957, and which showed that the flat was in poor decorative repair. He said that there were sundry cracks in the ceilings and in some of the walls, that the window frames required re-setting due to war damage, that there were patches of dampness in the kitchen ceiling, presumably due to leakage from the flat above and that there was dampness in the kitchen wall, the hot water tank being defective and the stove apparently out of order. That witness, Mr. Arscott, agreed that all those defects were reparable. The decision also recites that the tenant himself gave evidence that in 1957 the water system was such that a sanitary notice had been served in respect of "wet, defective and perished condition "of walls and ceiling in kitchen; leaky condition of water tank," and he had said that in 1956 and 1957 there was considerable inconsistency in the electricity supply. The decision further records that the valuation officer had agreed that with regard to the flat itself decorating was needed, that the hot water tank required replacing, that there were defects in the window frames and that there were superficial cracks in the ceilings and walls; but he considered that all those matters permitted of repair by the landlord. The decision of the Lands Tribunal, I think, proceeded on the basis that on March 30, 1957, that is to say, the time of valuation, there were conditions of disrepair in the premises of the nature of those to which I have referred.

The Lands Tribunal arrived at their conclusion by looking at the 1934 rent of the flat and by looking at the rents of other second floor flats. The tribunal came to the conclusion, having done so, that the starting figure should be £120. There was no doubt that certain adjustments then had to be made concerning services and interior repairs, and, those adjustments having been made, the figure would become one of £115 inclusive of rates. That was the decision of the Lands Tribunal. If the deduction for rates was made, then the gross figure would be £75. As I have indicated, the Lands Tribunal reduced that £75 to £65 because of the view taken concerning the change in amenities arising out of the coming of the Battersea Fun Fair. The Lands Tribunal, therefore, fixed £65 as the gross value and £48 as the rateable value.

There are now two main points of law which have been argued by Mr. Glover for the tenant and which were points that were taken, so far as they could be taken, before the Lands Tribunal. The notice of appeal summarises the points under four heads but

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the third of the four has not been argued before us. The first and second, which Mr. Glover agrees can really be taken as one main point, read as follows: "(1) That section 2 of the Valuation "for Rating Act, 1953, requires the hereditament to be valued "in the state of repair in which it was at the time of valuation. "(2) That the landlord's covenant under section 2 is only to "maintain the hereditament in the state of repair in which it was "at the time of valuation." Mr. Glover's argument runs as follows. He says that if reference is made to section 2 (3) (*a*), there has to be the assumption that on June 30, 1939, or on or about that date, the hereditament was subsisting in the state in which it actually subsists at the time of valuation. The time of valuation was March 30, 1957; and Mr. Glover says that the evidence was sufficient to establish that there were certain defects in the premises, of the kind to which I have referred, and that they existed on or about March 30, 1957. He therefore says that the valuation under section 2 (2) must be made on the assumption that in June, 1939, the hereditament was subsisting in the state in which it actually subsisted on or about March 30, 1957. He then says that in its application to the facts of this case subsection (2) contemplates an arrangement being made between a hypothetical landlord and a hypothetical tenant on the basis of the premises being in a state of disrepair, the landlord merely agreeing to do such repairs as would be necessary to prevent the premises becoming any worse.

To that submission counsel for the two respondents make several replies. They submit that that is a wholly unreal and artificial approach. They further submit certain contentions in regard to the construction of the words of subsection (2) and subsection (3). In regard to the words in subsection (3) (*a*), "that "the hereditament was subsisting on and about the said thirtieth "day of June in the state in which it actually subsists at the "time of valuation," it is submitted, particularly by Mr. Harris, that the word "state" as there used refers to the structural condition of the premises but does not include the state of repair or state of decoration. In furtherance of his submission he referred to a point, first raised by Harman L.J., that the word "state" is also used in sub-paragraph (*b*) of subsection (3) in the phrase "that the locality in which the hereditament is situated "was on and about the said day in the same state, as respects "the other premises situated in that locality," and so on. It was submitted that the basis of Mr. Glover's argument fails, because "state" does not include state of repair. Mr. Glover says that he does not contend that "state" primarily means state of repair but that the word is wide enough to include state of repair.

I do not think that it is necessary to express a final opinion on this point, for I propose to reach my conclusion on the assumption that the words of subsection (3) (*a*) are sufficiently wide to include the state of repair or decoration of the premises.

Another point of construction that has been raised concerns

the words at the end of subsection (2): " if the landlord had under- " taken to bear the cost of the repairs and insurance, and the " other expenses, if any, necessary to maintain the hereditament " in a state to command that rent." Are we to read the concluding words as governing " cost of the repairs and insurance " or are we to read them as governing " the other expenses, if " any, necessary to maintain the hereditament in a state to " command that rent " ? The words used in the subsection have substantially been in existence for a very long time. They are substantially the words which form the definition of " gross " value " in section 68 of the Rating and Valuation Act, 1925: " ' Gross value ' means the rent at which a hereditament might " reasonably be expected to let from year to year if the tenant " undertook to pay all usual tenant's rates and taxes . . . and if the " landlord undertook to bear the cost of the repairs and insurance, " and the other expenses, if any, necessary to maintain the " hereditament in a state to command that rent." So in the Act that applied to the metropolis, the Valuation (Metropolis) Act, 1869, in section 4 we find a definition of " gross value " which is substantially in the same terms. If, however, we go back to the Parochial Assessments Act of 1836 we find these words: " the rent at which the same might reasonably be expected " to let from year to year, free of all usual tenants' rates " and taxes, and tithe commutation rentcharge, if any, and " deducting therefrom the probable average annual cost of the " repairs, insurance, and other expenses, if any, necessary to " maintain them in a state to command such rent." Those words and that punctuation would more accord with the construction for which Mr. Glover contends; and it has been pointed out that in the change after the Act of 1836 there was no comma between the word " repairs " and the word " insurance " but instead of a comma the word " and " was inserted. That seems to lend some support to the view that the concluding words of subsection (2) are words that relate to " the other expenses, if any, necessary " to maintain the hereditament in a state to command that rent." The words of the subsection refer to the cost of the repairs and insurance. The cost of insurance would not seem normally to be effectively described by the words " expenses . . . necessary to " maintain the hereditament in a state to command that rent."

This point of construction does not appear ever to have been decided, but Mr. Raymond Phillips very frankly told us that his instructions were that in practice valuers had rather proceeded on the assumption that the concluding words did govern all the words that went before. Again, for my part, I do not find it necessary to decide this point, for it seems to me that even on the basis for which Mr. Glover contended, he still does not succeed. Mr. Glover's contention was summarised in the decision in this way: " Mr. Glover argued that under section 2 (3) (*a*) of " the Act of 1953 the flat must be valued exactly as it existed at " the date of the proposal, submitting that if a hereditament was

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" out of repair at the particular date, then the rent should be the " rent of the premises out of repair and, conversely, if in repair, " then the rent should be that of the premises in repair." The Lands Tribunal did not accede to those submissions. The first reason stated by the Lands Tribunal for disagreeing was expressed as follows: " I think that it is contrary to what happens " in everyday life, for in practice I am sure that a tenant viewing " a house or flat with the decorations dirty and worn, some cracks " in the walls and ceilings, and generally in a poor state of repair, " so long as his tenancy provided that the landlord was to bear " the cost of repairs, would not only require the landlord to keep " the premises in a good state of repair but also to put the " premises in a good and reasonable state of repair and decoration " before he entered into possession, and I do not think that this is " a matter where the hypotheses of rating require departure from " everyday practice." It seems to me that there is no error of law in that approach.

If, therefore, I make the assumption for which Mr. Glover contends, namely, that on or about June 30, 1939, the flat was in the state in which it actually was on March 30, 1957, and if I assume in his favour that the word " state " is wide enough to cover state of repair and state of decoration, it seems to me that Mr. Glover's submission becomes really a most unrealistic one. He submits that what has to be ascertained if premises are in temporary disrepair is what rent would be paid on the basis that the landlord only undertook to do such repairs as would prevent the premises from becoming in a worse state of disrepair. I cannot think that that is right. It runs contrary, as it seems to me, to all reason and does not accord with what could reasonably be contemplated as likely to be the bargain between a landlord and tenant. I think we must bear in mind the opening words of subsection (2): " The said rent is that at which the hereditament " in question might reasonably have been expected . . . to let." There is, therefore, introduced what might be expected and what might reasonably be expected. When the words of this subsection are first read it might seem as though a somewhat illusory test is laid down for the fixing of the rent. If a high rent was fixed, that could command onerous repair obligations and if a very low rent were fixed, that might result from a refusal to undertake any substantial repairs. That rather illusory test will not apply if the construction of subsection (2) is the construction contended for particularly by Mr. Harris. But it seems to me that the section is contemplating that the landlord will do repairs, and it must be remembered that if a landlord is to maintain premises in repair or to keep premises in repair, he has the obligation to put premises in repair. So it seems to me, if one postulates that a hypothetical landlord and a hypothetical tenant went into a flat which had the defects to which I have referred, such as bad window frames, cracks in the walls and ceilings and dampness and so on, and if we are considering what might reasonably have been expected by

way of rent, I would say that it would be such rent as would be payable on the basis that the landlord would then do the necessary repairs to make the flat reasonably habitable and would do such later repairs as would be reasonable in all the circumstances. I think one must assume that ordinary sensible people are dealing with the situation. I think also that consideration must be given to the class of property with which they are dealing.

Mr. Glover points out that in the case it is stated as follows: "It was admitted by both respondents that if it was correct in "law to value the said hereditament in the state of repair that "it was in at the date of the said proposal a deduction for the "state should be made in the valuations submitted on behalf of "the respondents. On behalf of the respondents the Battersea "Borough Council it was admitted that the said deduction should "be the sum of £10 per annum from the inclusive rental of £120 "per annum. It was admitted by the respondent Playle that "the said deduction from his inclusive rental should be £5 per "annum." There is a difference, it will be seen, between those two figures. But for the reasons that I have given, it seems to me that the Lands Tribunal did not in any way err in law in their approach. The state of disrepair was something that was easily remediable, as the case finds. In those circumstances it seems to me that what would reasonably be expected would be that the tenant would require the landlord to put right those remediable defects. Accordingly I consider that the basis on which the Lands Tribunal proceeded is not shown to be erroneous in law.

The other remaining point, which is quite a separate point, arises in this way. The hearing before the Lands Tribunal was on October 29 and 30. During the hearing, for the purpose of arriving at the starting figure of rent for the flat in question, a schedule or list of tenancies was put in showing the rents of second floor flats in the block of flats as at June, 1939. A flat which compared in size with No. 13 was No. 18, and the figures and circumstances with regard to that flat were set out, being part of the evidence for the tribunal to consider. After the hearing was concluded the tribunal decided to reserve its decision so as to put the decision into writing. On November 10 an application was made by the tenant for what was called a stay of proceedings to enable him to consider with counsel the making of an application for admission of further evidence. The other parties did not demur to the suggestion, and on December 8 a formal application was made by the tenant for the hearing of further evidence arising out of the evidence given on the last day of the hearing by the expert witness for the Battersea Borough Council. The decision recites that "the evidence was to concern "the comparative amounts of natural light reaching Nos. 18 "and 13, Park Mansions, and the effect of this on comparability "and on the value of No. 13." It will be apparent, therefore, that the nature of the additional evidence was such that the

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evidence could have been given at the time of the hearing. The case recites that the Lands Tribunal decided to refuse the application. I read from the decision: "I decided that these "applications should be refused because I am strongly of opinion "that once a hearing has been concluded that part of the proceed- "ings is definitely finished and the fact that a decision thereon "is often reserved to enable the tribunal to comply with the "requirement that the decision shall be given in writing, together "with a brief statement of the tribunal's reasons for its decision, "should not afford an opportunity for any of the parties concerned "to adduce fresh evidence." In the case stated the tribunal say: "I refused this application and read my decision, a signed "copy of which, together with a document setting out the details "of the second floor flats, is annexed hereto and forms part of "this case."

Mr. Glover submits that the Lands Tribunal had power to admit the further evidence sought to be tendered but wrongfully refused to exercise such power. He submitted that there was power to admit the evidence and a discretion in the tribunal, but that the tribunal either failed to exercise the discretion judicially or failed to exercise it at all. We were referred to the Lands Tribunal Rules, 1956 [S.I. 1956, No. 1734]. I do not propose to mention them in detail. It does not seem to me that there is any substance in this complaint. The Lands Tribunal do not say that in no circumstances ever would they hear further evidence after the evidence had been concluded. There are many circumstances in which a court might feel it appropriate to accede to an application to hear further evidence before judgment was given in a case where the hearing had been concluded and judgment reserved. This is not the occasion to seek to describe the situations where that might be appropriate. We were referred to *Bigsby* v. *Dickinson*.[1] That was a situation in which the Court of Appeal thought that it was clearly right that an opportunity should have been given to hear further evidence. It might easily be that after the conclusion of the evidence in a case and while judgment was reserved it might be found that there had been some inadvertent error in a figure or in some evidence and that it would be proper to make an application to a judge to hear further evidence in order to correct an error, and a judge would be very likely in an appropriate case to accede to such an application. But the present situation was quite different. A comparison between No. 13 and No. 18 was something which was a part of the inquiry before the Lands Tribunal and if parties, after a hearing is concluded, have some good ideas and feel that they would like to add a little to what they have already put forward, they might well make the end of litigation quite uncertain. It seems to me that the Lands Tribunal had a discretion here over this matter. I do not think that there was any wrongful

[1] (1876) 4 Ch.D. 24.

or non-judicial exercise of this discretion. It was perfectly within their powers to decide as they did. I, therefore, am of the opinion that that submission so clearly made by Mr. Glover also fails. I think, therefore, that the points to be decided in this case must be decided against the appellant.

WILLMER L.J. I have come to the same conclusion, and there is but little that I desire to add to what my Lord has said.

The right of appeal from the Lands Tribunal to this court is on a question of law only, and I am not persuaded in this case that the decision of the tribunal discloses any error of law. The principal argument advanced on behalf of the appellant amounts to this, that the combined effect of subsections (2) and (3) (*a*) of section 2 of the Valuation for Rating Act, 1953, is that the gross value of the premises in question is to be fixed by reference to the rent that such premises would have been expected to command at the material date in 1939, if they were in the same state of repair in which they actually were in 1957, and on the assumption that the landlord will do such repairs as are necessary to maintain the premises in a state of repair to command that rent. It seems to me that two assumptions are fundamental to that argument, and for myself I am doubtful as to the validity of either of them. One assumption is that the word "state," where it occurs in subsection (3) (*a*), includes state of repair so as to cover the kind of defective condition of repair that we have in this case. My Lord has already read the defects alleged here and it is unnecessary to repeat them. For myself I think it is extremely doubtful whether the word "state" is to be read in the sense of including state of repair. As my Lord has pointed out, where the same word occurs in the following sub-paragraph (*b*), it clearly has no reference to state of repair, and I am not persuaded, therefore, that the first assumption is correct.

The argument also assumes that the concluding words of subsection (2), namely, the words "necessary to maintain the "hereditament in a state to command that rent," are to be construed as governing not only the words "the other expenses, "if any," which immediately precede them, but also the earlier words, namely, "the cost of the repairs and insurance." For it is basic to the tenant's argument that the landlord's undertaking is to be construed as an undertaking only to execute such repairs as are necessary to maintain the hereditament in the same state of repair as at the date of the proposal. My Lord has already suggested some difficulties in the way of adopting that construction. I venture to suggest another difficulty. The words actually run: "the cost of the repairs and insurance, and the other "expenses, if any, necessary to maintain the hereditament in a "state to command that rent." On the tenant's argument we should have to construe those words as though they read: "the "cost of the repairs and insurance, and the cost of the other "expenses." That seems to me to be a very strange way of

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reading the subsection, and I should have thought that the more natural construction to put upon it is that the concluding words, which I have already read, are to be taken as governing only "the other expenses" which immediately precede them. Speaking for myself, therefore, I am disposed to doubt the validity of both the assumptions that underlie the tenant's argument.

However, as my Lord has pointed out, it is not necessary for us in this case to reach any concluded view about that, because the Lands Tribunal has in fact taken another route to the solution of the case, and, as I have already said, I can see no error of law in the reasons given for the decision. Even making those two basic assumptions in favour of the tenant, it remains true to say that the argument involves something which, in the words of the tribunal, is contrary to what happens in everyday life. For my part I should have thought it is clear that subsection (2) is to be construed on the basis of what normally does happen in everyday life. I infer that from the incorporation of the word "reasonably" at the beginning of subsection 2. The subsection speaks of the rent which might "reasonably" have been expected. That imports the notion of a reasonable landlord and a reasonable tenant, behaving reasonably and making a reasonable arrangement. If that is the right approach, then I entirely agree with what my Lord has said, namely, that one would expect a reasonable landlord and a reasonable tenant, when contracting for a tenancy, if it appeared that there were readily remediable defects such as those we have in this case, to proceed on the basis that the landlord's covenant to repair would include an obligation not only to keep the premises in repair but to put the premises in repair. That seems to me the common sense application of the subsection. That is the way in which the tribunal applied the subsection, and I am quite unable to say that the decision was wrong. On that main point, therefore, I do not find myself able to accede to the tenant's argument.

With regard to the second point, namely, that the tribunal was in error in refusing to grant leave to call further evidence after the hearing was concluded, I find myself in agreement with what my Lord has said, and I desire to add nothing further. In those circumstances I agree that this appeal should be dismissed.

HARMAN L.J. I am of the same opinion. It seems to me the decision of the Lands Tribunal was no less good law than it was clearly good sense. It would produce chaos if the tenant's contentions were upheld. It seems to me that where there is a landlord under a repairing covenant and a tenant about to take a house on a year's tenancy, the tenant must naturally be supposed to have a landlord whom he can oblige to observe his repairing covenant, and therefore the fact that there are, at the moment when the bargain is made, reparable and temporary defects in the property ought not to be taken into account in arriving at the hypothetical rent which is the basis of the rateable

value. If it were otherwise, it would be difficult in any case, and quite impossible in a case like the present, to arrive at a conclusion dependent on a state of repair existing so long ago as 1939. I am glad to think, therefore, that the tribunal was able to come to what seems to me to be a sensible conclusion and one in accordance with the law without the necessity of deciding the rather nice questions of construction raised by the two subsections which my Lords have discussed. On those I desire to reserve my opinion, expressing as at present advised a preference for the views to which Willmer L.J. has given expression.

I need say no more on the other point except that I agree with Morris L. J.

Appeal dismissed with costs—one set of costs to be divided equally between the two respondents.
Leave to appeal to the House of Lords refused.

Solicitors: *Mortimer, Wexler & Co.; Solicitor, Inland Revenue; Sharpe, Pritchard & Co.*

M. M. H.

[HOUSE OF LORDS.]

PUBLIC TRUSTEE . . . . . APPELLANT;
AND
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Nov. 5, 9, 10; *Dec.* 14.

Revenue—Estate duty—Property chargeable—Property deemed to pass—Meaning of "deemed"—Bequest to trustee for life of income from shares of residue—". . . so long as he shall act as trustee . . . by way "of remuneration"—Duty claimed on death of trustee on capital of share—Whether exempted as income received "only . . . as holder of "an office"—Scope of exempting provisions—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*), (2), (3), *as amended.*

Trust and Trustee—Remuneration—Annuity—Life interest in share of residue by way of remuneration—Estate duty claimed on death of trustee.

Judicial Precedent—House of Lords decision—Dictum long treated as correct—Patently wrong—Relevance of subject of discussion.

Judicial Precedent — Statute — Construction — Different situation — Whether different construction permissible.

Statute—Construction—Meaning of words—Ordinary meaning to be applied.

By section 1 of the Finance Act, 1894 (as amended by the Finance Act, 1946): "In the case of every person dying after the "commencement of this Part of this Act, there shall, save as herein- "after expressly provided, be levied and paid, upon the principal "value ascertained as hereinafter provided of all property, real or

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

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"personal, settled or not settled, which passes on the death of such "person a duty called 'estate duty,' at the graduated rates herein- "after mentioned, and the existing duties mentioned in Schedule I "of this Act shall not be levied in respect of property chargeable "with such estate duty."

By section 2: "(1) Property passing on the death of the deceased "shall be deemed to include the property following, that is to "say:—(*a*) Property of which the deceased was at the time of his "death competent to dispose; (*b*) property in which the deceased or "any other person had an interest ceasing on the death of the "deceased, to the extent to which a benefit accrues or arises by the "cesser of such interest; but exclusive of property the interest in "which of the deceased or other person was only an interest as "holder of an office, or recipient of the benefits of a charity, or "as a corporation sole . . . (2) Property passing on the death of "the deceased when situate out of the United Kingdom shall be "included only, if under the law in force before the passing of this "Act, legacy or succession duty is payable in respect thereof, or "would be so payable but for the relationship of the person to "whom it passes. (3) Property passing on the death of the deceased "shall not be deemed to include property held by the deceased as "trustee for another person under a disposition not made by the "deceased more than five years before his death where possession "and enjoyment of the property was bona fide assumed by the bene- "ficiary immediately upon the creation of the trust and thence- "forward retained to the entire exclusion of the deceased or of any "benefit to him by contract or otherwise."

A testator gave to one of the trustees of his will the income of certain shares of his residuary estate "during his life so long as he "shall act as executor and trustee of this my will by way of "remuneration for so doing. . . ." On the death of the trustee estate duty was claimed under section 1 of the Act, as property passing on the death, on the share of capital corresponding to the share of income to which the trustee had been entitled immediately before his death. The claim was resisted on the ground that the interest was enjoyed by the trustee "only . . . as holder of an "office," and that it therefore came within the exemption from duty in section 2 (1) (*b*):—

Held (Lord Keith of Avonholm dissenting) that the property in question should not be charged to estate duty.

Section 1 of the Act imposed the charge in general terms and section 2, by exclusion and inclusion, defined the precise area of that charge. The two sections were not mutually exclusive and the exempting words of section 2 (1) (*b*) were operative with regard to property which fell within that subsection, even though that property might also fall within the words of section 1 (post, pp. 206, 213, 215, 223). The trustee's trusteeship was an office, and his beneficial interest in the property was in respect of that office (post, p. 214).

Dictum of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198, 212; 15 T.L.R. 270 disapproved.

In re Duke of Norfolk [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 2 All E.R. 851 considered.

Observations of Lord Radcliffe in *Sanderson* v. *Inland Revenue Commissioners* [1956] A.C. 491; [1956] 2 W.L.R. 48; [1956] 1 All E.R. 14 considered.

Decision of the Court of Appeal [1958] Ch. 865; [1958] 3 W.L.R. 163; [1958] 2 All E.R. 720 reversed.

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APPEAL from the Court of Appeal (Lord Evershed M.R., Romer and Ormerod L.JJ.).

This was an appeal by the appellant, the Public Trustee, from an order dated June 26, 1958, of the Court of Appeal, affirming an order of the Chancery Division of the High Court of Justice (Danckwerts J.) made on February 13, 1958, on an application by the appellant by originating summons dated November 19, 1957, and issued pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1933, to have a question of liability to estate duty determined.

The facts are stated in the opinion of Viscount Simonds.

John Pennycuick Q.C. and *J. A. Wolfe* for the appellant.

Sir Lynn Ungoed-Thomas Q.C. and *E. B. Stamp* for the respondents.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *St. Aubyn* v. *Attorney-General* [1]; *In re Tapp* [2]; *In re Lambton's Marriage Settlement* [3]; *Dale* v. *Inland Revenue Commissioners* [4]; *Jacobs* v. *London County Council* [5] and *Burrell* v. *Attorney-General.* [6]

Their Lordships took time for consideration.

Dec. 14. VISCOUNT SIMONDS. My Lords, at the date of his death on August 31, 1955, the late Henry Preuss Arnholz was, in the events that had happened, entitled to a fractional share amounting to 3/49½ of the income of the residuary estate of the late Lord Northcliffe. This income he enjoyed under a bequest in Lord Northcliffe's will to him "during his life so long as he shall "act as executor and trustee of this my will by way of remunera-"tion for so doing." Upon his death a claim was made against the Public Trustee as his executor for estate duty on a share of Lord Northcliffe's residuary estate corresponding to the share of income to which he was entitled. The Public Trustee resisted the claim on the ground that the interest of the deceased was only an interest as holder of an office and was therefore exempted from estate duty. This plea having been rejected by the Commissioners of Inland Revenue, he took out an originating summons in the Chancery Division of the High Court of Justice to have the question of liability determined. It was determined adversely to him by Danckwerts J. and by the Court of Appeal. Hence this appeal to your Lordships, and I will say now that it is at once as simple and as difficult a question as any that I have had to decide in the long years that I have been privileged to sit in this House.

[1] [1952] A.C. 15; [1951] 2 All E.R. 473.
[2] [1959] Ch. 443; [1959] 2 W.L.R. 451; [1959] 1 All E.R. 705.
[3] [1952] Ch. 752; [1952] 2 T.L.R. 68; [1952] 2 All E.R. 201.
[4] [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671.
[5] [1950] A.C. 361; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737.
[6] [1937] A.C. 286; [1936] 3 All E.R. 758.

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Let me first, my Lords, set out the material parts of the sections of the Finance Act, 1894, by which for the first time the duty called " estate duty " was imposed.

Section 1, which imposed the charge, provided as follows: " In the case of every person dying after the commencement of " this Part of this Act, there shall, save as hereinafter expressly " provided, be levied and paid, upon the principal value ascer- " tained as hereinafter provided of all property, real or personal, " settled or not settled, which passes on the death of such person " a duty, called ' estate duty,' at the graduated rates hereinafter " mentioned, and the existing duties mentioned in Schedule I to " this Act shall not be levied in respect of property chargeable " with such estate duty." I pause to observe that the word " passes," familiar as it has now become to us, was not in 1894 a term of art in the law relating to death duties, and that it would appear to have been a matter of sheer necessity for the Act to proceed to a definition of the area of charge. It was natural that the draftsman should do so by the use of the word " deem," a word which, as my noble and learned friend, Lord Radcliffe, has said in another case,* is apt to include the obvious, the uncertain and the impossible.

So it is that section 2 opens with the words in subsection (1): " Property passing on the death of the deceased shall be deemed " to include the property following, that is to say: . . ." Then follow categories of property, some of which must upon any fair meaning of the word " pass " be considered to pass upon the death of the deceased, as to others of which there might be uncertainty and as to others there would be no doubt that but for the deeming they would not pass. Then, appropriately enough, there follow subsections (2) and (3), of which subsection (2) deals with property situate out of the United Kingdom, including some part and excluding other part of such property from " property " passing on the death of the deceased," and subsection (3) (having recourse once more to " deeming ") provides that property passing on the death of the deceased shall not be deemed to include property held by him as trustee, and so on.

My Lords, if I were today looking at this Act for the first time, I should say that these sections were straightforward and clear, the first section imposing the charge in general terms and the second defining by inclusion and exclusion the precise area of that charge. I should unhesitatingly reject any suggestion that the two sections were in any way mutually exclusive or, as a corollary, that, if any property clearly " passed " on the death of the deceased under section 1, it was unnecessary to look at section 2. I should point to the first category of property which under section 2 (1) (*a*) is to be deemed to be included in property passing on the death, namely, " Property of which the deceased " was at the time of his death competent to dispose," and ask

* *St. Aubyn* v. *Attorney-General* [1952] A.C. 15, 53; [1951] 2 All E.R. 473.

how this category which embraces the whole free estate of the deceased can be excluded from section 1, and, if it must (as it clearly must) pass under that section, what meaning can so far be given to section 2 (1) except that it is not purporting to bring into charge property which is not within section 1 but aims at defining all the various kinds of property which it is thought fit to charge. I should then look at section 2 (1) (*b*), and, bearing in mind that section 1 referred to property "settled "or not settled," and that section 2 (1) (*a*) had dealt with property that was not settled, I should expect to find that section 2 (1) (*b*) dealt with settled property. And that is what I should find. In language that is apt to cover all settled property and, in particular, the commonest form of settled property, namely, property in which a life interest is given with remainders over, the second main category of property is exhaustively defined. It would not occur to me that section 2 (1) (*b*) was intended to cover only property which did not pass (whatever that as yet undefined word might mean) under section 1. Moreover, if I had any doubt, it must have been dispelled by the words which are material to the present appeal; for the sub-paragraph proceeds to exclude from what is deemed to be included, property the interest in which of the deceased was "only an interest as "holder of an office, or recipient of the benefits of a charity, or "as a corporation sole." It would appear to be a wholly untenable view that these words of exclusion could refer not to a life interest but only to something less than a life interest. Strange as are the conclusions to which one is sometimes driven in the consideration of taxing statutes, I doubt whether in the whole realm of tax law a more fantastic result could be reached than to say that, if a person has a life interest in property as holder of an office, duty shall be leviable in respect of that property on his death, but that, if his interest is less than a life interest, then duty shall not be leviable. I should in fact find in the very words that I have cited the strongest argument against a construction of the statute for which the Crown has so far successfully contended.

I need say little about section 2 (1) (*c*) and (*d*). These sub-paragraphs bring the subject-matter within the area of charge which without a "deeming" clause would remain outside it. Nor need I say more about section 2 (2) and (3) than that in a section which comprehensively describes the area of charge I find, as I expect, a description of those categories of property and interest which are outside that area. Thus, my Lords, I come to the end of my examination of sections 1 and 2 with the clear conviction, which is not weakened but rather is confirmed by other sections, that section 2 is a categorical description of the property "settled "or not settled," upon which the new estate duty is imposed.

How is it, then, that in the present case Danckwerts J. and the Court of Appeal have come to a conclusion which rests upon a finding that the words of exclusion in section 2 (1) (*b*) have

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no relevance to a life interest enjoyed by a person as holder of an office? My Lords, they have been driven to this conclusion by those considerations which led me at the outset of this opinion to say that I have found this simple case so difficult to decide. They are founded upon expressions of opinion in this House primarily by Lord Macnaghten but in some degree by other learned Lords also. If in what I have already said I have impliedly criticised, and if in what I now say I venture to challenge, anything that Lord Macnaghten has said, I do so with the greatest diffidence. For I am well aware that to generations who have passed their lives in the law his is truly clarum et venerabile nomen. But his observations to which I must now refer have created so much doubt and difficulty that I have come to the conclusion, in which I understand that the majority of your Lordships concur, that the time has come to re-examine, not indeed, any decision of this House nor any reasoning that was strictly necessary to such a decision, but certain observations upon the interrelation of sections 1 and 2 which, as I humbly think, were made without full consideration of their consequences, and particularly of their bearing upon the words which are the special subject of this appeal.

My Lords, any discussion of this matter must begin with the case of *Earl Cowley* v. *Inland Revenue Commissioners*.[1] That case had a curious history. The facts were simple enough. A father and son (the second and third Earl Cowley) disentailed certain estates and, after mortgaging them to secure a large sum, resettled them so that a charge of an annuity was created in favour of the son and subject thereto the father enjoyed a life interest with remainders over. The father died and the question arose what estate duty was payable in respect of the settled estates; in particular could a deduction be made in respect of (a) the mortgage and (b) the son's annuity? It was decided by this House that the answer to (a) was "Yes" and to (b) "No." I may interpolate that it took more than 50 years to remedy by legislation the palpable injustice of the second answer. But, my Lords, the curiosity of the case was this. Until it reached this House the claim of the Revenue had been based on section 2 (1) (*b*). Were not the settled estates property in which the deceased father had an interest ceasing on his death? Neither in the Court of Appeal nor in the reported argument in this House nor in the formal case book, which I sent for and examined, was there any suggestion that the Revenue claim was based not on section 2 (1) (*b*) but upon section 1 to the exclusion of that section. Nine months passed, the case of *Attorney-General* v. *Beech*[2] having in the meantime been decided in this House, and then the judgment was given in which for the first time in the familiar words of Lord Macnaghten[3] the suggestion was made that "if the case falls within section 1 it cannot also come within

[1] [1899] A.C. 198; 15 T.L.R. 270.
[2] [1899] A.C. 53; 15 T.L.R. 85.
[3] [1899] A.C. 198, 212.

"section 2. The two sections are mutually exclusive." It is undeniable that the learned Lord expanded on this theme. But to me it seems plain that his observation was per incuriam, and that when he said [3]: "Section 2 might with equal propriety be "headed, 'and with regard to property not passing on death,'" he had forgotten subsections (2) and (3) of section 2 and forgotten, too, the words of section 2 (1) (*a*) and the definition of those words in section 22 (2) (*a*). No other explanation of his speech has ever to my knowledge been offered until this hour.

My Lords, I do not get any assistance from *Beech's* case,[4] which, as I have said, was heard and determined while *Cowley's* case [5] was in gremio. But it is at least clear that the Revenue claim was based on section 2 (1) (*b*) (see bottom of p. 53) and that the mutual exclusiveness of sections 1 and 2 was not advanced on either side. I return to *Cowley's* case.[5] In the speech of Lord Morris there is at least an indication that the provisions of section 2 (1) (*b*) were uppermost in his mind. The speech of Lord Shand is neutral. In that of Lord Davey I find much that puzzles me. That learned Lord, having said that he agreed with Lord Macnaghten as to the construction of the Act, and that the case clearly fell within section 1, said [6]: "But, in my opinion, whether it falls within the first or the "second section we arrive at the same result," then briefly stated the effect of those sections and proceeded [7]: "The "only material words for the present purpose are in sub-"section (1) (*b*)," that is, of section 2, which he cited. Thus, my Lords, for him the only material words were in a section which Lord Macnaghten (with whom he agreed) had said should not be looked at. I have omitted to refer to the speeches which preceded that of Lord Macnaghten. In that of Lord Watson there is no support for Lord Macnaghten's construction. On the contrary, his reference to the fact that [8] "upon his father's death "no interest or benefit accrued to the appellant in respect of any "part of the equitable estates . . ." shows that he had section 2 (1) (*b*) in mind and determined the liability to duty by reference to that subsection. Lord Halsbury, on the other hand, appears to have taken the same view as Lord Macnaghten. I must cite his words [9]: "I see no ground for dealing with section 2, since, "for the reasons I have given, I think it is section 1 to which you "must look to see what property, real or personal, settled or "not settled, passed upon the death of the second to the third "Earl; but if I were compelled to give a construction to section 2 "(1) (*b*), I should come to the same conclusion in respect of the "liability to duty, since I think the benefit accruing or arising to "the third Earl was only to the extent of the value of the equity

[3] [1899] A.C. 198, 212.
[4] [1899] A.C. 53.
[5] Ibid. 198.
[6] Ibid. 218–219.
[7] Ibid. 219.
[8] Ibid. 210.
[9] Ibid. 207.

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" of redemption. But, as I have said, the question must be " determined on section 1 alone."

My Lords, I will refer again to *Cowley's* case,[10] but now I pass on. Within a few months the case of *Attorney-General* v. *Dobree* [11] came before the court. Already the difficulty created by Lord Macnaghten's words had become obvious, and Channell J., a very learned judge, thus expressed himself [12]: " To my mind " there is a little difficulty in fully following the exact literal " words of Lord Macnaghten's judgment in *Earl Cowley* v. *Inland* " *Revenue Commissioners* [13] with respect to cases falling within " sections 1 and 2. It is quite true that if you can arrive at the " conclusion that the case falls within section 1, then section 2 " may be said to be excluded—you do not want section 2. But " one of the operations of section 2 seems to me clearly to be to " sweep into section 1 some cases which might be doubtful upon " the construction of section 1, but which section 2 includes in " clear words, and therefore brings them in to be subject to the " duty whether they were within section 1 on the true interpreta- " tion of it, or not. I think Lord Macnaghten must have meant " that in such cases, if you took the trouble to decide whether " they were within section 1 or not, and came to the conclusion " that they were, then you would not want section 2. At any " rate, it was not necessary for him in the case before him to " express an opinion contrary to what I have said." These observations were no doubt directed to the argument of Mr. Haldane Q.C.[14]: " The two sections are distinct and mutually " exclusive. If a case falls within section 2 it cannot fall within " section 1." I shall call in aid the last words that I have cited of the learned judge, which appear to me incontrovertible.

My Lords, I will now refer to two cases decided in this House, *Attorney-General* v. *Milne* [15] and *Nevill* v. *Inland Revenue Commissioners*.[16] In neither case was the validity of Lord Macnaghten's words in *Cowley's* case [17] necessary to the decision. I cite them to illustrate the surprising confusion that has grown up around them. In the first case Lord Haldane,[18] after referring to *Cowley's* case,[19] said: " Section 2 is thus not a definition section, " but an independent section operating outside the field of " section 1." In the latter case the same learned Lord said [20]: " ' Passes ' may be taken as meaning ' changes hands.' The " principle is contained in section 1. Section 2 combines defini- " tions of such property with the extension of the application of " the principle laid down in section 1 to certain cases which are " not in reality cases of changing hands on death at all . . ." Lord Haldane, whose irreconcilable statements encourage a new

[10] [1899] A.C. 53, 198.
[11] [1900] 1 Q.B. 442; 16 T.L.R. 80.
[12] [1900] 1 Q.B. 442, 450–451.
[13] [1899] A.C. 198.
[14] [1900] 1 Q.B. 442, 447.
[15] [1914] A.C. 765; 30 T.L.R. 476.
[16] [1924] A.C. 385; 40 T.L.R. 341.
[17] [1899] A.C. 198, 212.
[18] [1914] A.C. 765, 769.
[19] [1899] A.C. 198.
[20] [1924] A.C. 385, 389.

look at the sections, was the only learned Lord to take part in both cases. I do not find that any other Lord who took part in *Nevill's* case [21] expressly or impliedly dissented from his view of the interrelation of the sections. It was otherwise in *Milne's* case.[22] In that case Lord Atkinson appears to have adopted Lord Haldane's earlier view, treating section 2 as merely supplementary to section 1, and as designed to make liable to estate duty certain dispositions of property which were outside the scope and beyond the reach of section 1. "This section," he said,[23] "is not a definition section." He did not, however, say (and this is significant) that the two sections were mutually exclusive. Section 2 may well not be a definition section in the sense that any property escapes the charge which is not included in it, though I have not for myself been able to think of any property which would not be so included. It does not follow that the same property may not be caught by the general words in section 1 (Lord Haldane's "principle" in *Nevill's* case [24]) and by the categorical description in section 2. It is, I think, possible to attribute this meaning also to Lord Parker's words [25]: "It is "in no sense a definition section." If so, I would agree with it, as, I think, did my noble and learned friend, Lord Radcliffe, in a case to which I will presently refer. Lord Dunedin took a different view. Having said that whether Lord Macnaghten was strictly correct or not in saying that whether the two sections were mutually exclusive or not seemed to him to matter little, he added [26]: "It seems to me that that is as much as to say that "the words, 'property passing on the death,' in the first section, "are to be read as if the words, 'including the property following, "'that is to say'—(and then all the subsections) had been there "inserted." My Lords, I find it difficult to see how Lord Dunedin's view could march with Lord Macnaghten's words. But perhaps his statement that it mattered little whether Lord Macnaghten was strictly correct or not meant that he thought he was clearly wrong.

The next case in this House upon which reliance was placed was *Adamson* v. *Attorney-General*.[27] But I think it unnecessary to pause over it, for it throws no light on the inter-relation of the two sections except to illustrate the confusion of mind which *Cowley's* case [28] has caused.

I come to *De Trafford* v. *Attorney-General*.[29] In that case the material question was the same as the second question in *Cowley's* case,[30] and the answer given was inevitably the same. It was unnecessary to consider the relation of the two sections, either of which would cover the case. Lord Russell of Killowen, in whose opinion the other noble and learned Lords concurred, adopted the words of Lord Watson in *Cowley's* case,[30]

[21] [1924] A.C. 385.
[22] [1914] A.C. 765.
[23] Ibid. 773.
[24] [1924] A.C. 385, 389.
[25] [1914] A.C. 765, 779.
[26] Ibid. 775.
[27] [1933] A.C. 257; 49 T.L.R. 169.
[28] [1899] A.C. 198.
[29] [1935] A.C. 280; 51 T.L.R. 298.
[30] [1899] A.C. 198.

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which, as I have already pointed out, do not rest on Lord Macnaghten's construction of the two sections. Finally, so far as decisions of this House are concerned, I must refer to *Sanderson* v. *Inland Revenue Commissioners*.[31] I do so only for the purpose of saying that I concur in what my noble and learned friend, Lord Radcliffe, said in that case, and welcome the opportunity now given to him to elucidate this "minor mystery of the "law."

My Lords, I have not thought it necessary to refer to the numerous cases in which *Cowley's* case[32] has been commented on in the Court of Appeal. It was natural and proper that that court should feel bound to follow not only the decision but the dicta of Lord Macnaghten in that case. But I will refer to *In re Cassell*[33] for a particular reason. That case illustrates in a special degree the importance of putting an end to the controversy about the meaning and scope of Lord Macnaghten's words. It will be remembered that *Cowley's* case[34] was a decision partly in favour of the Crown (though not on any ground urged by the Crown) and it has since that case been frequently contended that, if a case fall within section 1, section 2 must be disregarded. That is the whole of the argument in the case under appeal. Yet in *Cassel's* case[35] Russell J. said: "This indeed was the contention before "me of counsel for the Commissioners of Inland Revenue, who "definitely contended that in the ordinary case of property settled "on A for life with remainder to B estate duty was leviable on "A's death not under section 1 simpliciter but under section 1 by "virtue of section 2. In other words, such a case was a section 2 "case and not a section 1 case. . . ." It is true that Russell J. felt himself constrained by *Cowley's* case[36] to reject the contention which otherwise appealed to him. With great respect, I doubt whether his analysis of the speeches of all the Lords who took part in that case is correct, but my purpose in citing this case is to show into what confusion the law has been thrown when the Revenue authorities, whose duty it is to administer this difficult branch of the law, advance at one time an argument founded on Lord Macnaghten's dictum and at another an argument directly opposed to it. And, lest it should be said that *Cassel's* case[37] is, after all, ancient history, I will remind your Lordships that as recently as 1950 in *In re Duke of Norfolk*[38] it was argued by counsel for the Crown that the fact that duty can be claimed in respect of the passing of an annuity under section 1 does not preclude a claim for duty under section 2 (1) (*b*).

This brings me, my Lords, to a point directly apposite to the present appeal. The contention of the Crown, which has so far prevailed, is that the excluding words in section 2 (1) (*b*) have no

[31] [1956] A.C. 491; [1956] 2 W.L.R. 98; [1956] 1 All E.R. 14.
[32] [1899] A.C. 198.
[33] [1927] 2 Ch. 275; 43 T.L.R. 743.
[34] [1899] A.C. 198.
[35] [1927] 2 Ch. 275, 279.
[36] [1899] A.C. 198.
[37] [1927] 2 Ch. 275.
[38] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 2 All E.R. 851.

application where property passes under section 1 and that, therefore, duty is payable in respect of property held by the holder of an office for his life, or presumably by a recipient of the benefits of a charity for his life or by a corporation sole (for example, a rector)—the last a somewhat difficult conception. Yet in the 65 years that have passed since the Finance Act, 1894, came into operation, such a claim has never before, so far as I or learned counsel are aware, been advanced by the Revenue authorities. In 1947 another trustee of Lord Northcliffe's will died. He, too, was entitled as trustee to a fractional share of the income of the residuary estate. Yet no claim was made for duty in respect of the proportionate share of capital. Why not? I do not find it easy to accept the suggestion that the omission was inadvertent.

What, then, my Lords, is the proper course to be taken? I believe that I yield to no one in the importance that I attach to the rule of precedent. But this case stands alone in my experience. Observations so patently wrong (may I be forgiven for saying so) that they leave only a sense of wonderment—unnecessary to the decision, for, as Lord Davey pointed out, the same result could be reached by another route—by Lord Davey himself accepted and dissented from in the same breath—flatly contradicted in 1924 by Lord Haldane who in 1914 had adopted them—the source of endless doubt and confusion to all who have been concerned in the examination or administration of this branch of law—all these factors lead me to the conclusion that I can properly invite your Lordships to say that sections 1 and 2 are not mutually exclusive and that the excepting words in section 2 (1) (*b*) are operative in regard to property which falls within that subsection even though that property may fall also within the wide words of section 1. And I feel the less reluctance in doing so because these very words had they been called to the attention of the House in *Cowley's* case [39] might well have led to re-examination of the sections and to a different conclusion, and because I do not think that in any reported case the same conclusions could not have been reached if the construction of sections 1 and 2 which I submit had been adopted.

A further point was taken on behalf of the Crown with which I can deal briefly. It is stated in the formal reasons of the respondents thus: "Because on the true construction of the "exception . . . it is limited in its application to interests attached "to an office and which the deceased had virtute officii and does "not extend to interests not attached to an office and which the "deceased merely enjoyed as an individual so long as he held a "particular office." If these words are intended to cut down the plain words of exception in the subsection, I see no justification for substituting them. The words of the statute and of the will are equally clear. Mr. Arnholz received a share of income during

[39] [1899] A.C. 198.

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his life so long as he acted as executor and trustee of the will by way of remuneration for so doing. His trusteeship was an office and there is no reason for saying that his beneficial interest in the property was any other than in respect of that office. This is in accordance with the decision in *Attorney-General* v. *Eyres*,[40] the correctness of which has never, I think, been questioned.

In these circumstances, I am of opinion that the judgment of the Court of Appeal should be reversed, that the question asked by the originating summons should be answered in the negative and that the respondents should pay the appellant's costs here and in the courts below.

LORD RADCLIFFE. My Lords, I agree that the interest of the late Mr. Arnholz in the income of Lord Northcliffe's residuary estate was "only an interest as holder of an office" within the meaning of section 2 (1) (*b*) of the Finance Act, 1894. I do not think it necessary to add anything to what has been said on that point by my noble and learned friend, Viscount Simonds.

In saying that, however, I have begged the main question that was the subject of argument in your Lordships' House: for the case for the Commissioners of Inland Revenue was founded on the proposition that, though Mr. Arnholz's interest was conferred by the will as a right to "three equal one hundredth parts of the "said income . . . during his life so long as he shall act as "executor and trustee," this did not mean that the trust fund in which he enjoyed that interest was property in which he had an interest ceasing on his death such as is referred to in section 2 (1) (*b*) and that, accordingly, the exception from the class of property mentioned in that subsection of any property in which the deceased was interested only as holder of an office could not apply to his case. The proposition as thus stated by me is contorted. But then I think that the construction of sections 1 and 2 which the commissioners invite us to adopt is itself singularly contorted. That is not their fault. Their reading seems, at any rate at first sight, to have tradition behind it, even if the original pronouncement of Lord Macnaghten from which it is derived has been, I believe, much more often repeated than it has been understood. I can only say that at the end of the day I am relieved to find that we are not constrained by any authority to impose upon ourselves a construction of taxing provisions which seems to me as much contrary to the plain meaning of the Act as it would be frivolously capricious in its result.

If one were to undertake in 1959 the very difficult task of interpreting the scheme of the Finance Act, 1894, without knowledge of the two generations of judicial decision that have imparted to such words as "passing on death" exact shades of meaning that could not originally have been discerned, I believe that the general purport of the Act and the interrelation of its

[40] [1909] 1 K.B. 723; 25 T.L.R. 298.

parts would still be tolerably clear. Settled estate duty apart, section 1 would be read as the section that imposed the charge of duty for all the purposes of the Act and it would be noted that the duty is granted upon " all property, real or personal, settled " or not settled, which passes on . . . death." It would be appreciated that the words " passing on death " had not at that time any precise significance in law; that they were not words of art or technical import; and that the conception of " estate duty " that was then being imposed was in many of its aspects radically different from the conceptions that had governed the familiar legacy and succession duties. Nor, since it was to be imposed on property settled as well as property not settled, did it present itself as another form of probate duty.

So approached, section 2 seems to be a natural sequel of section 1. Its purpose is to explain and refine upon the meaning of the words " property . . . which passes on . . . death " which section 1 had declared to be subject to the charge of duty. Subsection (1) therefore selects certain categories of property and, aided by the interpretation section, section 22, brings them expressly under the description of property passing on death, indifferent to the question whether, if it itself had not been part of the original scheme of the Finance Act, 1894, any one of those categories or any particular form of property falling within one of the categories would or would not have been treated by the courts as covered by the general words of section 1. I can see no significance one way or the other in the fact that it declares its purpose by saying that the categories selected shall be " deemed " to be included in the " property passing " which is charged by section 1. Such a phrase gives statutory certainty to what might otherwise be in some aspects uncertain and, in a few, impossible. Thus, subsection (1) (*a*) names a category, " Property of which the " deceased was . . . competent to dispose," which seems plainly to embrace all property which was within his absolute disposition at his death. Other uses of the same phrase in other sections of the Act show that there at least it is used in this general sense. Subsection (1) (*b*), consistently with this, names a category, " Property in which the deceased or any other person had an " interest, ceasing on the death of the deceased ": this seems the apt and natural expression to describe settled property in which the deceased had a life interest, settled property in which some other person had an interest terminable with the life of the deceased, and property in which there subsisted some interest for life, such as a life annuity, which did not carry the ownership of the whole income.

No doubt, much that is described in these two heads of section 2 (1) would have been charged in any event by force of the words used in section 1. In that sense it is permissible to say of section 2 (1), as has so often been said, that it " sweeps up " what is not covered by section 1. But that is to describe its effect or rather the effect that section 1 would have in the hypothetical

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situation of section 1 standing without section 2. It is not to describe its construction; and the distinction is important.

Having thus dealt with the two main heads of property the situation of which was such that it was to be regarded as passing on death, subsection (1) adds two other categories, of which it is enough to say that some cases that fall within them would anyway, most would certainly not without them, have been regarded as passing on death. Subsection (2), on the other hand, provided a rule for determining whether property situate outside the United Kingdom, assuming that it came within the description now established of what passed on death, should be subject to or exempt from duty. Subsection (3) deals with the special case of the passing of property on the death of a trustee holder. No one has ever questioned that the rules of inclusion or exemption contained in subsections (2) and (3) apply to all property within, or that would otherwise be within, the charge imposed by the terms of section 1.

I think that in the first years after the 1894 Act came into force its structure must have been generally understood to be as I have described it above. In particular section 2 (1) (*b*) was regarded as being applicable to the interest of a life tenant of settled property. No doubt, this era must now be looked back upon as some primitive golden age in the history of judicial dealings with the Estate Duty Act: but I cannot otherwise explain how it was that when *Earl Cowley's* case [41] came before the courts, it was throughout argued by counsel on both sides on the basis that it was the words of section 2 (1) (*b*) that provided the statutory rule for determining what property passed on the termination of a life interest in settled property such as was then in question. Neither side raised or argued any issue to the contrary. The real controversy in the *Cowley* case [41] was about something different, whether, a mortgage having been effected under a joint power of appointment created by tenant for life and remainderman on a resettlement, what was to be treated as passing on the life tenant's death was the equity of redemption, not the unincumbered fee. It was only when the House of Lords came to deliver their speeches upon that issue that there appeared for the first time in the speech of Lord Macnaghten this theory of the "mutual exclusiveness" of section 1 and section 2 which is solely responsible for the difficulty in the present case.

The purport of the *Cowley* decision [41] has been fully analysed in the speech which my noble and learned friend has just delivered. I do not want to take up time by repeating or enlarging upon it. All that I am concerned to state is what I think that authority amounts to for the purpose that we have now in hand. I accept that nearly every member of the House who took part in the decision held that settled property in which a

[41] [1899] 1 Q.B. 355; 14 T.L.R. 92; (H.L.) [1899] A.C. 198.

life interest terminated " passed under " section 1. That unfortunate phrase, however, means no more, indeed, could mean no more, than that such property would have been treated as charged with duty by virtue of section 1, even if section 1 had stood in the context of the Act without the accompaniment of section 2. And so, I expect, it would have been, since section 1 contains the words " settled or not settled," and the courts might from the first, unaided by section 2, have grasped that general conception of passing as being equivalent to changing hands in enjoyment which after two generations has become so natural to us. I confess that, since section 2 has from the first been as much part of the Act as section 1, I do not understand the value of this particudar form of interpretation, which is a mere essay in hypothesis, unless one is to go further, as Lord Macnaghten himself did, and conclude that at no point does the property described by section 1 coincide with or overlap the various categories of property listed in section 2. This conclusion was not, I think, shared or laid down by any of the other members of the House who decided the case nor did it appear to have any bearing on the outcome. On the contrary, they all seem to have thought that, though the property then in question " passed under " section 1, it did not matter whether it was section 1 or section 2 (1) (*b*) which provided the governing words, since in either case the practical result would be the same.

What the House did not decide is the question which we have here. That question can be set out as follows: If the words of section 2 (1) (*b*), " Property in which the deceased . . . had an " interest, ceasing on " his " death," are a fit and natural description of the property upon which duty is claimed, are the words of exemption found in that subsection, which relate to the holder of an office, a recipient of charitable benefit or a corporation sole, to be ignored, merely because the property would have been charged with duty by force of section 1, even if there had been no section 2 (1) at all? Now, if we were to treat Lord Macnaghten's own reading as if it had binding authority, I think that we should be compelled to answer that we must ignore them. For the construction that he adopted was that the categories of property which are spoken of in section 2 are only such " residual " items of property as would not have been charged by section 1 as passing on death if section 1 had stood by itself. From that it would seem necessarily to follow, if you allow that on Mr. Arnholz's death a share of the trust capital " passed " within the meaning of section 1 (see *In re Northcliffe*,[42] *Christie* v. *Lord Advocate*[43]), that the exemption attached to section 2 (1) (*b*) has no application to this capital share, since the exemption is attached exclusively to some species of property which section 1 does not touch.

In my opinion, Lord Macnaghten's construction is mistaken.

[42] [1929] 1 Ch. 327.

[43] [1936] A.C. 569; [1936] 1 All E.R. 443.

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I think that there is no foundation for it to be found in the words or scheme of the Finance Act, 1894, and it introduces into the interpretation of the Act a contorted and unnatural reading of section 2 (1) which, while normally of no practical effect, would produce in this particular case a consequence that I would regard as an absurdity. The words of section 2 (1) (*a*), "Property of "which the deceased was . . . competent to dispose," would shrink to signifying no more than the property over which a deceased person had possessed, but had not executed, a general power of appointment: the words of section 2 (1) (*b*), "Property "in which the deceased or any other person had an interest, "ceasing on the death of the deceased," would stand for no more than such property as had been subject to a terminable annuity. What meaning would be found for section 7 (7) (*a*) of the Act on this construction I have never yet been able to perceive, for it is clear that in that subsection it is assumed that the property described in section 2 (1) (*b*) may include property the deceased's interest in which extended to the whole income and which would therefore pass by virtue of section 1, even if it stood alone.

I speak of the consequence of this construction as an absurdity. I do not think those words are too strong. It would mean that the framers of this Act must be supposed to have intended to establish a scheme under which relief from duty was given where an office holder had been enjoying in respect of his office, say, an annuity for life charged on property, while no relief was to be available if the profit of the office had taken the form of the enjoyment of a house or land, the income of a trust fund or a perpetual annuity. Yet no ground of policy can be suggested for exempting the one class of property and taxing the others: and of all the typical cases of property which passes on the death of an office holder, recipient of charity, or corporation sole, the enjoyment of a residence stands, I should say, first.

It is worth observing how various have been the explanations of section 2 which have been given in this House since the *Cowley* decision.[44] Perhaps the only common ground is that it is not a definition section: and that I follow, though I think that Rigby L.J.'s description of it as an "explanation" section[45] comes very near the truth. My citations are not exhaustive, but they include the following. In *Attorney-General* v. *Beech*[46] (a case which was heard after, but decided before, *Cowley*[47]) Lord Watson said: "It apparently was anticipated that a court of law "might place upon these words, 'which passes on the death of "'such person,' a construction limited to property which passed "in the ordinary sense of the term from the deceased into the "possession and property of another person after his death. But "the second section of the statute widens that interpretation "very much; for it extends it to all cases where a survivor of the "deceased takes a succession, or I should say rather, derives a

[44] [1899] A.C. 198.
[45] [1898] 1 Q.B. 355, 375–377.
[46] [1899] A.C. 53, 58, 59.
[47] [1899] A.C. 198.

"benefit by reason of the death of the deceased dependent "upon and emerging upon the death of the deceased." This is not only very different from, but it also conflicts with, Lord Macnaghten's dichotomy. Lord Haldane dealt with the function of section 2 on two separate occasions. In *Attorney-General* v. *Milne* [48] he said of it: "Section 2 is thus not a definition section, "but an independent section operating outside the field of "section 1." In 1924, on the other hand, in *Nevill* v. *Inland Revenue Commissioners*,[49] he laid it down: "'Passes' may be "taken as meaning 'changes hands.' The principle is contained "in section 1. Section 2 combines definitions of such property "with the extension of the application of the principle laid down "in section 1 to certain cases which are not in reality cases of "changing hands on death at all. . . ." While I think that his two explanations must be regarded as "mutually exclusive," to borrow Lord Macnaghten's phrase,[50] I find it much easier to relate the second to the actual form of the section. In the *Milne* case [51] Lord Dunedin expressed himself as follows about section 2: "It seems to me that that is as much as to say that the words, "'property passing on the death,' in the first section, are to be "read as if the words, 'including the property following, that is "'to say'—(and then all the subsections)—had been there "inserted." I do not see how the effect of the two sections could be put more succinctly, so far as section 2 (1) is concerned: but it is a very different reading from that of Lord Macnaghten. To complete my citations, Lord Parker said in the same case [52]: "The second section of the Act, by providing that property pass- "ing at the death shall be deemed to include certain kinds of "property which do not in fact pass at the death, artificially "enlarges the ambit of the expression 'property passing at the "'death.'" Any construction that is couched in such terms fails to explain why, for instance, "Property of which the "deceased was . . . competent to dispose" does not cover a great deal of property which does "in fact pass at the death."

There are two reflections which have pressed upon me in considering whether or not to favour this appeal. One is that, if we allow it, we find ourselves deciding that Lord Macnaghten's deliberate opinion as to the construction of the Finance Act, 1894, was on this point quite wrong. That is an unusual situation, for we are accustomed to regard with exceptional respect any pronouncement on law by that great judge. Moreover, one would expect him to have been peculiarly familiar with such a matter as the scheme and purport of this remarkable Act. I can only say that, just as it was his talent to see further beneath the surface of the law than most judges and to discern with clarity what, until he revealed it, had been unseen, so on a very few occasions he may have been led to perceive what was actually

[48] [1914] A.C. 765, 769.
[49] [1924] A.C. 385, 389.
[50] [1899] A.C. 198, 212.
[51] [1914] A.C. 765, 775.
[52] Ibid. 779.

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not there. I think that this must have been one of those rare occasions.

The second disturbing aspect of our decision is the possibility that it may invalidate the reasoning upon which a number of other decisions on estate duty have been founded. Lord Macnaghten's exposition of the interrelation of section 1 and section 2 contained the essential characteristics of a statement of legal principle: it was expressed in very precise language, and with a confidence that excluded the possibility of any alternative view. Indeed, it was not long before his words were taken to represent the *Cowley* decision itself, something which, as I see it, they were far from doing. They have become entwined with a great deal of judicial analysis of the estate duty scheme. In *In re Duke of Norfolk* [53] Lord Evershed M.R. referred to the "celebrated pronouncement" as "one of the most significant decisions on the interpretation of the Finance Act, 1894." Even so, despite its fame, there seem to have been very few cases in which the application of Lord Macnaghten's formula has made any practical difference either in the incidence of duty or in the quantum of duty charged. In nearly every case it does not matter whether the property is regarded as passing "under" section 1 or "under" section 2, as "actually" passing or as "notionally" passing. That is because in the typical instance of settled property passing on the expiry of a life interest, the prescribed method of valuation is just the same whether you apply section 7 (5) or section 7 (7) (*a*). Certainly it was not part of the respondents' argument on this appeal that a decision in favour of the appellant would have a far-reaching consequential effect on established practice. It would not be fair to press this, for the consequences may take time to work out: but I find in it some support for my own view that the Macnaghten formula has been more of theoretical than practical importance.

I have been able to detect for myself only one line of case in which this particular method of construction has been the determining agent of the judgment arrived at. These are the cases of terminable annuities settled for successive life interests. It is obvious, for instance, that in *In re Cassel* [54] Lord Russell of Killowen (then Russell J.) would not have decided, contrary to his own judgment and to the argument of Mr. J. H. Stamp for the Revenue, that there was a passing "under" section 1 and, therefore, a valuation according to section 7 (5), if he had not thought himself compelled by Lord Macnaghten's words in *Cowley* [55] to reject a passing "under" section 2 (1) (*b*) and a valuation according to section 7 (7) (*b*). Similarly, the foundation of the Court of Appeal's judgment in *In re Duke of Norfolk* [56] is the Macnaghten formula. It would be wrong on this occasion to say anything more about those cases; it may or may not be necessary on another occasion to find out whether they would

[53] [1950] Ch. 467, 473.
[54] [1927] 2 Ch. 275.
[55] [1899] A.C. 198, 212.
[56] [1950] Ch. 467.

have been decided differently even if Lord Macnaghten had never spoken and to what extent in such cases a valuation according to section 7 (7) (*b*) would produce any result materially different from a valuation according to section 7 (5). Here it is necessary only to note their existence; and to observe with relief that, apart from them, there does not seem to be any line of case the issue of which would be changed by a refusal to apply Lord Macnaghten's formula for the future.

I would allow the appeal.

LORD COHEN. My Lords, under the will of the late Viscount Northcliffe, the late Henry Preuss Arnholz (to whom I shall hereafter refer as "Mr. Arnholz") was entitled immediately prior to his death to three of the 49½ shares of the income of the residuary estate of Lord Northcliffe. The interest in the income which Mr. Arnholz enjoyed was expressed by paragraph (26) of clause 6 of Lord Northcliffe's will to be given to him "during his "life so long as he shall act as executor and trustee of this my "will by way of remuneration for so doing."

The respondents claimed estate duty on the share of the capital of Lord Northcliffe's residuary estate corresponding to the share of the income thereof to which Mr. Arnholz was entitled immediately before his death on the footing that it had passed on the death of Mr. Arnholz within the meaning of section 1 of the Finance Act, 1894, but the appellant resisted this claim on the ground that liability to duty was avoided by the effect of the words in paragraph (*b*) of subsection (1) of section 2 of the said Act, which excludes property "the interest in which of the "deceased . . . was only an interest as holder of an office, or "recipient of the benefits of a charity, or as a corporation sole."

The respondents contended (1) that this exception has no application in relation to property which passes within the meaning of section 1, and (2) that in any event the interest of Mr. Arnholz in the income of the share of the capital which passed on Mr. Arnholz's death was given to him as an individual while he was living and held office as a trustee and was not attached to the office of trustee and was therefore not enjoyed by Mr. Arnholz as holder of an office within the meaning of the said paragraph (*b*).

Danckwerts J. rejected the respondents' second contention but upheld the first, as did the Court of Appeal. The Court of Appeal did not find it necessary to reach a conclusion on the second point.

My Lords, so far as the second point is concerned, I agree with Danckwerts J. that trusteeship of a will is an office within the meaning of section 2 (1) (*b*) and that Mr. Arnholz received his remuneration in the form of a share of the income of Lord Northcliffe's residuary estate only as holder of that office. I cannot usefully add anything to what has been said by the noble and learned Lord on the Woolsack on this branch of the case.

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I turn, therefore, to the first point. Do the words of exclusion in section 2 (1) (*b*) apply to the present case, since it is admitted that the property in question would pass under section 1 even if section 2 (1) were omitted from the Act?

In approaching this question I have in mind the words of Viscount Simon in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*,[57] where he said: "The golden rule is that the words of a "statute must prima facie be given their ordinary meaning." It was not, I think, disputed that, giving the words of the statute their ordinary meaning, the exclusion in section 2 (1) (*b*) would apply to the case now before your Lordships, but it was argued that your Lordships were precluded from so holding by reason of the decision of this House in *Earl Cowley* v. *Inland Revenue Commissioners*,[58] and in particular by the reasons given by Lord Macnaghten for his conclusion. The short facts of that case were that a father and a son, after disentailing, had mortgaged certain estates to an assurance company to secure £230,000, and had then resettled the estates so that, subject to a charge of annuity for the son during his father's life, the estates were held in trust for the father for life, and after his death for the son, with remainders over. The House of Lords held that the case fell under section 1 of the Act, and that the property which passed on the father's death was the equity of redemption, without any deduction for the annuity. Thus there were two questions: First, was what passed the estate or was it only the equity of redemption? And, secondly, should a deduction be made from the value of the estate or the equity in respect of the annuity? In answering the first question Lord Macnaghten said[59]: "The "two sections are mutually exclusive. Section 1 might properly, "I think, be headed, 'With regard to property passing on death, "'be it enacted as follows.' Section 2 might with equal pro- "priety be headed, 'And with regard to property not passing on "'death, be it enacted as follows.' I cannot, therefore, agree "with Rigby L.J. when he says that section 2 is a provision "'explanatory' of section 1. In my opinion the two sections "are quite distinct, and section 2 throws no light on section 1. "But, then, no doubt section 2 speaks of 'property in which the "'deceased . . . had an interest ceasing on the death of the "'deceased.' And that, it may be said, was just the position "of the second earl with regard to the Mornington settled estates. "So it was. But section 2 does not apply to an interest in "property which passes on the death of the deceased. That is "already dealt with in the earlier section."

If these observations are read without regard to what was the exact point before the House, they would be fatal to the appellant in the present case: but so read they would shut out the taxpayer not only from taking advantage of the excluding words in section 2 (1) (*b*) but also from the excluding provisions of subsections

[57] [1940] A.C. 1014, 1022; 56 T.L.R. 988; [1940] 3 All E.R. 549.
[58] [1899] A.C. 198.
[59] Ibid. 212–213.

(2) and (3) of section 2. This can hardly have been Lord Macnaghten's intention. Indeed in *Attorney-General* v. *Dobree*,[60] where the court was considering the question of liability for duty under section 2 (1) (*d*) of an interest purchased or provided by a deceased, Channell J. referred to Lord Macnaghten's observations in *Cowley's* case [61] and suggested that some qualification seemed required on the apparently wide effect thereof. He said [62]: "It "is quite true that if you can arrive at the conclusion that the "case falls within section 1, then section 2 may be said to be "excluded—you do not want section 2. But one of the operations "of section 2 seems to me clearly to be to sweep into section 1 "some cases which might be doubtful upon the construction of "section 1, but which section 2 includes in clear words, and there-"fore brings them in to be subject to the duty, whether they "were within section 1 on the true interpretation of it, or not. "I think that Lord Macnaghten must have meant that in such "cases, if you took the trouble to decide whether they were "within section 1 or not, and came to the conclusion that they "were, then you would not want section 2."

My Lords, I return to *Cowley's* case,[63] having in mind what was said by Jessel M.R. as to the use of authorities in *Hood* v. *Newby*.[64] He said: "You must always look to what was being "discussed by the judges as well as to the words used."

Now, applying the principle thus laid down by the Master of the Rolls, in *Cowley's* case [65] it is manifest that Lord Macnaghten had not in mind the excluding provisions of section 2, and in the case before your Lordships counsel for the respondents admitted that subsections (2) and (3) would apply to property passing under section 1. This admission was justified by what was said by Lord Parker of Waddington in *Attorney-General* v. *Milne* [66]: "It" [section 2] "also artificially limits such ambit" [the ambit of section 1] "by excluding certain kinds of property which do "in fact pass at the death." Counsel for the respondents argued, however, that the position was different as regards the excluding provision in section 2 (1) (*b*): this provision, he said, comes into the deeming provisions of section 1 and Lord Macnaghten's dictum must apply to the whole of subsection (1). My Lords, I am unable to agree. The material excluding provisions could equally have been expressed as a separate subsection thus: "Property passing on the death of the deceased shall not be "deemed to include property the interest in which of the deceased "or of some other person having an interest ceasing on the death "of the deceased was only an interest as holder of an office," etc. Had it been so expressed the provisions would plainly have been on a par with subsections (2) and (3), and I do not think the

[60] [1900] 1 Q.B. 442.
[61] [1899] A.C. 198.
[62] [1900] 1 Q.B. 442, 450.
[63] [1899] A.C. 198.
[64] (1882) 21 Ch.D. 605, 608.
[65] [1899] A.C. 198.
[66] [1914] A.C. 765, 779.

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situation has been altered by the fact that as a matter of convenience and for the sake of brevity it is included in subsection (1) (*b*) of section 2. I prefer to conclude that Lord Macnaghten's mind was not directed to any of the excluding provisions in any part of subsection (2) and that had his attention been called to them he would have modified his observations so as to reserve that point.

In expressing this opinion I do not, of course, intend to question the decision in *Cowley's* case [67] nor do I desire to challenge the validity of decisions such as that in *In re Duke of Norfolk* [68] which have been based thereon. But in so far as any of the observations of learned judges in such cases might appear to support the respondents in the case now before your Lordships, they are open to the same criticism as I have made on Lord Macnaghten's speech in *Cowley's* case,[69] namely, that they were not directed to any of the excluding provisions in section 2.

For the reasons I have given I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, for over sixty years Lord Macnaghten's judgment in *Cowley* [69] has, I should have said, been accepted as laying down a leading principle in the determination of estate duty cases. It has been repeatedly followed and made the ratio of subsequent decisions, and it must in very many cases which never reached the courts have been accepted as determining the liability to duty. As recently as 1950, in the case of *In re Duke of Norfolk*,[70], it was referred to by Lord Evershed M.R. as "the celebrated pronouncement of "Lord Macnaghten, which has constituted one of the most "significant decisions on the interpretation of the Finance Act, "1894." In the same case Jenkins L.J. referred to Wynn-Parry J. in that case as having held himself bound, by the decision in *Cowley* [71] as applied by Russell J. in his judgment in *In re Cassel*,[72] to hold "that sections 1 and 2" [of the Finance Act, 1894] "are mutually exclusive and that the application of "section 1 accordingly precluded recourse to section 2, subsection "(1) (*b*)." [73] Jenkins L.J. proceeded: "In my judgment the "judge was clearly right in the conclusion to which he came, "and the principles by which he was guided in arriving at it are "no less binding on this court than they were upon him." These views are not, of course, binding on this House, but they evidence the general acceptance of an interpretation of the statute that plainly stems from Lord Macnaghten's pronouncement. And similar recognition of this view is not wanting in this House. It has been accepted by various of their Lordships in *Attorney-General* v. *Milne*,[74] *Adamson* v. *Attorney-General*,[75]

[67] [1899] A.C. 198.
[68] [1950] Ch. 467.
[69] [1899] A.C. 198.
[70] [1950] Ch. 467, 473.
[71] [1899] A.C. 198.
[72] [1927] 2 Ch. 275.
[73] [1950] Ch. 467, 484.
[74] [1914] A.C. 765.
[75] [1933] A.C. 257.

Attorney-General v. *Lloyds Bank Ltd.*,[76] and *Christie* v. *Lord Advocate*,[77] in which case Lord Russell of Killowen had his earlier judgment in *In re Cassel*[78] before him. A somewhat ambiguous passage in the speech of Lord Haldane in *Nevill* v. *Inland Revenue Commissioners*,[79] a shadow of a doubt by Lord Dunedin in *Attorney-General* v. *Milne*[80] and the doubts expressed by my noble and learned friend, Lord Radcliffe, in the recent case of *Sanderson* v. *Inland Revenue Commissioners*[81] would seem to be the only expressions of opinion in this House indicating anything other than a complete acceptance of Lord Macnaghten's pronouncement. It is impossible to say what a departure from a practice based on this pronouncement may have on the future development of estate duty law, but it could be, I should think, not inconsiderable and may lead to the building up of a new body of estate duty decisions. In this situation I would examine afresh, but very briefly, the *Cowley* case.[82]

I would first observe that when Lord Macnaghten referred to section 2 of the 1894 Act he was clearly thinking of section 2 (1) of the Act. His observations could have no application to section 2 (2) or section 2 (3) of the Act, which brought in exceptions to the operation of section 1 and which had no relevance at all to the subject-matter under consideration by this House. Lord Macnaghten indeed has himself excluded these subsections, for, in referring to section 1, he said: "Subject to certain exceptions "or savings, it imposes a duty called estate duty upon the "principal value of all property 'settled or not settled' which "passes on death." The main exceptions or savings are to be found in sections 2 (2) and (3), 3, 15 and 21.

To turn, then, to section 2 (1), heads (*a*) and (*b*) of the subsection, taken literally and independently of any context, cover property that would come within section 1 of the Act as well as property that would not. But these heads must be read along with the opening words of section 2 (1): "Property passing "on the death of the deceased shall be deemed to include the "property following, that is to say," and then follow heads (*a*), (*b*), (*c*) and (*d*). On a well-known meaning of the word "deemed," much employed in legislation, this language may naturally be taken to mean: "The property following would not "be property which would be capable of being property passing "on death under section 1 but it is to be taken to be such "property." This may seem nonsense when one considers the language of subsections (1) (*a*) and (1) (*b*). But Lord Macnaghten cannot have failed to observe the terms of these subsections. It was, I think, their very obviousness that caused him to emphasise that they must not be read as including property that came under section 1. His reference to the view of Rigby L.J. alone

[76] [1935] A.C. 382.
[77] [1936] A.C. 569.
[78] [1927] 2 Ch. 275.
[79] [1924] A.C. 385.
[80] [1914] A.C. 765.
[81] [1956] A.C. 491.
[82] [1899] A.C. 198.

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shows that the matter was clearly before his mind. Property coming under section 2 is thus brought within section 1 and section 2 (1) has nothing to do with property which from its own nature passes on death without any need of a deeming provision. I do not say that initially this was the construction that need necessarily have been taken of the relationship of the two sections. Rigby L.J. in the *Cowley* case [83] took a different view, as did Channell J. a few months later in *Attorney-General* v. *Dobree*,[84] and the opinions expressed in the speeches delivered by your Lordships in the present case show that the opposite view was always open. What I have said is intended to epitomise in a few words what I understand to have been the train of reasoning in Lord Macnaghten's mind, as expressed much more fully in his speech delivered in the *Cowley* case.[85] I find it unnecessary to quote passages from a speech, already examined by your Lordships and so well known in the law, to elaborate the point. I am not convinced that what has been accepted as settled law should now be reversed and a new chapter of estate duty law entered upon afresh. It is not, I think, possible to say that each of the categories in section 2 (1) has not a content that would apply to cases that could not come under section 1 and which would be sufficient to explain the purpose of section 2 (1). And I cannot think that, if there had been no section 2, the courts would have had any difficulty in determining in the vast majority of cases what property passed on death, particularly having in view the definition in section 22 (1) (*l*). It would undoubtedly have been a more limited category than the legislature intended when it introduced section 2. But as section 1 includes property "settled" or not settled" and as on a cesser of life interests in settled property on death there has been held to be a passing of property under section 1, without any reference to section 2, it might reasonably be assumed that this result would have been reached if there had been no section 2 (1) in the statute at all.

My difficulties do not, however, end here. To turn to the facts of the present case, Mr. Arnholz enjoyed an aliquot share of the income of the residuary trust fund during his life so long as he should act as executor and trustee of the will and by way of remuneration for so doing. Had he enjoyed this income as an ordinary beneficiary of a life interest, estate duty would have been levied on his death as on a passing of property under section 1. But it is claimed that, as his enjoyment was that of a holder of office as trustee, the exemption in section 2 (1) (*b*) applies. Even if section 2 (1) (*b*) can be invoked, I feel some difficulty in thinking that the facts bring the case within the exemption. The excluding clause appears to me to point to property the interest in which pertained to the holder of an office, or recipient of charitable benefit, or a corporation sole, and fell to be enjoyed

[83] [1898] 1 Q.B. 355.
[84] [1900] 1 Q.B. 442.
[85] [1899] A.C. 198.

by a succession of such persons. In such cases it could not be said that there was any true passing of property on death, but there would be an interest in property within the meaning of subsection (1) (*b*). This would satisfy the limited meaning that Lord Macnaghten thought should be put on section 2 (1). I do not, however, fail to note that there may be hereditary and remunerative offices of which it may be said that there is a true passing of property under section 1. If so, I can see no reason why there should be any exemption from duty in the case of such property. This leads me to think that the exemption should be given a limited effect which does not apply to the facts of this case.

In the result I am of opinion, for the reasons which I have endeavoured to express, that the appeal should be dismissed.

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Appeal allowed.

Solicitors: *Russell & Arnholz; Solicitor of Inland Revenue.*

F. C.

[COURT OF APPEAL.]

CROWE (VALUATION OFFICER) *v.* LLOYDS BRITISH TESTING CO. LTD.

[LVC/793/1958.]

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Morris, Willmer and Harman L.JJ.

Rates and Rating—Industrial hereditament—"Non-industrial building" "ing"—Hereditament for testing cables held in 1931 *to be a factory but not an "industrial hereditament"—Whether "non-industrial "building" not "used wholly or mainly for industrial purposes"—Meaning of "industrial purposes"—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 22 (1) (*a*) *and* (*b*), (4)—*Rating and Valuation* (*Apportionment*) *Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *ss.* 3, 4—*Rating and Valuation* (*Miscellaneous Provisions*) *Act,* 1955 (4 *Eliz.* 2, *c.* 9), *s.* 5 (3).

Statute—Construction—Subsequent enactments—Earlier and later Acts to be construed "as one"—Rating and Valuation Act, 1925, *s.* 22 (1) (4)—*Rating and Valuation* (*Apportionment*) *Act,* 1928, *ss.* 3, 4.

The Rating and Valuation (Apportionment) Act, 1928,[1] granted rating relief to "industrial hereditaments" as therein defined,

[1] Rating and Valuation (Apportionment) Act, 1928, s. 3: "(1) In "this Act the expression 'industrial "'hereditament' means a hereditament (not being a freight-transport "hereditament) occupied and used as "a mine or mineral railway or, subject as hereinafter provided, as a "factory or workshop: Provided that "the expression 'industrial hereditament' does not include a hereditament occupied and used as a "factory or workshop if it is primarily "occupied and used for the following "purposes or for any combination of "such purposes, that is to say— . . . "(*f*) any other purposes, whether or "not similar to any of the foregoing, "which are not those of a factory or "workshop. (2) For the purposes of "this Act any place used by the "occupier for the housing or mainten-

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namely, those occupied and used, inter alia, "as a factory or workshop," those words having, for the purposes of the Act, the same meaning as in the Factory and Workshop Acts, 1901 to 1920. By section 10 (2) the Act of 1928 was to be construed "as one" with the Rating and Valuation Act, 1925.[2]

A company sought relief under the Act of 1928 in respect of premises occupied and used by them for the testing and finishing of chain cables and anchors under a licence, pursuant to the Anchors and Chain Cables Act, 1899. In 1931 the House of Lords decided that the testing establishment, although a factory, was not an "industrial hereditament" within the relief of the Act of 1928, because it was primarily used for the purposes of testing operations, and as such operations were not factory purposes, the hereditament fell within the exception from rating relief under section 3 (1) (*f*) of the Act of 1928.

The Rating and Valuation Act, 1957, gave certain rating relief to hereditaments which fell to be assessed under paragraph (*a*) of

"ance of his road vehicles or as "stables shall, notwithstanding that "it is situate within the close, curtilage or precincts forming a factory "or workshop and used in connection "therewith, be deemed not to form "part of the factory or workshop, but "save as aforesaid, the expressions "'factory' and 'workshop' have "respectively the same meanings as "in the Factory and Workshop Acts, "1901 to 1920."

S. 4: "(1) In every valuation list "every industrial hereditament occupied and used wholly for industrial "purposes shall be shown as being "so occupied and used, and as "respects every such hereditament "occupied and used partly for industrial purposes, the net annual "value thereof shall be shown, in the "prescribed manner, as being apportioned between the occupation and "user of the hereditament for industrial purposes, and the occupation "and user thereof for other purposes. "(2) For the purpose of determining "in what proportions an industrial "hereditament is occupied and used "for industrial purposes and for other "purposes respectively, the following "provisions shall have effect:— "(*a*) The hereditament shall be "deemed to be occupied and used for "industrial purposes except in so far "as any part thereof is, under this "Act or under the enactments relating to the regulation of mines, "factories and workshops, to be "deemed neither to be, nor to form "part of, a mine, factory, or workshop: . . . "

S. 10: "(2) This Act . . . shall be "construed as one with the principal "Act. . . ."

[2] Rating and Valuation Act, 1925, s. 22: "(1) For the purposes of the "first new valuation list to be prepared under this Act and of any "subsequent valuation list the rateable value of a hereditament shall "be ascertained as follows:—(*a*) If "the hereditament belongs to one of "the classes specified in the first "column of the table contained in "Part I of the Second Schedule to this "Act, there shall be deducted from "the gross value of the hereditament "an amount representing the deduction specified with respect to hereditaments of that class in the "second column of the said table, . . . "and the gross value as so reduced "is in this Act referred to as the net "annual value: (*b*) If the hereditament is not such a hereditament "as is mentioned in paragraph (*a*), "there shall be estimated the rent "at which the hereditament might "reasonably be expected to let from "year to year if the tenant undertook "to pay all usual tenant's rates and "taxes and tithe rentcharge, if any, "and to bear the cost of the repairs "and insurance and the other "expenses, if any, necessary to maintain the hereditament in a state to "command that rent, and the annual "rent as so estimated shall, for the "purposes of this Part of this Act, be "taken to be the net annual value of "the hereditament: . . . "

Sch. 2, Part I, Note: "For the "purposes of this Part of this "Schedule the expression 'houses "'and buildings' does not include "mills, manufactories or premises of "a similar character used wholly or "mainly for industrial purposes or "hereditaments valued as part of any "railway, dock, canal, gas, water, "electricity, or other public utility "undertaking."

section 22 (1) of the Act of 1925 (as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955).[3]

Held (Morris L.J. dissenting), that the testing establishment should be valued under paragraph (*a*) of section 22 (1), for it was not a factory "used wholly or mainly for industrial purposes," and was, therefore, a "non-industrial building" within the definition in section 22 (4). Where, as here, the earlier and later Acts were concerned with the same subject-matter and were to be construed "as one," then, prima facie, an industrial hereditament in the Act of 1928 and an industrial building in the Act of 1925 (as amended by the Act of 1955) ought to receive the same interpretation; and so to construe them avoided the absurdity that a hereditament held in 1931 not to be an "industrial hereditament" was at one and the same time not a "non-industrial building" (post, pp. 247, 249).

The combined effect of sections 3 and 4 of the Act of 1928, moreover, required "industrial purposes" to be equated with "factory purposes," and the same meaning should be given to "industrial purposes" in the subsequently enacted section 22 (4). The House of Lords having decided that the work of testing cables was not a factory purpose, it followed that it was not an industrial purpose (pp. 246, 249).

Per Willmer L.J. The words "used wholly or mainly for indus- "trial purposes" in section 22 (4) must be construed as governing each of the three categories previously mentioned, namely, "fac- "tories," "mills" and "other premises of a similar character" (post, pp. 244, 245).

Grove v. *Lloyds British Testing Co. Ltd.* [1931] A.C. 450, 466; 47 T.L.R. 308 applied.

Per Morris L.J. dissenting. In the absence of any statutory limitation or modification, the words "industrial purposes" should be construed in their ordinary meaning; and nothing in the

[3] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5: "(1) Section 22 of the Act of 1925 "(which specifies the way in which "the rateable values of hereditaments "outside London are to be ascer- "tained) shall have effect subject to, "and as extended by, the following "provisions of this section. (2) In "paragraph (*a*) of subsection (1) of "that section (which provides for "ascertaining the net annual value "by making certain deductions from "the gross value), for the words from "the beginning of the paragraph to "the words 'second column of the "'said table' there shall be substi- "tuted the followings words:—'If "'the hereditament consists of one "'or more houses or other non- "'industrial buildings, with or with- "'out any garden, yard, court, fore- "'court, outhouse or other appurten- "'ance belonging thereto, but with- "'out other land, there shall be "'deducted from the gross value of "'the hereditament an amount repre- "'senting the deduction specified, in "'relation to that gross value, in "'the second column of the table "'contained in Part I of the Second "'Schedule to this Act.' (3) At the "end of the said section 22 there "shall be added the following sub- "section:—'(4) In this section the "'expression "house" includes part "'of a house, the expression "non- "'"industrial building" means a "'building, or part of a building, of "'any description, with the exception "'of factories, mills and other pre- "'mises of a similar character used "'wholly or mainly for industrial "'purposes, and of premises valued "'as part of—(*a*) a railway, dock, "'canal, gas, water or electricity "'undertaking, or (*b*) any public "'utility undertaking not falling "'within the preceding paragraph, "'and the expression "appurten- "'"ance," in relation to a dwelling- "'house, or to a school, college or "'other educational establishment, "'shall be taken to include all land "'occupied therewith and used for "'the purposes thereof.' (4) The "table contained in the Second "Schedule to this Act shall be sub- "stituted for the table in Part I of "the Second Schedule to the Act of "1925 (including the note appended "thereto)."

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"deeming" process laid down by section 4 (2) of the Act of 1928, which introduces the phrase "industrial purposes," forms any basis for ascribing to that phrase any meaning other than its ordinary meaning. This testing establishment is a building of a similar character to factory premises used wholly or mainly for industrial purposes, namely, the proving and testing of chain cables and anchors in accordance with the Anchors and Chain Cables Act, 1899, and does not fall to be assessed under section 22 (1) (*a*) (post, pp. 237, 243).

Decision of Lands Tribunal affirmed.

APPEAL from Lands Tribunal (Mr. Erskine Simes Q.C.) on a case stated.

The following statement is compiled from the written decision of the Lands Tribunal given on November 24, 1958, the case stated on May 26, 1959, and the statement of the facts (including a citation describing the operations of a company at the hereditament in question, taken from the report in the Court of Appeal of an earlier case concerning the same premises—*Dudley Revenue Officer* v. *Lloyds British Testing Co. Ltd.*[4])—and of the provisions of the Anchors and Chain Cables Act, 1899, in the judgment of Morris L.J. (infra).

Prior to 1928, a company, Lloyds British Testing Co. Ltd., owned and occupied a hereditament described as testing house and premises, 177, Cradley Road, Dudley, for the purpose of testing, proving, and finishing chain cables and anchors in accordance with the provisions of the Anchors and Chain Cables Act, 1899. Under that Act it is provided that a maker of or dealer in anchors or chain cables shall not sell or contract to sell, nor shall any person purchase or contract to purchase, for use on any British ship, any chain cable or any anchor exceeding in weight 168 lbs., unless it has been previously proved in accordance with the Act. A contract for the sale of any such chain cable or anchor carries with it, in the absence of an express stipulation to the contrary, an implied warranty that the anchor or cable has before delivery been proved in accordance with the Act. A chain cable or anchor must be tested and proved by authorities independent of the manufacturers, of whom the Committee of Lloyd's Register of British and Foreign Shipping for testing establishments is one.

The company had a licence pursuant to the provisions of section 5 of the Act for the testing of anchors and chain cables with a view to their proof. The Act lays down the methods of testing anchors and chain cables, and prescribes the tensile strength and the breaking strain used for the purpose of testing anchors and chain cables. Provision is made for the authorising of the maximum charges which may be made by a licensed tester, who must clearly show in his testing establishment both the authorised scale of maximum charges and the charges actually made by him. An Inspector of Testing Establishments is appointed.

[4] [1931] 1 K.B. 404, 405–408; 46 T.L.R. 601.

The operations carried on by the company were, in 1930, described as follows: "The cables were sent to the occupiers' "works in their manufactured state but unfinished in the respects "hereinafter mentioned. In accordance with the provisions of "section 9 of the Act of 1899 a piece of three links was selected "and cut out of the length of chain cable. This cutting out was "performed by a heavy hydraulic cutter which severed two links "one on each side of the piece of three links. The sample piece "was then taken to a hydraulic machine and subjected to a test "load, called the breaking strain, determined as to load by the "provisions of the Second Schedule of the said Act. If the piece "selected failed to withstand the breaking strain, a further "sample piece was cut out in the aforesaid manner and subjected "to the same test. If neither of the samples withstood the break-"ing strain the whole length was rejected. If one of the sample "pieces satisfactorily withstood the breaking strain the several "parts of the cable length were joined together by a welded link "formed and welded at a forge on the premises by the occupiers' "employees. The restored cable length was then placed in its "entire length in the chain proving machine and subjected to a "reduced test load, as provided by the Act, and termed the "tensile strain, and this test resulted in appreciable elongation "of the cable and a certain change in shape in each link. The "cable was then carefully examined link by link by two separate "sets of examiners successively who in the course of examination "detected any flaws and removed all scale from the links. In the "event of any defective links being found on this examination "these were cut out and replaced by welded links formed and "joined in the manner above described, and the whole length "was then retested. When the said tests had been applied in "accordance with the Act the occupiers, as licensed testers, were "under obligation to, and did in fact, stamp with a distinctive "mark, as laid down in section 10 of the Act, each cable that had "withstood the said strains and was in the opinion of the "licensed tester without flaw or material weakness. Thereafter, "the cable length was drawn into a tank and submerged in hot "water. Whilst still hot it was then drawn through a second "tank containng an anti-corrosive tar preparation and after that "it was ready for despatch to the ultimate consignee. These "last two processes were necessary in order to make the cable "commercially saleable, and if not carried out at the occupiers' "works would have to be carried out at some other place and either "by the manufacturer, purchaser or some other person. With "regard to anchors, these were similarly received in their manu-"factured state from the makers but unfinished in the respects "hereinafter mentioned. The anchor was weighed to determine "the test load. It was then placed in the anchor testing machine "and submitted to the statutory proof strain required. It was "then taken to pieces for examination of the various parts, and "if satisfactory was reassembled. In some types of anchor, the

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" riveting of heated pins inserted by the occupiers' workmen was " necessary in the process of reassembly. When an anchor had " passed the test, the obligations and practice of the occupiers " as regards stamping was the same mutatis mutandis as in the " case of cables. Before delivery to the consignees anchors " were painted by hand. It was further the obligation under the " Act and practice of the occupiers, upon request, to deliver a " certificate in respect of any cable or anchor which had " respectively withstood the said strains and in the opinion of " the occupiers was without flaw or material weakness. The " hereditament contained heavy machinery and plant both " hydraulic and electric for the purpose of carrying out the work " above mentioned, and also of other work carried out upon the " hereditament, which consisted of testing samples of metal, " cable, wire rope and other metal substances for other manufac- " turers, such tests not being in any way connected with the Act " of 1899. In the case of such wire rope the method employed " was to test to destruction, i.e., to place strain upon the rope " until it broke, and the result of such test was communicated " to the manufacturers by means of a written statement or " formula showing the result of the test. In the hereditament " there was a machine shop installed with power and machinery " in which the manufacture and repair of tolls and plant used by " the occupiers and the shaping of portions of metal for the above- " mentioned tests were carried out."

The hereditament was similarly used, as the Lands Tribunal found, at the date in 1958 of the hearing before the tribunal, save that the three links for the breaking test were then cut at the maker's premises and not on the hereditament, and the amount of " forging " of links had been considerably reduced since 1931, consequent on the uses of high tensile steel for cables which could not be forged on the hereditament. The extent of that change was indicated by the fact that in the year end December 31, 1931, of 23,650 fathoms tested, all were of wrought iron, and approximately 1,600 links were forged, while in the year ended December 31, 1956, of 51,374 fathoms tested, 3,570 only were of wrought iron and 82 links only were forged.

In 1931 the hereditament in question was the subject of an appeal to the House of Lords (*Grove* v. *Lloyds British Testing Co. Ltd.*[5]), and in the course of that hearing it was admitted that the forging of links brought the hereditament within the definition of " metal and india rubber works " in the Sixth Schedule to the Factory and Workshop Act, 1901. The hereditament was thereafter treated as subject to the Factory Acts. The House of Lords decided on that appeal in 1931 that the hereditament in question, although a factory, was not an " industrial hereditament " within the definition in the Rating and Valuation (Apportionment) Act, 1928, because it was primarily used for the purposes of testing

[5] [1931] A.C. 450, 466; 47 T.L.R. 308.

operations, and as such operations were not factory purposes, the hereditament fell within the exception from rating relief under section 3 (1) (*f*) of the Act of 1928.

The company was after that decision assessed for rating purposes under section 22 (1) (*b*) of the Rating and Valuation Act, 1925; and until the coming into force of the Rating and Valuation Act, 1957, it was a matter of no practical importance to the company whether the assessment was under paragraph (*b*) or under paragraph (*a*) of section 22 (1). But the Act of 1957 gave certain rating relief to hereditaments which fell to be assessed under paragraph (*a*); and the company therefore applied to the rating authorities for the alteration of the assessment of the testing house under paragraph (*b*) from rateable value £2,500 to an assessment under paragraph (*a*) gross value £2,700, rateable value £2,247. The local valuation court for Stafford South granted the application and amended the valuation list for the county borough of Dudley rating area accordingly by substituting the assessment under paragraph (*a*) for that under paragraph (*b*). The valuation officer appealed from that decision to the Lands Tribunal, on the following grounds: That the hereditament did not consist of one or more houses or other non-industrial buildings within the meaning of section 22 (1) (*a*) of the Rating and Valuation Act, 1925 (as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955), and should not, therefore, be valued in accordance with section 22 (1) (*a*): that the hereditament fell to be valued in accordance with section 22 (1) (*b*) of the Rating and Valuation Act, 1925, and, accordingly, no entry should be made in respect of the hereditament in the valuation list under the column headed "Gross Value"; and that the hereditament should be entered in Part I of the valuation list with rateable value £2,250.

The Lands Tribunal, in its written decision given on November 24, 1958, stated that the sole question on the appeal was whether the hereditament fell within the description of "factories, mills and other premises of a similar character used "wholly or mainly for industrial purposes" in the definition of "non-industrial building" in section 22 (4) of the Rating and Valuation Act, 1925, as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

It was agreed between the parties that if it did so fall, it should be assessed under section 22 (1) (*b*) of the Act of 1925 with a rateable value £2,250, but that if it did not so fall it should be assessed under section 22 (1) (*a*) of that Act with gross value £2,700, net annual value £2,247, rateable value £1,798.

The tribunal referred to the House of Lords decision in 1931 [6] and the description of the hereditament and the work there carried on, set out in the report of that case in the Court of Appeal (supra), and summarised the findings as to its present use, stated above.

[6] [1931] A.C. 450, 468.

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On the contention of the parties the tribunal said that counsel for the valuation officer had contended that in construing the provisions of the Act of 1925 the provisions of the Rating and Valuation (Apportionment) Act, 1928, were irrelevant. He referred to the provisions of the original Schedule to the Act of 1925 and suggested that the amending subsection (4) was derived therefrom, and contended that "industrial purposes" should be construed in the ordinary meaning of those words as understood in 1925. He referred to the definitions of "industrial" and "industry" in the Shorter Oxford English Dictionary, the Students' English Dictionary, Chambers' 20th Century Dictionary and Webster's Dictionary, and to passages from articles on industry and various subjects using the adjective "industrial" in the Encyclopaedia Britannica (14th ed.) and Chambers' Encyclopaedia, and contended that from these definitions industry meant the manufacture and sale of articles in a commercial market, and that industrial purposes were purposes connected with industry or a particular industry; and that since an anchor chain was not saleable until tested and, in the case of those other than for the Admiralty, coated with an anti-corrosive tar preparation, the work at the hereditament fell into place in the line of manufacture and, moreover, was used for purposes connected with the particular industries of building and equipping ships and supplying cables.

Counsel for the company had contended that "industrial purposes" in section 22 (4) of the Act of 1925 should be construed in the same sense as in section 4 (2) of the Act of 1928, since by section 10 (2) of the Act of 1928 and section 84 of the Local Government Act, 1929, those Acts were to be construed as one, and words should be given the same meaning unless there was some manifest discrepancy; and he relied on *Hart* v. *Hudson Bros. Ltd.*,[7] *Phillips* v. *Parnaby*[8] and *Canada Southern Railway Co.* v. *International Bridge Co.*[9] in support of this contention. He submitted that there was no manifest discrepancy in so construing, and that it was not only possible but desirable to apply the same meaning in the two Acts. He pointed out that both Scrutton L.J. [in *Dudley Revenue Officer* v. *Lloyds British Testing Co. Ltd.*[10]] and Lord Dunedin [in *Grove* v. *Lloyds British Testing Co. Ltd.*[11]] regarded the forging of links as ancillary to testing, and contended that the tarring was of the same nature. It was clear from the decision of the House of Lords that testing was not a factory purpose.

Alternatively, he contended that even in the ordinary sense "industrial purposes" connoted productive works, and he referred to the Oxford English Dictionary definition of "industry" as showing that that was the modern prevalent sense.

[7] [1928] 2 K.B. 629; 44 T.L.R. 820.
[8] [1934] 2 K.B. 299; 50 T.L.R. 446.
[9] (1883) 8 App.Cas. 723, 727.
[10] [1931] 1 K.B. 404, 515.
[11] [1931] A.C. 450, 467.

The Lands Tribunal held that the amendment to section 22 by the Act of 1955 must have been drafted having in mind the provisions of the Act of 1928, and agreed with the contention for the company that the words " industrial purposes " in section 22 (4) should be given the same meaning as those words had in section 4 (2) of the Act of 1928, and that it must follow from the decision of the House of Lords that the hereditament was not used mainly for industrial purposes.

But the tribunal was satisfied that, even if one had to apply the ordinary meaning to " industrial purposes," by the references to the dictionaries " industrial purposes " connoted production processes, and that the processes for which the hereditament in question was used could not be described as productive. Nothing was produced on the premises apart from the negligible number of links, which were purely incidental to testing, and even if it could be suggested that the tar coating was a stage in the production, it could not possibly be suggested that that was the main purpose for which the hereditament was used. It formed a very minor part and might be regarded as simply ancillary to the testing.

The tribunal was therefore satisfied that the hereditament should be assessed under section 22 (1) (*a*) of the Act of 1925, and that the appeal should be dismissed with costs, and the valuation list as amended by the local valuation court confirmed, subject to the amendment of rateable value £2,247 to net annual value £2,247, rateable value £1,798.

In the case later stated for the opinion of the court on May 26, 1959, the tribunal added that, before giving the decision, the tribunal had inspected the hereditament which, after the decision of the House of Lords and until the decision of the local valuation court in the present case, continued to be valued under section 22 (1) (*b*) of the Rating and Valuation Act, 1925.

The question on which the decision of the honourable court was desired was whether on the findings of fact the tribunal came to a correct decision in law in deciding that the hereditament was not a " factory, mill or other premises of a similar character used " wholly or mainly for industrial purposes " within the meaning of those words as used in the definition of " non-industrial build- " ing " in section 22 (4) of the Rating and Valuation Act, 1925, as amended by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

The valuation officer appealed.

W. L. Roots Q.C. and *Raymond Phillips* for the valuation officer.

J. P. Widgery Q.C. and *David Widdicombe* for the company.

The following case, in addition to those cited in the judgments,

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was cited during the argument: *London Transport Executive* v. *Betts*.[12]

Cur. adv. vult.

Dec. 18. MORRIS L.J. This is a case stated by the Lands Tribunal for the decision of the Court of Appeal pursuant to section 3 (4) of the Lands Tribunal Act, 1949. The question in issue is whether, on the facts as found, the premises of Lloyds British Testing Co. Ltd. are to have their rateable value ascertained under section 22 (1) (*a*) of the Rating and Valuation Act, 1925, as amended, or under section 22 (1) (*b*). The figures which respectively become applicable on the basis of the alternative contentions are not in dispute.

[His Lordship stated the nature of the company's hereditament, cited the relevant provisions of the Anchors and Chain Cables Act, 1899, as set out above, and continued:] It is important to appreciate the nature of the work involved in the testing and finishing of chain cables. A statement in regard to it can conveniently be found in the report in the Court of Appeal of a case concerning the company to which I shall later refer. [His Lordship read from the report of *Dudley Revenue Officer* v. *Lloyds British Testing Co. Ltd.*[1] as set out above, and continued:] The Lands Tribunal have found that the hereditament is similarly used today save that the three links for the breaking test are now cut at the maker's premises and not on the hereditament, and that the amount of "forging" of links has been considerably reduced since 1931 consequent on the uses of high tensile steel for cables and this cannot be forged on the hereditament.

Section 22 of the Rating and Valuation Act, 1925, provided for the method of ascertaining the rateable value of a hereditament for the purposes of the first new valuation list to be prepared under the Act and of any subsequent valuation list. For hereditaments coming under subsection 1 (*a*) there was one method of ascertaining the net annual value; for those coming under subsection 1 (*b*) there was another. A hereditament was under (*a*) if it belonged to one of the classes specified in the first column of the table contained in Part I of the Second Schedule to the Act. A hereditament was under (*b*) if it was not such a hereditament as mentioned under (*a*). If reference is made to Part I of the Second Schedule, it will be seen that the first five classes of hereditaments are "houses and buildings without land, "other than gardens" of varying gross values. But there is an important Note to Part I of the Schedule which reads: "For the "purposes of this Part of this Schedule the expression 'houses "' and buildings' does not include mills, manufactories or "premises of a similar character used wholly or mainly for "industrial purposes or hereditaments valued as part of any

[12] [1959] A.C. 213; [1958] 3 W.L.R. 239; [1958] 2 All E.R. 636. T.L.R. 601.

[1] [1931] 1 K.B. 404, 405–408; 46

" railway, dock, canal, gas, water, electricity, or other public " utility undertaking."

There was no definition of the word " manufactories " nor of the phrase " industrial purposes." The words I have quoted from the Second Schedule remained in effective operation until slightly altered in 1955. Were the premises at Dudley a manufactory or were they of a similar character to a manufactory? Were they used wholly or mainly for industrial purposes? The words to which I refer must be given ordinary reasonable meanings. The word " manufactory " was probably in 1925 synonymous with factory or workshop, but whether this was so or not, I would consider that the testing establishment would aptly be described as premises of a similar character to a manufactory. Were they used wholly or mainly for " industrial " purposes "? I would have thought clearly so. As Parliament did not define the phrase it would be inapposite to seek to do more than to decide whether or not a particular purpose does come within the phrase " industrial purpose." The phrase denotes a contrast with various other purposes such as, for example, residential purposes, or the purposes of a retail shop. An industrial purpose connotes to my mind a purpose connected with industry. If an industrial concern makes and sells chain cables and anchors, and if the concern can only sell them if it pays a testing establishment to prove and test them, I would consider that the premises of the testing establishment were being used either wholly or mainly for industrial purposes.

If I am right in my view of the position under the Act of 1925, then the question arises whether any change was made as a result of any later legislation or as a result of an amendment made in 1955 of the Act of 1925. In 1928 the Rating and Valuation (Apportionment) Act, 1928, was passed. It was required that in valuation lists certain classes of hereditaments were to be distinguished from each other and " agricultural hereditaments," " industrial hereditaments " and " freight transport heredita- " ments " were to be so distinguished. The Act proceeded to prescribe a highly technical definition of an industrial hereditament. Subject to a qualification it meant an hereditament occupied and used as a mine or mineral railway or as a factory or workshop. But the expressions " factory " and " workshop " were " for the purposes of " that Act to have the same meanings as in the Factory and Workshop Acts, 1901 to 1920. The qualification was that though a hereditament might be occupied and used as a " factory " or " workshop " (those words having for the purposes of the Act their meanings as in the Factory and Workshop Acts) yet it would not be an " industrial hereditament " if it were primarily occupied and used for certain specified purposes or any combination of them. One group of such purposes consisted of the purposes of a public supply undertaking. Another group of such specified purposes consisted of purposes " which

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" are not those of a factory or workshop." In that context again the words factory and workshop have their attributed meanings.

After the passing of the Act of 1928 and of the Local Government Act, 1929, the company sought to establish that their hereditament was an " industrial hereditament." The resultant litigation went to the House of Lords [sub nom. *Sedgwick* v. *Watney, Combe, Reid & Co. et al.* (*The Industrial Hereditaments Cases*)].[2] The final decision was adverse to the contentions of the company. In the House of Lords it was agreed and it was held that the premises came within the definition of a " factory." They were within the words " any works, warehouses, furnaces, " mills, foundries or places named in Part I of the Sixth " Schedule " of the Factory and Workshop Act. Group (13) in Part I of that Sixth Schedule consisted of " ' metal and india- " ' rubber works,' that is to say, any premises in which steam, " water, or other mechanical power is used for moving machinery " employed in the manufacture of machinery, or in the manu- " facture of any article of metal not being machinery, or in the " manufacture of india-rubber or gutta-percha, or of articles made " wholly or partially of india-rubber or gutta-percha."

Though the premises came by this rather unanticipated route within the statutory definition of a factory, they failed to qualify as an industrial hereditament, because testing, for which the premises were primarily occupied and used, was not, within the definitions of the Act of 1901, a " factory " purpose. The premises qualified to be regarded as a " factory " because there was the manufacture of articles of metal. The premises failed to qualify to be regarded as an " industrial hereditament " because it was for the testing, and not for the manufacture of metal articles, that the premises were primarily occupied and used. " Testing " did not amount to " adapting " for sale and " test- " ing " was not within any statutorily defined factory purpose. Lord Dunedin in his speech in the House of Lords in *Sedgwick* v. *Watney, Combe, Reid & Co.* [*The Industrial Hereditaments Cases*] [3] said: " Undoubtedly, there is in the works the forging " of links to join up the chains which have been severed, and " that forging gives to the premises the character of a factory. " The Attorney-General admits this in his case, but then he says: " ' True, it becomes a factory, but it is not an industrial heredita- " ' ment because it is struck at by clause (*f*) of section 3 (1), " ' namely, being primarily occupied and used for other purposes " ' which are not those of a factory or workshop.' Now, the " question, put in this way, was, as I have said, not dealt with in " the courts below. In answer to the argument of the Attorney- " General, Mr. Comyns Carr presented an argument to this " effect: ' This is,' said he, ' admittedly a factory, but this factory " ' has only one purpose, to wit, testing. Therefore, it cannot be " ' said that it is mainly used for a purpose which is not a

[2] [1931] A.C. 446, 466; 47 T.L.R. 308.

[3] [1931] A.C. 446, 468–469.

" ' factory purpose.' This argument is very ingenious, and seems, " at first sight, difficult to answer, but on consideration, I am " satisfied that it is unsound. One must begin by remembering " that, in considering this argument, testing alone is, ex " hypothesi, not a factory purpose. The purpose of a particular " factory must be gathered from that which makes it a factory. " If it was made a factory because it fell within an actual " description in Part I of the Schedule, you must gather the " purpose from that description. Here the hereditament is made " a factory because of the manufacture of articles of metal. " Therefore, so far as this hereditament is a factory, its purpose " is the manufacture of metal. But the hereditament is, without " doubt, primarily occupied and used for the purposes of testing " operations, and such operations are, ex hypothesi, not factory " purposes, consequently the case falls within the words of the " exception, and the hereditament, although a factory, is not an " industrial hereditament."

The rateable value of the testing establishment was and continued to be ascertained on the basis that it came within section 22 (1) (*b*). That meant that it was treated as being within the words " mills, manufactories or premises of a similar " character used wholly or mainly for industrial purposes." So matters remained for very many years. The company point out that until 1957 there was, however, no difference from the point of view of what amount the company would actually have to pay, whether the rateable value was assessed under section 22 (1) (*a*) or under section 22 (1) (*b*). But when the Rating and Valuation Act, 1957, was passed, the company realised that they would be more favourably placed if they could come within section 22 (1) (*a*), and they claimed accordingly. The local valuation court acceded to the company's claim and assessed the hereditament under section 22 (1) (*a*), and on appeal by the valuation officer to the Lands Tribunal this basis of assessment was upheld.

The wording of section 22 of the Act of 1925 had been by that time to some extent varied. The amendment was effected by section 5 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The opening words of section 22 (1) (*a*) now read: " If the hereditament consists of one or more houses or " other non-industrial buildings, with or without any garden, yard, " court, forecourt, outhouse or other appurtenance belonging " thereto, but without other land." It will be seen that the phrase " non-industrial buildings " is introduced. Consequent on that, a new subsection (subsection (4)) was enacted, which reads: " In this section the expression ' house ' includes part of a house, " the expression ' non-industrial building ' means a building, or " part of a building, of any description, with the exception of " factories, mills and other premises of a similar character used " wholly or mainly for industrial purposes, and of premises valued " as part of—(*a*) a railway, dock, canal, gas, water or electricity " undertaking, or (*b*) any public utility undertaking not falling

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" within the preceding paragraph, and the expression ' appurten-
" ' ance,' in relation to a dwelling-house, or to a school, college
" or other educational establishment, shall be taken to include
" all land occupied therewith and used for the purposes thereof."
It will be seen that the definition of " non-industrial building "
has the words of exception which closely follow the Note in the
Schedule to the Act of 1925 to which I have referred above, and
which was in effective operation for the 30 years between 1925
and 1955. Instead of mention of manufactories there is mention
of factories. The phrase " industrial purposes " exists as before.
A factory is not stated to be a factory as defined in any Act
relating to factories. There is no definition of industrial purposes.
All the words must, in my judgment, be given their ordinary
meanings, and it seems to me that the position is not effectively
altered from what it was in the years following 1925. The agreed
description of the testing establishment and of the character of
the equipment and the nature of the operations leads me to the
view that, whether or not it could appropriately be described as a
factory, it falls to be described as premises having a character
similar to that of a factory. Furthermore, I consider that the
premises were used wholly or mainly for industrial purposes.
They were used for a purpose connected with the industry of
making and selling anchors and chain cables. The view of
the Lands Tribunal in the present case was that " industrial
" purposes " connotes production processes. With respect, I do
not agree. The phrase may include production processes but it
includes much else.

Though the phrase " industrial purposes " is nowhere defined,
it is contended on behalf of the company that some guidance can
be found by considering section 4 of the Act of 1928, and that, if
so, assistance is afforded in the determination of the present case
because by section 10 (2) of the Act of 1928 that Act is to be
construed as one with the Act of 1925, and because in section 84
of the Local Government Act, 1929, it is provided as follows:
" In this Part of this Act the expression the ' principal Act '
" means, in relation to places outside London, the Rating and
" Valuation Act, 1925, as amended by any subsequent enactment,
" and in relation to London, the Valuation (Metropolis) Act,
" 1869, as so amended as aforesaid, and the principal Act, the
" Rating and Valuation (Apportionment) Act, 1928, and this
" Part of this Act shall be construed as one, and may be cited
" together as the Rating and Valuation Acts, 1925 to 1929, or as
" the Rating and Valuation (Metropolis) Acts, 1869 to 1929, as
" the case may be."

As to the effect of this, reference may be made to *Preston and Area Rent Tribunal* v. *Pickavance*.[4] The Landlord and Tenant (Rent Control) Act, 1949, provided by section 11 (5) as follows:
" This section shall be construed as one with the Act of 1946, and

[4] [1953] A.C. 562; [1953] 3 W.L.R. 242; [1953] 2 All E.R. 498.

" references in this section to that Act shall be construed as " references to that Act as extended by section 7 of this Act." Lord Porter in his speech said [5]: " Moreover, it has to be borne " in mind that the Act of 1949 does not provide that section 11 " is to be read with section 5 of the earlier Act; it is to be read " with that Act generally and there are many other provisions of " that Act to which that reference is applicable, e.g., section " 2 (1) and (3). Such an application seems to me to justify the " use of the words ' read with ' in section 11 of the Act of 1949, " and negatives the necessity of confining the meaning of those " words in that Act to a notice such as would be required under " section 5 of the Act of 1946." Lord Reid said in reference to these words [6]: " In my opinion this means neither more nor less " than that section 11 must be read as if it were a section in the " 1946 Act. There is no difficulty about so reading it. It does " not alter or amend anything in the 1946 Act. It adds something " new, which is materially different in character from anything " in the 1946 Act." Lord Tucker in his speech said [7]: " The " exact consequence of a provision that one Act is to be construed " as one with another, beyond incorporating the definitions " contained in the first Act, is not altogether easy to ascertain, " because it would seem that if both Acts are dealing with the " same subject-matter it would in any event in a case of " ambiguity be necessary to construe the second Act in the light " of the provisions of the first. In the present case, having regard " to section 8 of the Act of 1946, which gives power to make " procedural regulations, it would seem that in order to make it " clear that such regulations apply to applications under section " 11 of the Act of 1949 some such provision as that contained in " subsection (5) was desirable."

The argument for the company is based on a consideration of section 4 of the Act of 1928. That section, which only comes into operation if a hereditament is shown to be an " industrial " hereditament," provides that valuation list must show whether an industrial hereditament is occupied and used wholly or only partly for industrial purposes, and the net annual value must when necessary be apportioned. Here again is the phrase " industrial purposes." It is not defined. Prima facie, and particularly as the Act of 1928 is to be construed as one with the existing Act of 1925, the phrase must be given its existing or ordinary meaning. In so far as any help in construction may be gleaned from the Act of 1928, it is to be noted that when in section 5 the phrase " transport purposes " is being defined there are references to " all purposes connected with." Section 4 proceeds to direct as to how to determine the proportions in which an industrial hereditament is occupied and used for industrial purposes, or, alternatively, for other purposes. There is a simple

[5] [1953] A.C. 562, 575.
[6] Ibid. 580.
[7] Ibid. 582.

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test. It is to be " deemed " to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be nor to form part of a mine, factory or workshop.

It is said on behalf of the company that this section gives guidance as to the meaning of the phrase " industrial purposes," or, in other words, impliedly defines the phrase. It is said that an industrial purpose is equated with a factory purpose. But where Parliament has refrained from defining and has used words capable of ordinary interpretation, I cannot think that an indirect definition is to be extracted from the Act of 1928. An industrial hereditament must be either a mine or a mineral railway or a " factory " or " workshop " as these two latter words were statutorily defined by the Act of 1901. But section 4 merely says that an industrial hereditament is " deemed " to be occupied and used for industrial purposes unless any part is " deemed " not to be a part. Thus, if a mine is held to be an industrial hereditament, it is deemed to be occupied and used for industrial purposes unless under some enactment relating to the regulation of mines some part is " deemed " not to be a part of the mine. That does not involve equating an industrial purpose to or with a factory purpose: nor does it in any way limit or modify the ordinary meaning of the phrase " industrial purposes." Under section 3 (2) of the Act of 1928, it is provided that if the " industrial " hereditament " is a " factory " or " workshop " (as statutorily defined for the purposes of the Act) then the part within the close curtilage or precincts used by the occupier for the housing or maintenance of his road vehicles or as stables is to be " deemed " not to form part of the factory or workshop. Another illustration of the way in which a part of a factory or workshop is " deemed " not to form part may be found by reference to section 149 (4) of the Factory and Workshop Act, 1901. That subsection reads: " Where a place situate within the close, curtilage, or precincts " forming a factory or workshop is solely used for some purpose " other than the manufacturing process or handicraft carried on " in the factory or workshop, that place shall not be deemed to " form part of the factory or workshop for the purposes of this " Act, but shall, if otherwise it would be a factory or workshop, " be deemed to be a separate factory or workshop, and be regulated " accordingly." On the application of that subsection, a part of an " industrial hereditament " was excluded in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail Ltd.*[8]

It was held by the Lands Tribunal that it followed from the decision of the House of Lords in 1931 that the hereditament at Dudley is not used mainly for industrial purposes. With every respect, I do not share this view. The House of Lords held that, though the testing establishment was a " factory " within the

[8] [1931] 1 K.B. 47; 46 T.L.R. 499.

statutory definition of that word, it was not, by reason of the proviso to section 3 (1) of the Act of 1928, an "industrial hereditament," because the establishment was primarily used for testing, and because testing was not a purpose of a "factory" within the statutory definition of that word. The House of Lords never had occasion to consider section 4 of the Act of 1928 nor to consider the phrase "industrial purposes."

For the reasons which I have endeavoured to state, it does not seem to me that the "deeming" processes laid down by section 4 (2) of the Act of 1928 form any basis for seeking to ascribe to the phrase "industrial purposes" any meaning other than its ordinary meaning. When the phrase was used in the Act of 1928, it could not be that some sort of implied amendment of the Act of 1925 was being introduced. It is said that the Act of 1928 could be resolving an existing ambiguity in the meaning of the phrase as used in the Act of 1925. But it seems to me (a) that there was no ambiguity in the phrase as used in the Act of 1925; (b) that section 4 (2) of the Act of 1928 does not equate "industrial purposes" with anything; (c) that if Parliament had been intending to lay down some definition or to remove some ambiguity it would have said so and done so expressly. It is further to be noted that when in 1955 Parliament amended the Act of 1925 and introduced the phrase "non-industrial building," Parliament refrained, when defining the phrase, from incorporating the existing statutory definition of an industrial hereditament.

In my judgment, the premises of the testing establishment of the company should be regarded as being premises of a similar character to factory premises and as being wholly or mainly used for industrial purposes. It is said that, if this view be correct, the company would have the misfortune to have failed to qualify for some relief after the Acts of 1928 and 1929 and now to fail to qualify under the Act of 1957. But, in my judgment, I must be uninfluenced by this consideration and must only be guided to a conclusion by the statutory words which apply. I would answer the question raised in the case stated in the negative, and I consider that the assessment should be under section 22 (1) (*b*).

WILLMER L.J. I differ from Morris L.J. with diffidence, but for my part I have come to the conclusion that the Lands Tribunal came to a correct decision in holding that the company's hereditament ought to be valued in accordance with section 22 (1) (*a*) of the Act of 1925. The effect of this would be that the net annual value would be calculated by reference to a gross value, from which the appropriate deduction would be made in accordance with the table contained in Part I of the Second Schedule to the Act in order to arrive at the net annual value.

As a matter of history, it should be recorded that in 1931 the company sought to obtain relief under section 68 of the Local Government Act, 1929, on the ground that the hereditament was

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an " industrial hereditament " within the meaning of section 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. That attempt failed because, although it was conceded that the hereditament was a " factory," as being within paragraph (13) of Part I of the Sixth Schedule to the Factory and Workshop Act, 1901, it was decided by the House of Lords in *Grove* v. *Lloyds British Testing Co.*[9] that it was not an " industrial hereditament " within the meaning of the Act of 1928. The work of forging links was sufficient to make the hereditament a factory, but it was not an " industrial hereditament " because, in the view of the House of Lords, it was primarily occupied and used for the purpose of merely testing the cables, which was not a factory purpose.

From 1931 onwards until 1957 it made little or no financial difference to the company whether the hereditament was assessed under paragraph (*a*) or (*b*) of section 22 (1) of the Act of 1925. But by the Rating and Valuation Act, 1957, a measure of relief was accorded in the case of a hereditament, other than a dwelling-house, private garage or private storage space, whose net annual value was calculated by reference to its gross value, that is, in accordance with section 22 (1) (*a*). In the present proceedings the company have sought to claim the benefit of this relief, and have claimed that their hereditament consists of non-industrial buildings which ought to be assessed under that paragraph. They are met, however, with the contention that their hereditament is excluded by the definition of " non-industrial building " contained in section 22 (4), as enacted by section 5 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The material words of the definition are as follows: " ' non-industrial building ' " means a building, or part of a building, of any description, with " the exception of factories, mills and other premises of a similar " character used wholly or mainly for industrial purposes . . . "

If the valuation officer's contention be right, the effect would be that the company, having been shut out from relief under the Local Government Act, 1929, on the ground that their hereditament was not an industrial one, would now find themselves equally shut out from relief under the Act of 1957 on the apparently diametrically opposite ground that their hereditament is not a non-industrial building. Prima facie this would be a strange result, and it seems to me that the grounds on which the valuation officer's argument is based require careful examination.

The valuation officer's contention in the first place is that the building in question is a factory, as conceded in the litigation in 1931, and as found by the House of Lords. That, according to the valuation officer, is the end of the matter, because it is argued that the word " factories " in section 22 (4) is not qualified by any of the words which follow. On this point I find his argument wholly unacceptable. In my judgment, the words

[9] [1931] A.C. 450, 466; 47 T.L.R. 308.

" used wholly or mainly for industrial purposes " must be construed as governing each of the three categories previously mentioned, namely, " factories," " mills " and " other premises " of a similar character." That is the natural way to read the words. Had the draftsman not intended the words " factories " and " mills " to be so qualified, he could, and I have no doubt would, have made such intention plain, for example, by numbering or lettering the various categories, so that the material words would read: " with the exception of: (*a*) factories; (*b*) mills; and " (*c*) other premises of a similar character used wholly or mainly " for industrial purposes."

The valuation officer's next contention is that, even assuming the word " factories " to be qualified by the words that follow, the expression " industrial purposes " is to be construed in a broad sense as meaning any purposes connected with industry; and the testing of cables, it is argued, is a process connected with the industrial process of producing cables. The company's hereditament, therefore, would still fall within the exception, and consequently outside the definition of " non-industrial building." The company's answer to this argument is that the Act of 1925 (as amended in 1955) is to be construed as one with the Act of 1928, so that prima facie the same words and phrases should be construed in the same sense in the two Acts. So far the company's contention appears to me to be unassailable, for section 84 of the Local Government Act, 1929, provides as follows: " In this Part of this Act "—that is, Part V, which deals with rating and valuation—" the expression the ' principal Act ' means, " in relation to places outside London, the Rating and Valuation " Act, 1925, as amended by any subsequent enactment . . . and " the principal Act, the Rating and Valuation (Apportionment) " Act, 1928, and this Part of this Act shall be construed as " one. . . ."

I entertain no doubt, therefore, that it is not only permissible but necessary to refer to the provisions of the Act of 1928 in order to construe section 22 (4) of the Act of 1925, as enacted by the Act of 1955. I look, accordingly, at section 3 (1) of the Act of 1928 for the definition of " industrial hereditament," which, omitting immaterial words, is in the following terms: " In this " Act the expression ' industrial hereditament ' means a hereditament . . . occupied and used . . . as a factory . . . : Provided " that the expression industrial hereditament does not include a " hereditament occupied and used as a factory . . . if it is primarily occupied and used for the following purposes . . . (*f*) any " other purposes, whether or not similar to any of the foregoing, " which are not those of a factory . . . " By subsection (2) the expression " factory " is defined as having the same meaning as in the Factory and Workshop Acts, 1901 to 1920.

So far, then, the result is that a hereditament, although it be a factory within the meaning of the Factory and Workshop Acts,

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is not an industrial hereditament—that is to say, it is a non-industrial hereditament—if it is primarily occupied and used for purposes which are not those of a factory.

The expression "industrial purposes," which is the expression we have to construe in this case, occurs first in section 4, which deals with apportionment of the net annual value in the case of an industrial hereditament occupied and used partly for industrial purposes and partly for other purposes. The material part of this section provides as follows: "4.—(1) In every valuation list every "industrial hereditament occupied and used wholly for industrial "purposes shall be shown as being so occupied and used, and as "respects every such hereditament occupied and used partly for "industrial purposes, the net annual value thereof shall be shown, "in the prescribed manner, as being apportioned between the "occupation and user of the hereditament for industrial purposes, "and the occupation and user thereof for other purposes. (2) For "the purpose of determining in what proportions an industrial "hereditament is occupied and used for industrial purposes and "for other purposes respectively, the following provisions shall "have effect:—(*a*) The hereditament shall be deemed to be occu-"pied and used for industrial purposes except in so far as any "part thereof is, under this Act or under the enactments relating "to the regulation of mines, factories and workshops, to be "deemed neither to be, nor to form part of, a mine, factory, or "workshop . . ."

The reference to a hereditament any part of which is deemed not to form part of a factory is clearly a reference to section 149 (4) of the Factory and Workshop Act, 1901, whereby it was enacted that a place within a factory, which is used solely for some purpose other than the manufacturing process carried on in the factory, shall not be deemed to form part of the factory. "Industrial purposes" are thus contrasted with purposes other than the manufacturing process carried on in the factory, that is, purposes other than those which make it a factory. Reading sections 3 and 4 of the Act of 1928 together, therefore, the conclusion seems to me to be irresistible, that the expression in section 3 (1) (*f*), "other purposes . . . which are not those of a factory," must mean purposes which are not "industrial purposes." This explains why it is enacted that a hereditament primarily occupied and used for such purposes, that is, purposes which are not "industrial purposes," is not an "industrial hereditament."

In my judgment, therefore, the true effect of sections 3 and 4 of the Act of 1928 is to equate "industrial purposes" with factory purposes—that is, the purposes which make the hereditament a factory—and "other purposes" with purposes other than factory purposes—that is, other than the purposes which make the hereditament a factory. If that is the meaning of the words "industrial purposes" in the Act of 1928, I think that they must be held to bear the same meaning in section 22 (4) of the Act of 1925, as enacted by the Act of 1955.

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What then is the result in relation to the company's hereditament? The House of Lords has decided that the work of testing cables, which is the purpose for which the hereditament is primarily occupied and used, is not a factory purpose. It is not, therefore, an industrial purpose. Consequently the hereditament does not fall within the exception in section 22 (4), for it is not a factory used wholly or mainly for industrial purposes. It is, therefore, a "non-industrial building," and as such ought to be valued, as the Lands Tribunal held, in accordance with section 22 (1) (*a*).

I venture to think that the construction which I have put on the words "industrial purposes" is not only consonant with common sense, but also ensures consistency between the Acts of 1925 and 1928, which are to be read as one. At least it has the merit of avoiding the absurdity of holding that a hereditament, which has been held not to be an "industrial hereditament," is at one and the same time not a "non-industrial building." For these reasons, I am of the opinion that the appeal should be dismissed.

HARMAN L.J. In my judgment also, this appeal should be dismissed. As the court is not unanimous, I shall explain the reasons for my view as shortly as I may.

The statute to be construed is the Rating and Valuation Act, 1925, s. 22, as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5. Under section 22 as it originally appeared in the Act of 1925, all real property was described as hereditaments: these were divided into two categories, one described in section 22 (1) (*a*) and the other in (*b*). Category (*a*) consisted of hereditaments belonging to one of the classes specified in the Second Schedule, which were all there described as "houses and buildings," and (*b*) of "all other "hereditaments"; and by the Note to Part I of the Second Schedule to the Act there were excluded from the expression "houses and buildings" "mills, manufactories or premises of a "similar character used wholly or mainly for industrial purposes." It will be observed that the word "hereditaments" is used to cover houses and buildings. Apparently it did not matter to the company whether the hereditament in question came within (*a*) or (*b*), the net annual value amounting to the same in either case. It was classed under (*b*).

In 1928 there was passed the Rating and Valuation (Apportionment) Act of that year designed to give relief to what were there called industrial hereditaments. To these were given certain relief, and the respondent company sought to bring itself within that relief. The question whether it could do so gave rise to *Grove* v. *Lloyds British Testing Company Ltd.*,[10] which was

[10] [1931] A.C. 446, 466; sub nom. *Sedgwick* v. *Watney, Combe, Reid & Co. and several other Appellants and Respondents. The Industrial Hereditament Cases.*

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eventually decided in the House of Lords. The House there held that the company could not claim relief under the Act of 1928 because the hereditament, that is to say, the company's building, was not an industrial hereditament. It is not for us to question the convenience, still less the good sense, of that decision.

The Act of 1955 amended the Act of 1925, s. 22 (*a*), by classifying all the hereditaments included in it as "houses or "other non-industrial buildings," by substituting a new table, and by striking out the Note. It also added a new subsection (4), of which the part here material has already been read by Morris L.J. I may say at once that I construe the words "wholly or mainly," etc., as applying to factories. The company's property continued to appear in the list under section 22 (1) (*b*) of the Act of 1925. There was still no advantage to be gained by arguing that it fell within section 22 (1) (*a*). This, however, became a live question after the passing of the Rating and Valuation Act, 1957, which gave further relief to hereditaments of which the net annual value was an amount ascertained by reference to gross value as defined in section 68 of the Act of 1925. Now this relief only applied to hereditaments which could be brought within section 22 (1) (*a*) and not to those within section 22 (1) (*b*). The company applied to the local valuation court, which in 1958 decided in their favour by classifying their building as being within category (*a*): on appeal to the Lands Tribunal this decision was affirmed. The valuation officer now appeals to this court.

It will thus be seen that in order to come within category (*a*) the company must prove that their building is a "non-industrial "building." These are the words to be construed by the court, and not the words "industrial purposes," though, no doubt, it was the purpose of subsection (4) to explain the former by the latter. Should the appeal be successful, it would follow that the company's building, though not ranking as an industrial hereditament under the Act of 1928 having regard to the decision of the House of Lords, will yet rank as an industrial building for the purposes of the Act of 1925, as amended by the Act of 1955. This would be a most bizarre result, for, after all, a building is only one sort of hereditament, as the Act of 1925 recognises. This word is now used chiefly in connection with rating, though the conveyancer still not infrequently writes "lands and heredita- "ments" in his parcels. Hereditaments, of course, originally meant any species of property which would descend to the heir at law, and it is still so defined in the Law of Property Act, 1925. By section 205 (1) (ix) of that Act land is said to include buildings . . . and other corporeal hereditaments, and hereditaments to mean any real property which on an intestacy before the Act might have devolved upon an heir. In the Rating and Valuation Act, 1925, s. 68 (1), "'Hereditament' means any lands, "tenements, hereditaments or property which are or may become "liable to any rate . . ." Moreover, the Acts of 1925, 1928 and

1955 are all to be read together, as provided by section 10 (2) of the Act of 1928 and section 84 of the Local Government Act, 1929, and therefore the expressions in all of them must be construed as if contained in one Act—see *per* the Earl of Selborne L.C.'s observations in *Canada Southern Railway Co.* v. *International Bridge Company* [11]: "It is to be observed that those two Acts "are to be read together by the express provision of the 7th and "concluding section of the amending Act; and therefore we must "construe every part of each of them as if it had been contained "in one Act, unless there is some manifest discrepancy, making "it necessary to hold that the later Act has to some extent "modified something found in the earlier Act." It follows, in my judgment, that the two expressions "industrial heredita-"ments" and "industrial buildings" ought to receive the same interpretation in the absence of some manifest discrepancy making a different interpretation necessary. For my part, I can find no such discrepancy, and that is enough, as the Lands Tribunal held, to dispose of this appeal.

The argument for the valuation officer was that the House of Lords in the case in 1931 did not decide that this building was not being used for industrial purposes but only that for the purposes of relief under the Act of 1928 the building was not an industrial hereditament because it was not primarily used for factory purposes. The House held that the only portion of the building used for those purposes was a small portion used as a forge for working metal and that that was not the primary purpose for which the building was used, which was for testing purposes. It was argued that it did not follow from this that the main purpose, though not a factory purpose, was not in the ordinary sense of the word an industrial purpose, and reliance was placed on section 4 of the Act of 1928, which has been dealt with by Morris L.J. in his judgment. I agree that this is so and that the testing operations, which are the main purpose of the factory and are described in the report of the case in 1931,[12] might, if there were no other guide, properly be described as industrial as being connected with industry, that is to say, the industry of making anchors and chains; but this method of reasoning lands the user of it in the absurdity described above and in giving to the same expression used in two Acts which are to be read together a different meaning: quod est absurdum, as Euclid has it. I therefore feel constrained to reject this line of reasoning and to conclude that, read in the light of the Act of 1928, it is right to hold that for this purpose industrial purposes must be tantamount to factory purposes. This is the only way I can see to construe the two Acts consistently. The principle of interpreting an earlier Act by a later one where both are concerned with the

[11] (1883) 8 App.Cas. 723, 727.

[12] [1931] 1 K.B. 404, 405–408.

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same subject-matter is well established, as appears from Maxwell on Statutes (10th ed., pp. 33 and 35), and the cases there cited.

Appeal dismissed with costs.
Question in case stated answered in the affirmative.
Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor; Gregory, Rowcliffe & Co. for Shakespeare & Vernon, Birmingham.*

M. M. H.

[PRIVY COUNCIL.]

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OFFICIAL ASSIGNEE OF THE PROPERTY OF KOH HOR KHOON AND OTHERS, BANKRUPTS . . . . . APPELLANT;

AND

EK LIONG HIN LTD. . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Moneylender—Definition—Exclusion from—Loans "in the course" and "for the purposes" of business not having for its primary object the lending of money—Moneylenders Ordinance (Laws of the Colony of Singapore, 1955 *Ed., c.* 193), *s.* 2 (*d*)—*Moneylenders Act,* 1900 (63 & 64 *Vict. c.* 51), *s.* 6 (*d*).
Singapore—Moneylender.

By section 2 of the Moneylenders Ordinance, c. 193 of the 1955 edition of the Laws of Singapore: "'Moneylender' shall include "every person whose business is that of moneylending, . . . but "shall not include . . . (*d*) any person . . . bona fide carrying on "any business not having for its primary object the lending of "money, in the course of which and for the purposes whereof he "lends money." (Section 2 (*d*) of the Singapore Ordinance is identical with section 6 (*d*) of the English Moneylenders Act, 1900.)

The respondent company, incorporated in Singapore, owned a rubber estate and ships, and carried on as their primary business that of rubber merchants and shippers. They also had a godown storage department and made loans to selected customers on the security of goods stored in the godowns, such loans being made, according to the evidence, in order to retain their existing customers and to gain fresh ones; they did not advertise the fact that they were willing to lend money. Shortly after loans had been made by the respondents to a firm on the security of goods stored in the godowns the firm encountered financial difficulties and the respondents sold the goods and credited the money from the sale against the loans. Thereafter a receiving order was made against the firm and its members were adjudicated bankrupts, and the appellant,

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* *Present*: LORD DENNING, LORD JENKINS, the RT. HON. L. M. D. DE SILVA.

as official assignee of the bankrupts' property, alleging that the respondents were moneylenders within the meaning of the Moneylenders Ordinance, claimed from them the return of the goods or their value on the ground that, admittedly, they had not, when dealing with the firm, complied with the formalities required by the Ordinance:—

Held, that the moneylending transactions were undertaken in the course of the previous business and as part of its activities as a whole, and being undertaken, necessarily, in the respondents' view, to retain existing customers and to gain fresh ones, and thus to preserve and advance the business previously done, were carried on for the purposes of the business. The loans were thus made "in "the course" and "for the purposes" of the respondents' business as a whole, and they were not therefore moneylenders within the meaning of the Ordinance, and the appellant's claim failed.

"Whereof" in section 2 (*d*) of the Ordinance refers to the business and not to the primary objects of the business; it is sufficient that the moneylending transactions are undertaken genuinely for the purposes of the business, that is, with the object of preserving, advancing or otherwise assisting the business, and not necessarily in connection with its primary objects.

Furber v. *Fieldings Ltd.* (1907) 23 T.L.R. 362 approved.

Edgelow v. *MacElwee* [1918] 1 K.B. 205 considered.

Judgment of the Court of Appeal of the Colony of Singapore affirmed.

APPEAL (No. 8 of 1959) from a judgment of the Court of Appeal of Singapore (January 13, 1958) reversing a judgment of the High Court of Singapore (Knight J.) (July 5, 1957).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellant, who was the plaintiff in this case, was the official assignee of the property of four persons who had been adjudicated bankrupt on February 27, 1953, and who, before that date, had been trading together under the name of Koh Bian Seng. The firm had borrowed certain sums of money from the defendant company (respondents to this appeal) on the security of a quantity of galvanised iron sheets placed in its possession. In this action instituted in the High Court of Singapore the appellant asked for the return to him by the respondents of the iron sheets or their value, and for certain other relief on the ground that the respondents were moneylenders within the meaning of that term in the Moneylenders Ordinance of Singapore (cap. 193, Legislative Enactments of Singapore, 1955 Edition), that they had failed when dealing with Koh Bian Seng to comply with the formalities required by section 5 of the Ordinance and that, consequently, the security taken could not be enforced.

Section 5 of the Ordinance was to the following effect: "5.—(1) No contract for the repayment by a borrower or his "agent of money lent to him or to any agent on his behalf by a "moneylender or his agent on or after the first day of January, "1936, or for the payment by him of interest on money so lent, "and no security given by the borrower or by any such agent as "aforesaid in respect of any such contract, shall be enforceable,

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" unless a note or memorandum in writing of the contract in the " English language be signed by the parties to the contract or " their respective agents, or, in the case of a loan to a partnership " firm, by a partner in or agent of the firm, and unless a copy " thereof authenticated by the lender or his agent be delivered to " the borrower or his agent, or, in the case of a loan to a partner- " ship firm, to a partner in or agent of the firm, before the money " is lent; and no such contract or security shall be enforceable, if " it is proved that the note or memorandum aforesaid was not so " signed before the money was lent or before the security was " given, as the case may be: . . ."

There was a proviso to that subsection and three subsections (2), (4) and (5), which had no bearing on the matter under consideration in this case.

Subsection (3) read: " (3) The note or memorandum aforesaid " shall contain all the terms of the contract, and in particular " shall show separately and distinctly—(*a*) the date of the loan; " (*b*) the principal; and (*c*) the rate of interest per centum per " annum payable in respect of such loan or, where the interest is " not expressed in terms of a rate per centum per annum, the " amount of such interest."

The respondents admitted that the formalities required by the section were not observed but denied that they were moneylenders. The High Court of Singapore (Knight J.) held that they were. On appeal, the Court of Appeal (Whyatt C.J., Tan Ah Tah and Chua JJ.) held that they were not. This was an appeal from that decision.

Under section 2 of the Moneylenders Ordinance of Singapore " moneylender " was defined thus: " ' moneylender ' shall include " every person whose business is that of moneylending, or who " carries on or advertises or announces himself or holds himself " out in any way as carrying on that business, whether or not " that person also possesses or earns property or money derived " from sources other than the lending of money, and whether or " not that person carries on the business as a principal or as an " agent; but shall not include . . . " then followed certain exceptions (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*), of which the only one relevant on the facts of this case to the question to be decided was " (*d*) any " person bona fide carrying on the business of banking or insur- " ance, or bona fide carrying on any business not having for its " primary object the lending of money, in the course of which " and for the purposes whereof he lends money; . . ."

The definition was the same as that to be found in section 6 of the English Act of 1900 except that the words " whether or not " that person also possesses or earns property or money derived " from sources other than the lending of money " did not appear in the English Act. The Singapore Ordinance also contained (section 3) the following provision not to be found in the English Act: " 3. Save as excepted in paragraphs (*a*), (*b*), (*c*), (*d*), (*e*) " and (*f*) of the definition of ' moneylender ' in section 2, any

" person who lends money at interest or who lends a sum of " money in consideration of a larger sum being repaid shall be " presumed, until the contrary is proved, to be a moneylender."

The respondents admitted that they carried on the business of moneylending but claimed that they were not moneylenders within the meaning of the Ordinance on the ground that they were a " person," who, in the language of section 2 (*d*) (see above), carried on " a business not having for its primary object the " lending of money, in the course of which and for the purposes " whereof he lends money."

It was found by the trial judge that " there is no suggestion " that the defendant company's primary object is moneylending— " in fact they are rubber merchants and shippers—and the only " question for determination is whether these loans were made " ' in the course of their business and for its purposes '."

It was upon that question that the courts in Singapore had disagreed and it was the only question for decision on this appeal. It was common ground that if the respondents were held as a result of the answer to the question to be moneylenders this appeal should be allowed, and that if they were held not to be moneylenders the appeal should be dismissed.

The respondents were a limited company incorporated in Singapore in 1948 with a nominal capital of 2,000,000 dollars and assets approximately of the value of 10,000,000 dollars. Their primary business, as found by the trial judge, was that of " rubber " merchants and shippers." They had a rubber estate and ships that plied between Singapore and Indonesia. In 1951 they started a godown storage department as a facility for their customers, and in the same year they also started as an additional facility to make loans on the security of the goods stored in their godowns. The audited figures in the balance-sheet " at Decem- " ber 31, 1952," showed that out of their total assets of about 10,000,000 dollars about 1,000,000 was out on loan. They made loans only to selected customers who stored goods with them. They did not advertise the fact that they were willing to lend money.

1959. Nov. 9, 10. *Eustace W. Roskill Q.C.* and *Basil Eckersley* for the appellant.

C. P. Harvey Q.C. and *I. Starforth Hill* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Samuel* v. *Newbold* [1]; *Litchfield* v. *Dreyfus* [2]; *Kirkwood* v. *Gadd* [3]; *Newman* v. *Oughton* [4]; *Newton* v. *Pyke* [5]; *In re South African Supply and Cold Storage*

[1] [1906] A.C. 461, 469; 22 T.L.R. 703.
[2] [1906] 1 K.B. 584; 22 T.L.R. 385.
[3] [1910] A.C. 422; 26 T.L.R. 530.
[4] [1911] 1 K.B. 792; 27 T.L.R. 254.
[5] (1908) 25 T.L.R. 127.

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Co.[6]; *Archambault* v. *Archambault*[7]; and *Temperance Loan Fund Ltd.* v. *Rose.*[8]

1960. Jan. 14. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA, who stated the facts set out above and continued: It does not appear to what extent the moneys raised were utilised by the borrowers in connection with the other branches of the respondents' business, and it is assumed for the purposes of this judgment that a large part of it was not so used.

The trial judge opened his judgment with the words "The "facts in this case are not in dispute." No question of credibility arose in this case and the lowest at which the case for the respondents on the facts can be viewed is that the witnesses called by them believed what they said even if it can be suggested that they were mistaken in certain inferences of fact which they made.

On the question whether the respondents "lent money (*a*) in "the course of their business and (*b*) for the purposes of their "business" Whyatt C.J., who wrote the principal judgment of the Court of Appeal said: "As regards (*a*), it is clear from the "evidence that these loans were made in accordance with the "normal commercial practice of shipping and godown companies "in Singapore and therefore it follows, in my view, that they "were made in the course of the appellants' business. As regards "(*b*), the evidence shows that the purpose of these loan transactions was to prevent the appellants losing customers to their "competitors and it cannot, in my view, be said that money lent "for such a purpose was not lent for the purposes of the appellants' business. As the appellants' godown manager put it: "'If we did not allow certain customers loans against their goods, "'we would lose a lot of them. Several of our customers who "'use our godown storage also use our ships'."

Their Lordships agree with the conclusions arrived at by the Court of Appeal. It was said for the appellant that the evidence did not warrant a finding that there was "a normal commercial "practice" as found. There was evidence, that "several other "firms do this sort of business which is a useful facility for "members of the business community." So that, even if the practice was not "normal" in the strict sense of the word, it was not infrequent. The moneylending transactions could not properly be regarded as a separate business and, as observed by the Chief Justice, it was never suggested in the course of the argument before the Court of Appeal that it was. They were undertaken in the course of the previous business and as a part of its activities as a whole. It also appears from the evidence that they were undertaken by offering facilities to retain the existing customers and to gain fresh ones, and thus to preserve and advance the business previously done. They can therefore legitimately be

[6] [1904] 2 Ch. 268.
[7] [1902] A.C. 575.
[8] [1932] 2 K.B. 522, 533.

said to have been undertaken and carried on for the purposes thereof.

Upon the question discussed in the preceding paragraph the trial judge said: "The evidence on this point is very slight. "The manager of defendant company's godown department "stated that unless they allowed these facilities to persons who "stored their goods in the company's godowns, these customers "would go elsewhere. This, of course, might result in a loss "to the company's godown business though I do not see how its "primary objects, i.e., rubber trading and shipping, would be "affected. It is true the witness inferred that if customers left "the company's godowns they might cease to use the company's "ships—but there is no concrete evidence in this regard what-"soever and mere inference, as I see it, is wholly insufficient."

It will be seen that the trial judge was of the opinion that there was not sufficient material upon which he could accept the correctness of the view which, as a matter of business judgment, was held by the company, that if the moneylending transactions had not been undertaken some of the customers might have ceased to do business with the company in spheres (other than that of moneylending) such as shipping. In their Lordships' opinion the correctness of the view held by the company is immaterial to their case. The important thing is that it was genuinely held. If it was, then the moneylending transactions were carried out with the object of preserving and advancing the business and therefore for the purposes of the business. The trial judge refused to accept the correctness of the view held by the company but he did not hold, and the whole tenor of his judgment indicates that he would not have held, that the view was not genuinely held. Even if the view was incorrect, in the words of the Court of Appeal, "the evidence shows that the purpose of "these loan transactions was to prevent the respondents [appel-"lants in the Court of Appeal] losing customers to their "competitors" and therefore they were undertaken for the purposes of the business. It would be most unsafe to hold that a business view such as the one mentioned was in fact incorrect without very much more investigation than has taken place. And, as already stated, correctness was immaterial so long as it was genuinely held.

The trial judge seemed to have thought that the words "for "the purposes whereof he lends money" indicate that the money lent must be shown to have been lent for the purposes of the primary objects of the business. Their Lordships do not think this is the true construction of the subsection. "Whereof" refers to the business and not to the primary objects. It is sufficient in their opinion that the moneylending transactions are undertaken genuinely for the purposes of the business, that is, with the object of preserving, advancing or otherwise assisting the business and not necessarily in connection with its primary objects.

J. C.
1960
OFFICIAL ASSIGNEE OF KHOON v. EK LIONG HIN LTD.

Their Lordships would observe that the decision of Phillimore J. in *Furber* v. *Fieldings (Ltd.)* [1] has followed the same general line of reasoning as their own. In that case the question arose whether the plaintiff was a moneylender within the meaning of the Moneylenders Act, 1900. If he had been, his claim would have failed. He carried on the business of a surveyor, valuer and auctioneer and also lent money. It was argued for him that by reason of the provision in section 6 (*d*) of that Act (identical with section 2 (*d*) of the Singapore Ordinance) he was not a moneylender. It appeared from the evidence that [2] " Substan- " tially any person who asked them for a loan on the security " of chattels would receive that loan if the security were sufficient " unless there was some personal objection to the applicant," and that [3] " Their [the plaintiff's firm's] object in advancing money " upon bills of sale was that by that means they obtained a " valuation fee, in the first instance, and the business also " brought them in touch with a class of persons from whom they " got other business. They charged 15 per cent. interest as a " regular rate. They never advertised or paid commissions to " people introducing business, and they never discounted bills or " lent money on personal security." It was argued for the defendants that though the plaintiff was a person who came within the first part of the section as he was a " person who " carried on a bona fide business not having for its primary object " the lending of money " yet he did not come within the second part of the section because the moneylending transactions were not " transactions in that business." It was argued that [3] " the " large sum lent by the plaintiff's firm had not been lent in the " course of their business of valuers or auctioneers, and to say " that the business of advancing money could be run together " with and help the other business was a very different thing from " saying that the lending of money was a natural incident of the " business of an auctioneer and surveyor," and further that because the business of valuers and auctioneers which the plaintiff carried on was a business which did not involve the lending of money, the moneys lent were not lent in the course of carrying on that business within the meaning of section 6 of the Act. The facts (though not the inferences) as stated in the above argument appear to have been admitted. Phillimore J. held that the plaintiff had brought himself within section 6 (*d*) and was not a moneylender within the meaning of the Act. The judgment has not been reported in detail, but it does not appear that the fact that the plaintiff secured valuation fees was the basis of, or a principal point in, the decision.

The case of *Edgelow* v. *MacElwee* [4] was cited by the appellant. In that case McCardie J. said [5]: " If the Court comes to the " conclusion that the solicitor carries on the actual business of a

[1] (1907) 23 T.L.R. 362.
[2] Ibid. 363.
[3] Ibid.
[4] [1918] 1 K.B. 205.
[5] Ibid. 208.

" money-lender as well as the vocation of a solicitor, then his " professional calling will not free him from the requirement of " registration under the Act of 1900." (Registration is a requirement of the English Act though not of the Singapore Ordinance.) Their Lordships agree. The mere fact that he carried on the vocation of a solicitor will not have released him. It was necessary to consider whether the primary object of his business was moneylending and, if not, whether the moneylending took place " in the course of and for the purposes " of that business. In the case considered by McCardie J. it was found on the facts that [6] " his vocation as a solicitor, so far as he carried it on, was " used as a mere disguise in order to give a colourable professional " appearance to the course of ordinary money-lending trans- " actions. . . ." The primary object of the business was moneylending and the solicitor could not therefore have been heard to say that the provisions of the Moneylenders Act, 1909, were not applicable to him. There are dicta in McCardie J.'s judgment upon which an argument was based before their Lordships that the exception could not be utilised by a person who had not shown that the money lent was used in connection with the primary objects of the business. As already stated, their Lordships are of opinion that this argument is not sound. It is sufficient if it is lent in the course of and for the purposes of the business as a whole, and not merely of its primary objects.

Figures based on the accounts produced in the case were placed before their Lordships to show that the profits from the moneylending branch of the business for the particular year to which they related were large when compared with other profits. It was suggested that these figures gave an indication of the relative size of the moneylending business when compared with other business done. Their Lordships cannot accept this suggestion. In any particular year the profits from the other business may be very low or it may even show a loss for reasons connected with that particular year. Without taking into account (this has not been done) this and other relevant factors no inference can be drawn. In any case there is a finding of fact by the trial judge, affirmed by the Court of Appeal, that the primary object of the business is not moneylending and consequently the submission loses most if not all its relevance.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Solicitors: *Slaughter & May; E. F. Turner & Sons.*

C. C.

[6] [1918] 1 K.B. 205, 209.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1959
Dec. 7.

Lord Parker C.J., Hilbery and Salmon JJ.

REGINA *v.* SHACTER.

Company — Auditor — Whether "officer" of company — "Officer" — "Public officer"—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *ss.* 83, 84—*Companies Act*, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 159, 328 (1) (*j*), 330 (*a*), 331, 333.

In 1953, the appellant was appointed auditor of a company and his appointment was continued from year to year thereafter. He was convicted as a "public officer" of a public company of falsifying the books of the company and publishing fraudulent statements contrary to sections 83 and 84 of the Larceny Act, 1861, and, being "an officer" of the company, of making false entries, fraud and defaults contrary to sections 328 (1) (*j*), 330 and 331 of the Companies Act, 1948. On appeal on the ground that, at the material time the appellant was not an "officer" of the company:—

Held, that an auditor appointed to fill an office of a company was an officer, whereas an auditor appointed ad hoc for a limited purpose was not, and that the appellant was an "officer" of the company, and a "public officer" within the meaning of the Companies Act, 1948, and the Larceny Act, 1861, respectively.

In re London and General Bank [1895] 2 Ch. 166; 11 T.L.R. 374; *In re Kingston Cotton Mill Co.* [1896] 1 Ch. 6; 12 T.L.R. 21, 60, 123, 430; *In re Western Counties Steam Bakeries and Milling Co.* [1897] 1 Ch. 617; 13 T.L.R. 170, 276 applied.

APPEAL against conviction.

The appellant, Norman Shacter, was convicted at Manchester Assizes together with one Maurice Shalam on eight counts committed as an officer of a company, Maurice Shalam & Co. Ltd. Two of the counts, under section 84 of the Larceny Act, 1861, alleged the publishing of fraudulent statements as a public officer of a public company, and a further count under section 83 of that Act alleged falsifying books as such an officer. Three counts under section 330 (*a*) of the Companies Act, 1948, alleged fraud by an officer of a company. A count under section 331 of the Act of 1948 alleged default as an officer of a company that was wound up in keeping accounts, and the final count under section 328 (1) (*j*) of the Act of 1948 alleged the making, as an officer of a company, of a false entry in a paper relating to the affairs of a company subsequently ordered to be wound up by the court.

In 1950 Shalam formed a private company to carry on a family business and the appellant was appointed auditor, he being also appointed auditor of another company formed by Shalam, the Wellington New Mills (Blackburn) Co. Ltd. The appellant was first appointed on June 22, 1953, at an annual general meeting of the company, and his appointment was continued year by year thereafter. The companies, or one of them, got into

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

financial difficulties and ultimately, with a view to obtaining an overdraft from a bank, certain figures were put before the bank including the stock position, and all the charges against the appellant related to the putting forward of those figures to the bank.

At the trial, Thesiger J. directed the jury in his summing-up in these words: "There is no dispute that Mr. Maurice Shalam "was a director of the company, and I direct you as a matter of "law that if Mr. Shacter was appointed auditor, and was exer- "cising the office of auditor in 1953—and that fact does not seem "to be in dispute—then he would be an officer of the company. "That is a point of law on which I have to take the responsibility "of deciding."

The appellant was found guilty on all counts and was sentenced to a total of nine months' imprisonment and ordered to pay £100 towards the costs of the prosecution. He appealed mainly on the ground that he was not an "officer" of the company within the meaning of the Acts.

Christmas Humphreys Q.C. and *A. K. Hollings* for the appellant.

Fenton Atkinson Q.C. and *Philip Kershaw* for the Crown.

The following cases, in addition to those which are referred to in the judgment, were cited in argument: *Findlay* v. *Waddell* [1]; *In re Liberator Permanent Benefit Building Society* [2]; *Rex* v. *Whitaker*.[3]

LORD PARKER C.J., giving the judgment of the court, stated the facts and continued: In all the counts under the Companies Act, 1948, the offences laid were offences said to have been committed by "an officer of the company." Under the Larceny Act, 1861, the words are "by a public officer of a public com- "pany," but no one suggests that in this case at any rate the word "public" adds anything.

The first and main question which arises in this appeal is whether the appellant was at the material time an officer of the company. The argument for the appellant can be summarised as follows: An auditor prima facie is not an officer. His duty is to safeguard the shareholders and not to help the directors, and he is not concerned with the day-to-day running or internal management of the company. It would be surprising, so runs the argument, to find him treated by the legislation as an officer, and great stress is laid on the definition clause in the Companies Act, 1948, s. 455, where an officer is defined in these terms: "'officer,' in relation to a body corporate, includes a director, "manager or secretary." Observe, it is said, that no reference is made to "auditor."

[1] 1910 S.C. 670.
[2] (1894) 10 T.L.R. 537; 71 L.T. 406.
[3] [1914] 3 K.B. 1283; 30 T.L.R. 627.

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... That section, however, is a section of inclusive definition, and it is necessary to look more closely at the sections of the Act. The first and perhaps most relevant section is section 159, subsection (1) of which provides: "Every company shall at each "annual general meeting appoint an auditor or auditors to hold "office from the conclusion of that, until the conclusion of the "next, annual general meeting"; and in subsections (5) and (6) of that section reference is again made to auditors appointed to hold office and to the office of auditor. Pausing there, it can well be asked what office an auditor is being appointed to unless it is an office in the company, and what officer he becomes unless it be an officer of the company.

Turning to section 161, it is provided, so far as it is relevant, by subsection (2): "None of the following persons shall be "qualified for appointment as auditor of a company—(*a*) an "officer or servant of the company;" and by the last sentence: "References in this subsection to an officer or servant shall be "construed as not including references to an auditor." It follows from that, first, that an auditor becomes, or at any rate may become on his appointment, an officer of the company, otherwise the last sentence I have referred to is unnecessary. Secondly, if he does become an officer of the company, it can only be by reason of being an auditor, for if he became an officer for any other reason he would under the subsection be disqualified. Further, in various sections of the Act, in particular section 167 (5), section 205 and section 448 (1), reference is made to an auditor "whether an officer of the company or not." Those passages again, at any rate, show that an auditor may be an officer of the company, and this can, as I have already said, only be by reason of his appointment as auditor. Clearly, therefore, the Act contemplates that an auditor may, at any rate, be an officer by reason of his appointment under section 159.

So far as the authorities are concerned, these are all concerned with the misfeasance section in earlier Acts dealing with civil liability, but they clearly show that an auditor appointed to fill an office is an officer, whereas an auditor appointed ad hoc for a limited purpose is not. The first case to which we were referred was *In re London and General Bank*.[1] In that case an auditor had been appointed by a banking company pursuant to section 7 of the Companies Act, 1879. Subsection (1) of that section provided, so far as is relevant, as follows: "Once at the least in every year "the accounts of every banking company . . . shall be examined by "an auditor or auditors, who shall be elected annually by the com-"pany in general meeting." By subsection (2) it was provided: "A director or officer of the company shall not be capable of being "elected auditor of such company." The court, consisting of Lindley, Lopes and Kay L.JJ., were of the opinion that the

[1] [1895] 2 Ch. 166; 11 T.L.R. 374.

auditor was an officer of the company within the relevant misfeasance section. It is true that in that case the articles of the bank in fact defined auditors and the secretary as meaning those respective "officers" from time to time of the company. In other words, the articles, unlike the present case, were treating auditors as officers, but if one examines the judgments it is quite clear that in all three cases they are based upon the appointment, although the opinions expressed were confirmed or fortified by a reference to the articles.

Again, in *In re Kingston Cotton Mill Co.*,[2] the court, again the Court of Appeal, followed the *London and General Bank* case,[3] and they did that despite the fact that there was nothing in the articles in that case corresponding to the articles in the *London and General Bank* case.[3]

Finally, in *In re Western Counties Steam Bakeries and Milling Co.*,[4] the same distinction was drawn, namely, a distinction between somebody appointed to an office who would be an officer of the company, and an auditor who was merely appointed ad hoc for some limited purpose.

It is true, as I have said, that those three cases were all dealing with questions of civil liability, but this court sees no reason to draw any distinction in a criminal case. Section 333 of the Act of 1948, which is the present misfeasance section, must be taken to have been passed, and passed in virtually the same words as in earlier Acts, with full knowledge of the decisions in those cases to which I referred. It is a section which follows closely on the sections creating criminal offences, and this court sees no reason to give any different interpretation to the word "officer" in the penal sections than in section 333.

Mr. Humphreys urged that under the present legislation there is no power to appoint an auditor except under section 159 (1) of the Act. If that be so, the words "whether an officer of the company or not," which appear in the various sections to which I have referred, are meaningless, but, without deciding the matter, it seems to this court that the scheme of the present legislation is really to perpetuate the distinctions drawn in the cases referred to, and that it would still be possible under this legislation for the directors as opposed to the shareholders in annual general meeting to appoint, for instance, somebody as auditor for a limited purpose, it may be for a private audit. Looked at in that way, it becomes clear at once why no reference to "auditor" is specifically put in the definition section. This court has come to the clear opinion that the appellant was, at the relevant time, an officer of the company, and that the judge's direction to the jury was correct in law.

[His Lordship then considered the remaining grounds of appeal and concluded:] Accordingly, this court, having considered

[2] [1896] 1 Ch. 6; 12 T.L.R. 21, 60, 123, 430.
[3] [1895] 2 Ch. 166.
[4] [1897] 1 Ch. 617; 13 T.L.R. 170, 276.

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the matter with some care, has come to the conclusion that there is nothing in the points raised, and therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *A. L. Hamwee & Co., Manchester; Solicitor, Board of Trade.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1959
Nov. 23, 24; *Dec.* 15.

PARKER AND OTHERS . . . . . APPELLANTS;

AND

LORD ADVOCATE . . . . . RESPONDENT.

Revenue—Estate duty—Property chargeable—Property deemed to pass—Settlement—Income payable to children during life of parent—On parent's death capital to be divided among survivors—Interest passing—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*d*)—*Finance Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 32), *s.* 28.

By section 2 (1) of the Finance Act, 1894: "Property passing "on the death of the deceased shall be deemed to include the "property following . . . (d) any annuity or other interest pur- "chased or provided by the deceased . . . to the extent of the "beneficial interest accruing or arising by survivorship or otherwise "on the death of the deceased."

By section 28 of the Finance Act, 1934, for the purposes of the foregoing section the extent of any such beneficial interest "shall "be ascertained and shall be deemed always to have been ascertain- "able, without regard to any interest in expectancy the beneficiary "may have had therein before the death."

A truster transferred certain investments to trustees for behoof of her three children. The trust deed provided that during her lifetime the children were to be paid the whole income of the trust fund equally among them with provision for the event of any of them dying leaving issue or not leaving issue; on the death of the truster the trust fund was to be divided into three equal parts and one part paid to each child as his or her absolute property. There was a destination over in favour of issue of predeceasers and a survivorship clause. The truster died, survived by the three children, all of full age:—

Held, that estate duty was rightly levied on the whole of the capital of the trust. Before the death the right of each beneficiary was to the usufruct of a fund in the hands of trustees during the joint lives of the beneficiary and the truster; after the death a surviving beneficiary became entitled to one-third of the fund absolutely and this was the extent of the interest deemed to be including in the property passing on the death. The rights which then accrued were substantially different in kind from any previously enjoyed in respect of which no deduction could be made.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

In re Parkes' Settlement [1956] 1 W.L.R. 397; [1956] 1 All E.R. 833 and *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403 considered.

Decision of the Second Division of the Court of Session, 1958 S.C. 426 affirmed.

APPEAL from the Second Division of the Court of Session.

This appeal was brought by leave granted by the Second Division of the Court of Session from an interlocutor of that Division dated July 9, 1958, whereby their Lordships refused an appeal brought by the appellants, George Coats Parker, Marie Symington Parker and Eliza Balfour Parker, the trustees acting under a deed of declaration of trust by them and others dated April 21, 22 and 29, 1938, and registered in the Books of Council and Session on August 9, 1938. The appeal was brought under section 10 of the Finance Act, 1894, against an assessment to estate duty dated November 15, 1957, made by the registrar, Estate Duty Office, on behalf of the Commissioners of Inland Revenue, for and on behalf of whom the Lord Advocate appeared as respondent in this appeal.

John Pennycuick Q.C. (of the English Bar) and *W. J. Stewart* (of the Scottish Bar) for the appellants.

William Grant Q.C., Solicitor-General for Scotland (of the Scottish Bar), *E. B. Stamp* (of the English Bar) and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Income Tax Commissioners for City of London* v. *Gibbs* *; *Coutts & Co.* v. *Inland Revenue Commissioners* †; *Grey* v. *Pearson* ‡ and *In re Townsend.* §

Their Lordships took time for consideration.

Dec. 15. VISCOUNT SIMONDS. My Lords, I am so fully in agreement with the opinion given by their Lordships of the Second Division of the Court of Session that I can be very brief.

In the month of April, 1938, the late Mrs. Parker, whom I will call "the truster," transferred certain investments to trustees for behoof of her three children. The trust deed (which is sufficiently and accurately described by the learned Lord Justice-Clerk in these terms [1]): "provided that during the truster's lifetime "the three children were to be paid the whole income of the trust "fund equally among them with provision for the event of any "of the children dying leaving issue or dying without leaving

* [1942] A.C. 402; [1942] 1 All E.R. 415.
† [1953] A.C. 267; [1953] 1 All E.R. 418.
‡ (1857) 6 H.L.C. 61.
§ [1903] 2 K.B. 331.
[1] 1958 S.C. 426, 430.

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"issue. On the death of the truster the trust fund was to be "divided into three equal parts and one part paid over to each "child as their absolute property. There was a destination over "in favour of issue of predeceasers and a survivorship clause. "Vesting in the fee was clearly postponed to the date of the "parent's death."

The truster died on February 16, 1956, survived by her three children. All of them had then attained their majority. On the death of the truster the respondent claimed that estate duty was payable upon the whole of the trust fund under section 2 (1) (*d*) of the Finance Act, 1894, upon the footing that the trust fund was an interest provided by the truster, and that a beneficial interest accrued to the three children on her death, and that the extent of that beneficial interest was the whole corpus of the fund. This claim, which was resisted by the appellants, was held to be well founded by the Court of Session. Hence their appeal to this House, and, in spite of the strenuous and ingenious arguments of Mr. Pennycuick on their behalf, I have no doubt that the decision was right.

It must be asked: what were the rights of the beneficiaries before and after the death of the truster? Before the death it was the usufruct of a fund in the hands of trustees during the joint lives of the beneficiary and the truster: the beneficiary had no right in the corpus of the fund: vesting was expressly postponed until the truster's death. After the death the child, if surviving the truster, became entitled to one-third of the fund absolutely. The beneficial interest that then arose or accrued to each child was an absolute interest in one-third of the corpus subject to the expenses of administration and distribution and duties, if any. This, then, and nothing more nor less was the extent to which the interest provided by the truster must be deemed to be included in the property passing on her death.

The answer to this claim, as I understand it, is that in order to ascertain what beneficial interest so accrues under a disposition it must first be asked what rights of enjoyment in possession the beneficiary had immediately before the death upon which the property passed. Then, the argument proceeds, the value of the rights enjoyed before the death is to be deducted from the value of the rights enjoyed after the death, and duty is payable only on the excess of the one over the other. In other words, it was argued that duty is exigible only in respect of any enlargement of interest arising on the death. But this is a contention for which I can find no justification, except perhaps within very narrow limits. I would reserve the question whether in *In re Parkes' Settlement* [2] it was correctly decided that duty was not payable in respect of the annuities to which the daughters were entitled on the death of the settlor. In that same case the difference is emphasised between the case in which the rights of

[2] [1956] 1 W.L.R. 397; [1956] 1 All E.R. 833.

the beneficiary merely become more valuable, and that in which such rights are materially changed upon the death. In regard to the latter, my noble and learned friend, Lord Jenkins, said, in respect of the interest accruing to the children upon the death of the settlor [3]: "I find it impossible consistently with the ratio "decidendi in *Adamson's* case [4] as explained by Lord Porter in "*D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [5] to hold "that such vested interest in capital was not a beneficial interest "accruing or arising on the death of the deceased within the "meaning of section 2 (1) (*d*)." So here, the rights that accrued or arose upon the death of the truster were substantially different in kind from any rights previously enjoyed by the children, and no deduction can be made for any rights previously enjoyed.

I would dismiss the appeal with costs.

LORD RADCLIFFE. My Lords, I agree that the appeal should be dismissed.

The only question that we have to consider is how to apply the provisions of section 2 (1) (*d*) of the Finance Act, 1894, to the interests accruing or arising under this particular declaration of trust dated April 21, 1938. I do not pretend that I understand or can reconcile all that has been laid down judicially about the meaning or effect of this subsection, the purport of which seems to become only the more elusive with each authoritative explanation of what it is: but, even so, if one is to determine what were the beneficial interests which accrued or arose on the death of the settlor, Mrs. Parker, I do not see how one is to avoid going to the settlement itself and ascertaining what was the exact nature of the interests which were created by its particular terms.

I am afraid that I cannot get out of this settlement anything that will aid the argument of the appellants. During the lifetime of Mrs. Parker each child was entitled to receive the income of a share of the trust fund during his life. He was also entitled (a) to certain contingent interests in expectancy by way of accruer of the other children's shares of income during Mrs. Parker's life, and (b) to an interest in expectancy contingent on his surviving Mrs. Parker in his share of capital and, subject to contingencies, in the other shares as well. On Mrs. Parker's death each child who survived her found that his right to receive the income of a share of the trust fund came to an end, and that what the settlement provided for him was a right to have made over to him a corresponding share of the capital of the fund as his own absolute property.

In my opinion, the beneficial interest that thus accrued or arose to him was that right to capital, with all its incidental rights and advantages. I cannot see that the value of that right (which, under section 28 of the Finance Act, 1934, has to be

[3] [1956] 1 W.L.R. 397, 412.
[4] [1933] A.C. 257; 49 T.L.R. 169.
[5] [1953] A.C. 347; [1953] 2 W.L.R. 372; [1953] 1 All E.R. 403.

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ascertained without regard to the pre-existing interest in expectancy) can be reduced by the circumstance that under the settlement it had been preceded by an interest for the same child's life which was limited to cease on the death of Mrs. Parker. It may be correct to speak of that interest as being enlarged by the death: but it seems to me that what is important for the purpose of section 2 (1) (*d*) is that it was the death that was the occasion of the contingent right to capital becoming absolute and displacing the previous limited right which had come to an end.

LORD COHEN. My Lords, the question for your Lordships' decision is as follows: Whether on the true construction of a deed of declaration of trust registered on August 9, 1938, and of section 2 (1) (*d*) of the Finance Act, 1894 (as amended by section 28 of the Finance Act, 1934), estate duty became payable on the death of the truster, Mrs. Eliza Parker, on the principal value of the trust property on the footing that a beneficial interest in one-third thereof thereupon accrued or arose to each of her three children, or whether, as the appellants contend, each of Mrs. Parker's children had a single continuing interest in the trust estate during Mrs. Parker's life, the only effect of her death upon that interest being to enlarge it.

The relevant trust purposes were, first, payment of the expenses of the administration of the trust; secondly, during the lifetime of the truster the whole income of the trust fund, less the expenses of administration, was payable to the three children equally between them. If any of them died leaving issue, the issue should take equally between them per stirpes the share of income to which his or her parent would have been entitled on survivance. If any of them died without leaving issue the share of income of such predeceaser should accrue to the survivors equally between them. On the death of the truster the trust fund was to be divided into three equal parts and one part paid over to each of the three children. If any child predeceased the truster leaving issue, the issue should take the parent's share. If any child predeceased the truster without leaving issue, his or her share of capital should be divided equally among the survivors and the issue of any children who predeceased leaving issue.

The Commissioners of Inland Revenue assessed the funds held under the deed of declaration of trust to estate duty under section 2 (1) (*d*) of the Finance Act, 1894, upon the footing that the entire trust fund was liable to estate duty because beneficial interests in the entire trust fund accrued or arose on the death of the truster.

Before the Inner House, as before your Lordships, the appellants contested the correctness of this assessment, arguing that each of the children had a single continuing interest in the trust fund from the date of its execution, and that the only beneficial interest accruing or arising on the truster's death was the disappearance of the risk of his precedeasing the truster, or,

alternatively, that the measure of the accruing interest was the value of a reversion upon a full life interest.

The Inner House unanimously rejected these contentions. I respectfully agree with them. I should be content to adopt the language of Lord Patrick in the concluding paragraph of his judgment where he said [6]: "Before the death of the truster the "children, according to Scots law, had no interest of any kind "in the trust fund. They had only a right to call on the trustees "to administer the trust property so as to give them the income "resulting from that administration according to the provisions "of the trust—see *per* Lord President Normand in *Inland "Revenue* v. *Clark's Trustees*.[7] After the death of the "truster the trust came to an end. Each child then owned the "corpus of one-third of the trust fund. Each child's enjoyment "of income would now depend on his or her own disposition, "provident or otherwise, of the share of the trust fund owned "by him or her. Ownership of the tree carries with it as an "accessory the right to the fruits of the tree, but a right to the "fruits of a tree as cultivated by oneself is a very different thing "from a right to share in the fruits of an orchard cultivated by "others. As I view the matter, a share of the capital of the "trust fund accrued or arose to each child at the date of "the truster's death. The capital of the trust fund must there-"fore in terms of subsection 2 (1) (*d*) be deemed to have passed "at that date. The children's rights to the fruits of their respec-"tive shares of the capital after the truster's death are a mere "accessory to their ownership of their shares of the capital of "the trust fund. These rights certainly accrued and arose in a "literal sense to the children on the death of Mrs. Parker. More-"over, they are rights substantially different in kind to any rights "the children previously enjoyed."

I should add that I do not think any different result would have been reached had the deed of declaration of trust been an English settlement in similar terms.

The Lord Justice-Clerk referred to the decision of the Court of Appeal in England in the case of *In re Parkes' Settlement*.[8] I agree with him that the facts of that case were similar to the case now before your Lordships: indeed, we could not allow this appeal without disapproving the decision on one point in *In re Parkes' Settlement*.[8]

The facts of that case are set out in the headnote: "By a "settlement made in 1929 a settlor, who died in 1952, directed "his trustees to stand possessed of the settled property on trust "during his lifetime to pay the income of the trust fund equally "to his two daughters so long as they both remained alive and "unmarried, but so that the amount paid to each daughter was "not to exceed £250 in any year, or if one of them died or

[6] 1958 S.C. 426, 434–435.
[7] 1939 S.C. 11, 24.
[8] [1956] 1 W.L.R. 397.

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"married, the income payable to the other should not exceed "£410 in any year. Subject to this trust the income of the "surplus of the fund was to be paid equally between the surviving "children of the settlor. After the death of the settlor the "trustees were directed to appropriate, in respect of such of the "daughters as should then be unmarried, a fund sufficient at that "time to produce an annuity of £250 each year for her life, to be "paid so long as she continued unmarried. The trustees were "empowered to resort to the capital of the appropriated fund to "make good any deficiency of the annual income of that fund. "Subject to those trusts, the capital and income of the trust "fund, including any surplus income of the appropriated fund, "was to be held on trust for such of the settlor's children as "should survive him and if more than one in equal shares "absolutely. All the four children of the settlor survived him "and both the daughters had remained unmarried. The Crown "claimed estate duty under section 2 (1) (*d*) of the Finance Act, "1894, first in respect of the annuities which became payable "to the daughters out of the appropriated funds on the death and, "secondly, in respect of the corpus of the settled property to "which the four children of the settlor became absolutely entitled "at his death."

Only the decision on the second claim is relevant to the point now before your Lordships. The Court of Appeal decided it in favour of the Crown. Jenkins L.J. said[9]: "Before the death "of the settlor, each child had a future interest in the capital "of the fund contingent on him or her surviving the settlor "and uncertain as regards its amount, which depended on "the number of children who might survive him. After the "death of the settlor, each child had an absolutely vested interest "in one-fourth of the capital of the trust fund, and the future "income thereon. I find it impossible consistently with the ratio "decidendi in *Adamson's* case,[10] as explained by Lord Porter in "*D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[11] to "hold that such vested interest in capital was not a beneficial "interest accruing or arising on the death of the deceased within "the meaning of section 2 (1) (*d*). It is further, to my mind, "quite plain that, in arriving at the extent or value of such "beneficial interest, no deduction can be made in respect of the "four children's interest pur autre vie in the surplus income "during the life of the settlor, for these interests came to an end "on his death. Any deduction in respect of their interests in "expectancy is, of course, precluded by section 28 of the Finance "Act, 1934." Those observations are directly in point in the present case and I respectfully agree with them.

Appellants' counsel said that a deed having exactly the same substantive effect as the deed of declaration of trust could have been so framed as unquestionably to reduce the liability of duty

[9] [1956] 1 W.L.R. 397, 412.
[10] [1933] A.C. 257.
[11] [1953] A.C. 347.

to the extent to which he contended. That may be so. He went on to say that liability to estate duty ought not to depend on the mere words of the trust disposition. But in practice it must. I respectfully agree with the observations of Lord Reid in the case of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners*,[12] where he said: "It may seem unduly technical that liability for "estate duty should depend on the form of the settlement and "not on the fact that a financial benefit emerges on the death, "but that seems to me to be inevitable once it is found, as it was "in *D'Avigdor-Goldsmid's* case,[13] that 'beneficial interest' in "section 2 (1) (*d*) means a legal right and not a financial benefit."

For these reasons I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, this case raises a short point which turns on the effect, for estate duty purposes, of a clause in a trust deed on property deemed to have passed under section 2 (1) (*d*) of the Finance Act, 1894. The deed takes the form of a declaration of trust, dated April 21, 1938, in respect of certain investments transferred to the trustees by a Mr. Parker for behoof of her three children. Mrs. Parker (the truster) died on February 16, 1956, survived by her children, who had all attained majority. The material clause is as follows: "During "the lifetime of the said Mrs. Eliza Balfour Coats or Parker the "whole income of the trust fund shall, after deduction of the "expenses of administration be paid and made over to the said "children equally between them, and in the event of any of them "dying leaving issue, such issue shall take, equally among them, "per stirpes the share of income to which their parent would "have been entitled on survivance, and in the event of any of the "said children dying without leaving issue, the share of income "of such predeceaser shall accrue to the survivors equally "between them and on the death of the said Mrs. Eliza Balfour "Coats or Parker, the trust fund shall be divided into three "equal parts, and one part shall be paid over to each of the said "children as their absolute property and that either by transfer-"ence of the investments then constituting the trust fund, or by "realisation of the trust fund and payment in cash, or partly in "the one way and partly in the other, in the absolute discretion "of the trustees: and in the event of any of the said children "predeceasing the said Mrs. Eliza Balfour Coats or Parker leaving "issue, such issue shall take equally among them per stirpes, "the share of capital to which their parent would have been "entitled on survivance; declaring, however, that during the "minority of such issue, the trustees shall retain the share of "capital to which such minor issue would have been entitled, and "shall pay to them the income therefrom during minority and "the capital only on such issue attaining majority: and in the "event of any of the said children predeceasing the said Mrs.

[12] [1958] A.C. 210, 230; [1957] 3 W.L.R. 427; [1957] 2 All E.R. 745.

[13] [1953] A.C. 347.

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"Eliza Balfour Coats or Parker without leaving issue the share "of capital effeiring to such predeceaser shall be divided equally "among the survivors, and the issue, per stirpes, of any of the "said children who may have predeceased leaving issue; declar- "ing further that no interest in the trust fund shall vest in any "of the beneficiaries thereunder until the death of the said Mrs. "Eliza Balfour Coats or Parker."

An assessment for estate duty has been made on the entire trust fund in respect of the death of Mrs. Parker under section 2 (1) (*d*). The trustees appealed to the Commissioners of Inland Revenue, who upheld the assessment, and the trustees then appealed against the assessment to the Court of Session. The appeal was heard by the Second Division of the Court of Session, who refused the appeal and granted leave to appeal to this House.

The contentions of the appellants are that each of the truster's children had a single continuing interest in the trust fund, and that the only effect of her death upon that interest was to enlarge it by removing the risk of the beneficiary predeceasing her. Accordingly, the value of the beneficial interest should be assessed, the argument runs, by calculating the amount, if any, by which the value of the beneficiary's interest immediately after the truster's death exceeded the value of that interest before her death. This should be calculated, it is said, either (1) by taking into account the fact that immediately before her death the truster was in articulo mortis, so that the risk of a beneficiary's predecease was negligible and his interest at that time almost equal to the capital value of his share; or (2) by measuring the difference in value actuarially by reference to their respective ages and the age of the truster and their eventual interests.

I find it unnecessary to consider these consequential contentions, for I find myself, in limine, in agreement with their Lordships of the Second Division that the relevant clause of the trust deed conferred no single continuing interest in the trust fund which was merely enlarged on the death of the truster. The argument for the appellants was put in its most attractive form by saying that during the life of the truster the children had an interest in possession in the enjoyment of the income of the trust fund and that on the truster's death, in the events that have happened, they continue to enjoy that income. But granted they enjoy the same income, the income before and after the death is derived from quite different rights. Before the truster's death there was merely a right in the children to call the trustees to account for their administration of the trust and to pay to them the income arising: *Inland Revenue* v. *Clark's Trustees*.[14] After the death their income derived from ownership of the corpus of the trust estate vested in them for the first time on the death of the truster. These are radically different rights. It is not possible to say that there were single continuing interests in

[14] 1939 S.C. 11.

possession enjoyed before and after the truster's death. The trust came to an end with the truster's death and the right to receive the income of the trust fund ceased with it. I am merely repeating the reasons which commended themselves to their Lordships of the Second Division and to which I cannot usefully contribute anything further. A similar question came up in *In re Parkes' Settlement* [15] upon a settlement in English form, the terms of which I do not find it necessary to repeat. I cite it only for the observation of Lord Evershed M.R., where he said [16]: "But whatever the 'substance' of the children's interests might "be in the sense in which Mr. Pennycuick used that term, it is to "my mind incontrovertible that the legal effect of the settlement "was to confer or give rise for the first time on the death of the "settlor to an absolute interest in capital in favour of each of the "settlor's four children, contingently upon their surviving the "event of the settlor's death. Those interests were, to my mind, "distinct and different in kind and quality from the rights of the "four children to share in surplus income during the life of the "settlor." This passage, in my opinion, precisely covers this case.

I would dismiss the appeal.

LORD JENKINS. My Lords, I agree

By a deed of declaration of trust made in the month of April, 1938, a trust fund provided by the late Mrs. Eliza Balfour Coats or Parker (hereinafter called "the deceased") was settled upon trusts whereunder, during the lifetime of the deceased, the income of the trust fund was to be paid to her three children in equal shares, with a gift over in the event of any child dying in the lifetime of the deceased to the issue of the child so dying, or in default of such issue by way of accruer to the surviving children equally between them; and on the death of the deceased the trust fund was to be divided into three equal parts, and one part was to be paid over to each of the said children as their absolute property, with provisions to the effect that in the event of any child dying in the lifetime of the deceased leaving issue, such issue were to take equally among them per stirpes the share of capital which their parent would have taken on survivance, and that in the event of any of the said children dying in the lifetime of the deceased without leaving issue, the share of capital which the child so dying would have taken was to be divided equally among the survivors and the issue per stirpes of any of the said children who might have died before the deceased leaving issue. The deed also contained an express provision to the effect that no interest in the trust fund should vest in any of the beneficiaries thereunder until the death of the deceased.

The deceased died on February 16, 1956, survived by her three children, all of whom had attained majority; and the trust fund thereupon became immediately divisible in equal shares among the three children as their absolute property.

[15] [1956] 1 W.L.R. 397. [16] Ibid. 401.

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In these circumstances, the Commissioners of Inland Revenue assessed the entire trust fund to duty on the death of the deceased under section 2 (1) (*d*) of the Finance Act, 1894, on the footing that the trust fund was within the meaning of that provision an "interest . . . provided by the deceased," and was, accordingly, to be deemed to pass on the death of the deceased "the extent "of the beneficial interest accruing or arising . . . on the death "of the deceased"; that a beneficial interest did so accrue or arise to each of the three children, in the shape of the absolute interest in one-third of the capital of the trust fund to which he or she then became absolutely entitled in possession; and that the beneficial interest so accruing or arising to the three children collectively extended to the whole of such capital.

From this assessment the trustees of the deed of trust appealed to the Court of Session under the provisions of sections 10 and 23 (1) of the Finance Act, 1894. Their appeal was refused by an interlocutor of the Second Division of the Court of Session dated July 9, 1958, and from that interlocutor the trustees, pursuant to leave granted by the Second Division of the Court of Session, now appeal to your Lordships' House.

In view of the decision in *Adamson* v. *Attorney-General*,[17] Mr. Pennycuick, in his argument for the trustees, did not dispute that the trust fund was an interest provided by the deceased within the meaning of section 2 (1) (*d*); or that any beneficial interests in the trust fund which could be shown to have accrued or arisen to the three children on the death of the deceased attracted estate duty under that provision, according to their extent when properly ascertained; or that *some* beneficial interests did so accrue or arise. His sole complaint was to the effect that the beneficial interests which did admittedly so accrue or arise did not when properly ascertained extend to the entire capital of the trust fund, because allowance ought to be made for the beneficial interests in possession in the income of the trust fund to which (according to his argument) the three children were entitled before, and continued to be entitled after, the death of the deceased under the provisions of the deed of trust.

Before proceeding to examine this argument, I should refer to section 28 of the Finance Act, 1934, which was passed to counteract the effect of the decision in *Adamson's* case.[17] Under that section, the extent of any beneficial interest accruing or arising on the death of the deceased in cases falling within section 2 (1) (*d*) "shall be ascertained, and shall be deemed always to "have been ascertainable, without regard to any interest in "expectancy the beneficiary may have had therein before the "death."

It follows that the extent of the beneficial interests here in question must be ascertained without regard to the value of the interest in expectancy in one-third of the capital of the trust fund

[17] [1933] A.C. 257.

to which each child was entitled immediately before the death of the deceased contingently on surviving her.

Accepting this, as he must, Mr. Pennycuick seeks to reduce the extent of the beneficial interests accruing or arising on the death of the deceased by reference to pre-existing interests in possession as distinct from pre-existing interests in expectancy, and he puts his case in this way. He says that from the date of the deed of trust each child became in any event entitled in possession to a life interest in one-third of the income of the trust fund; and that the death of the deceased only affected the position in that it removed the risk to which each child was subject of losing his or her interest in the trust fund through dying in the lifetime of the deceased, and enlarged each child's life interest into an absolute interest. He submits accordingly that the beneficial interest accruing or arising to each child on the death of the deceased must be limited to the difference between the value at the death of the deceased of one-third of the capital of the trust fund and the value at the same date of an interest for the life of that child in a like share of such capital. The life interest, he says, cannot be treated as part of the beneficial interest accruing or arising on the death of the deceased, because the child already had it before the death of the deceased.

I cannot accept this argument, which appears to me to do violence to the provisions of the deed of trust as they actually stand. It is plain that under those provisions the income trusts are confined to the period from the date of the deed down to the date of the death of the deceased. During that period if he or she so long lives each child is entitled to one-third of the income, or it may be more in the event of accruer by reason of the death of one or both of the others without issue. On the death of the deceased, the income trusts come to an end and there arise new and distinct trusts of a different character for the payment to each child if then living of one-third of the capital of the trust fund as his or her absolute property, with the provisions already described for the substitution of the issue of any child dying in the lifetime of the deceased, and for the accruer to the other children or their issue of the share of any child dying in the lifetime of the deceased without leaving issue. During the lifetime of the deceased these trusts of capital conferred no more than contingent future interests and the persons to become actually entitled under them were not, and could not be, ascertained until the death of the deceased. In the event which happened of all three children surviving the deceased the trust of capital which actually took effect was the primary trust to divide it among them in equal shares as their absolute property, and this trust took effect in their favour on the death of the deceased by reason of the fact that they survived the deceased. It appears to me that the designation of a "beneficial interest accruing or arising on the "death of the deceased" is wholly apt to describe the entire interest in capital taken by each child on the death of the

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deceased under this trust, and that in ascertaining the extent of such beneficial interest there is no ground for making any deduction in respect of the very different interest previously enjoyed by the child under the trusts of income which the death of the deceased had brought to an end. I cannot reconcile with the terms of the deed Mr. Pennycuick's submission to the effect that each child took from the outset a life interest in one-third of the income of the fund continuing after the death of the deceased. This prolongation of a child's life interest, as I understand the argument, depends on the theory that each child on receiving his or her share of capital became an absolute owner of such share, entitled to whatever income it might produce, and thus remained life tenant of the share, albeit also entitled if so minded to dispose of the capital. I find it impossible to accept this novel doctrine; and even if (contrary to my view) the theory that each child is to be considered as a life tenant of the absolute interest in capital taken by him or her on the death of the deceased is tenable at all, I fail to see any justification for tacking this constructive life interest, depending as it did on the child surviving the deceased and so becoming absolutely entitled to one-third of the capital, on to the interest in income which ceased on the death of the deceased, so as to piece together one continuous life interest in one-third of the income beginning at the date of the deed and persisting after the death of the deceased. Moreover, quoad the period of prolongation this so-called life tenancy would itself be a product of the receipt by the child of his or her share of capital, or, in other words, an incident of the beneficial interest accruing or arising to the child on the death of the deceased in the shape of the right to enjoy the income produced by his or her share of capital when paid over. I do not see how this incident of the beneficial interest accruing or arising can constitute a proper deduction from the value of that interest for the purposes of section 2 (1) (*d*). Indeed, it would form part of the interest in expectancy which the child had in the share of capital before the death and accordingly could not be deducted consistently with section 28 of the Finance Act, 1894.

In the course of the argument your Lordships were referred to a number of cases, including *Adamson* v. *Attorney-General* [17] and *Attorney-General* v. *Lloyds Bank Ltd.*[18] These cases, so far as they decided that regard should be had to expectant interests in measuring, for the purposes of section 2 (1) (*d*) of the Act of 1894, the extent of the benefit accruing or arising, have been displaced by section 28 of the Finance Act, 1934, but this passage in the speech of Lord Buckmaster in *Adamson* v. *Attorney-General* [19] has some bearing on the present case. Lord Buckmaster there said, in holding that section 2 (1) (*d*) applied: "The interest here provided by the deceased was materially

[17] [1933] A.C. 257.
[18] [1935] A.C. 382.
[19] [1933] A.C. 257, 268.

" changed at his death from being an interest liable to be divested " and contingent into an interest absolute and undefeatable, and " that new interest arose on the death of the deceased." The following passage to the like effect occurs in the speech of Lord Warrington of Clyffe, where Lord Warrington, after rejecting the claim to duty on the ground of an actual passing under section 1, continued as follows [20]: " But this does not conclude the matter. " It is still necessary to consider the alternative claim of the " Crown under s. 2, subs. (1) (*d*). This section, unlike s. 1, " which deals only with property as a whole, brings within the " ambit of the charge individual interests provided by the " deceased to the extent of the beneficial interest accruing or " arising on the death of the deceased. In the present case the " interest of each child was unquestionably provided by the " deceased, and is therefore to be deemed to be included in the " expression ' property passing on the death of the deceased,' but " only to the extent of the beneficial interest accruing or arising " on the death of the deceased. Before his death each child had " a beneficial interest, but one that might be destroyed either by " an exercise of the power of appointment or by the death of the " child in the lifetime of the deceased; on his death without " exercising his power the beneficial interest of each child became " absolute and indefeasible. The value of this beneficial interest, " of course, exceeded the value if any of that interest to which " the child was entitled previously to the death of the deceased, " and to the extent of that excess such beneficial interest is, in " my opinion, to be deemed to be property passing on the death " and would under section 1 be charged with duty accordingly." So far as this passage limits the beneficial interest accruing or arising on the death to the excess in value of that beneficial interest over the interest (sc. the interest in expectancy) to which the child was entitled previously to the death of the deceased, it has, as already mentioned, been overruled by section 28 of the Finance Act, 1934, but it still affords authoritative guidance as to the character of the changes of beneficial interest on a death to which section 2 (1) (*d*) is directed.

On the other hand, in the case of *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [21] it was sought to charge with duty under section 2 (1) (*d*) as a beneficial interest accruing or arising on the death of the deceased the proceeds of a policy of insurance on the life of the deceased to which a son of the deceased had become absolutely entitled in the deceased's life-time, and it was held in your Lordships' House (reversing the decision of the Court of Appeal) that this claim was ill-founded, inasmuch as the death of the deceased merely enhanced the value of an asset (namely, the contract of assurance) of which the son was already the absolute owner, and accordingly no beneficial interest which the son had not previously possessed accrued or

[20] [1933] A.C. 257, 277.

[21] [1953] A.C. 347.

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arose to the son on the death of the deceased. The ratio decidendi of this case sufficiently appears from the speech of Lord Porter [22] and that of Lord Reid.[23] Lord Porter said [24]: "From the date of the assignment to him in 1934 the appellant "was the absolute owner of the policy and, subject to payment "of the premium, entitled to receive the sum insured, with any "bonus, when the stipulated time of payment, viz., the death, "had been reached. He did not get a new interest; he obtained "the fruition of the interest which he already held. As one of "your Lordships expressed it in the course of argument, the "value of the chose in action is increased, the interest of the "beneficiary is not altered." Later Lord Porter said [25]: "In "*Adamson's* case [26] there was, as the majority of their Lordships "held, a change in the interest of the beneficiaries: before the "death they had a contingent interest which might have been "divested; after it they had a vested interest. The reasoning is "best seen in the observations of Lord Warrington." Then, after citing the passage from the speech of Lord Warrington to which I have already referred, Lord Porter continued [27]: "On that "reasoning there was as a result of the death a change in the "rights which each child enjoyed. Until it occurred he might "have got all or nothing or some intermediate sum: afterwards "his rights were finally determined. The case differs from the "present one in which the rights of the appellant have not "changed. He is and has been since 1934 full and absolute "owner of the policy. All that has happened is that, though its "value is greater, his interest is the same. It follows that in my "view this alternative argument, like that previously presented, "should not succeed." Lord Reid said [28]: "In the cases where "the Crown has succeeded it has been because it was held that "some right or property of a different kind from that previously "enjoyed by the beneficiary arose or accrued on the death, or the "right of the beneficiary was in some way enlarged or altered and "not merely because the beneficiary's existing right became more "valuable after the death."

In the two cases of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners and Wrightson* v. *Inland Revenue Commissioners*,[29] which concerned insurance policies comprised in settlements, a majority of your Lordships' House reached the same conclusion as in *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [30] by a similar process of reasoning.

I would finally refer to the case in the Court of Appeal of *In re Parkes' Settlement*.[31] In that case a settlor who died in 1952 had by a settlement made in 1929 settled a fund upon trust during his lifetime to pay the income of the fund to his two

[22] [1953] A.C. 347, 364, 365.
[23] Ibid. 375.
[24] Ibid. 364.
[25] Ibid. 365.
[26] [1933] A.C. 257.
[27] [1953] A.C. 347, 365.
[28] Ibid. 375.
[29] [1955] A.C. 210; [1957] 3 W.L.R. 427; [1957] 2 All E.R. 745.
[30] [1953] A.C. 347.
[31] [1956] 1 W.L.R. 397.

daughters in equal shares so long as they remained alive and unmarried, but not exceeding £250 to each of them in any one year. Subject to this trust the income was to be paid equally between the surviving children of the settlor. After the death of the settlor, the trustees were directed to appropriate in respect of each daughter then unmarried a fund sufficient to produce an annuity of £250 per annum for her life with power to resort to capital. Subject to those trusts the capital and income of the fund including any surplus income of the appropriated fund was to be held in trust for such of the settlor's children as should survive him and if more than one in equal shares. All four children of the settlor survived him and both the daughters remained unmarried. Estate duty was claimed under section 2 (1) (*d*) first in respect of the annuities which became payable out of the appropriated funds on the death, and secondly in respect of the corpus of the settled property to which the four children of the settlor became absolutely entitled at his death. It was held by the Court of Appeal that the first of these claims failed, on the ground that the effect of the trusts of income during the settlor's life was to entitle each daughter so long as she remained alive and unmarried to an annual payment of £250 out of the income of the entire fund, while the effect of the trusts which came into operation on the settlor's death was to entitle each daughter so long as she continued unmarried to an annual payment of £250 out of the income, or if need be out of the capital, of the appropriated fund. In the result, therefore, each daughter became entitled from the date of the settlement to an annuity of £250 during her life and spinsterhood whether the settlor was alive or dead, the only difference being that before the death of the settlor each daughter's annuity was payable out of the income of the entire fund, whereas after his death it was payable out of the income, and if need be out of the capital, of the fund appropriated to meet it. This change in the mode of payment of, and security for, the annuity did not appear to the Court of Appeal to involve any such change in the character of the daughter's beneficial interest on the death of the settlor as was required on the *D'Avigdor-Goldsmid* [32] principle in order to make the annuity payable to her after his death a beneficial interest accruing or arising on his death within the meaning of section 2 (1) (*d*), as opposed to a mere continuation of the annuity to which she had been entitled ever since the date of the settlement.

As I have already indicated, it is to my mind clear that no such continuing interests were created by the deed of trust in the present case.

The second claim in *In re Parkes' Settlement*,[33] namely, the claim to duty on the corpus of the settled property, was upheld in the Court of Appeal. In my own judgment [34] I summarised my reasons for that view in terms which are to my mind so closely

[32] [1953] A.C. 347.
[33] [1956] 1 W.L.R. 397.
[34] Ibid. 412.

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applicable to the present case that I venture to repeat them here: "As regards the interest of each of the four children in the "capital of the trust fund, I think the judge was clearly right in "holding, as he did, that section 2 (1) (*d*) applied. Before the "death of the settlor, each child had a future interest in the "capital of the fund contingent on him or her surviving the "settlor and uncertain as regards its amount, which depended "on the number of children who might survive him. After the "death of the settlor, each child had an absolutely vested interest "in one-fourth of the capital of the trust fund, and the future "income thereon. I find it impossible consistently with the ratio "decidendi in *Adamson's* case,[35] as explained by Lord Porter in "*D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*,[36] to "hold that such vested interest in capital was not a beneficial "interest accruing or arising on the death of the deceased within "the meaning of section 2 (1) (*d*). It is further, to my mind, "quite plain that, in arriving at the extent or value of such "beneficial interest, no deduction can be made in respect of the "four children's interests pur autre vie in the surplus income "during the life of the settlor, for these interests came to an end "on his death. Any deduction in respect of their interests in "expectancy is, of course, precluded by section 28 of the Finance "Act, 1934."

For the reasons I have endeavoured to state, which are substantially in accord with those upon which their Lordships of the Second Division of the Court of Session proceeded, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Baddeleys & Co. for Hunter, Harvey, Webster & Will, W.S., Edinburgh; Moncrieff, Warner, Paterson & Co., Glasgow; Solicitor of Inland Revenue.*

F. C.

[35] [1933] A.C. 257. [36] [1953] A.C. 347.

[COURT OF APPEAL.]

In re LEVY, DECD.

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Oct. 20, 29, 30; *Dec.* 2.
Lord Evershed M.R., Sellers and Harman L.JJ.

BARCLAYS BANK LTD. *v.* BOARD OF GUARDIANS AND TRUSTEES FOR THE RELIEF OF THE JEWISH POOR AND OTHERS.

[Plaint No. 1958, L. No. 7.]

Will—Construction—Absolute gift or gift of interest—Charity, gift to—Gift of income to charity indefinitely—Whether carries right to corpus—Testator's intention.

Charity—Gift of income—Indefinite gift in perpetuity—Whether charity entitled to capital.

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Trust and Trustee—Sole beneficiary—Direction—Charity—Whether gift in perpetuity of income to charity covers corpus.

A testator gave his residual estate, after the death of the survivor of his brothers and sisters, to the official trustee of charitable funds on trust to form a fund to be known as "the L. family charitable "trust." The income of the fund was to be divided into eight equal parts and paid as directed in the will to six named charities. On the question whether the beneficiaries were entitled to the corpus:—

Held, (1) that in the case of a gift to a charity for its general purposes, it should not be inferred that an indefinite gift of income so carried a right to the corpus, for such a gift could be enjoyed by the charity to its fullest extent in perpetuity. The existence of any such right depended on the true interpretation of the particular gift.

In re Morgan [1893] 3 Ch. 222, and *Wharton* v. *Masterman* [1895] A.C. 186 distinguished.

Philipps v. *Chamberlaine* (1798) 4 Ves.Jun. 51, as explained in *In re Lawes-Wittewronge* [1915] 1 Ch. 408, 412, considered.

(2) That, on the true construction of this gift, no intention was discernible that the beneficiaries were to be entitled to the corpus of the fund.

Per Lord Evershed M.R. It is not correct that the canon of construction takes effect independently of the wishes of a testator as expressed in his will. A right to corpus cannot be inferred to save a gift which would be otherwise void for perpetuity if, on its true construction, the gift is inconsistent with that inference.

Decision of Danckwerts J. reversed.

APPEAL from Danckwerts J.

The following statement of the facts is taken substantially from the judgment of Lord Evershed M.R.: By his will dated August 12, 1936, the testator, George Levy, provided for the disposition of his residuary estate as follows: Clause 11: "And "I declare that my trustees shall stand possessed of the income "of my trust estate upon trust to pay the said income to my said "two brothers and my said sister in equal shares during their "lives and after the death of the survivor of them my trustees "shall stand possessed of the capital as well as the income of the "residue of my estate upon trust to pay or transfer the same to "the Official Trustees of Charitable Funds upon the trusts follow-"ing relating thereto namely: The capital shall form a fund to be "known as the 'Levy Family Charitable Trust' and the income "thereof shall be divided into eight equal parts and shall be paid "as follows: (a) As to two equal parts thereof to the London "Jewish Hospital. (b) As to two further equal parts thereof to "the London Hospital, Whitechapel Road. (c) As to one further "equal part thereof to the Jewish Board of Guardians. (d) As to "one further equal part thereof to the Jewish Hospital and "Orphan Asylum at Norwood. (e) As to one further equal part "thereof to the Jewish Home for Incurables at Tottenham. "(f) As to the remaining one equal part thereof to St. Thomas' "Hospital, London."

By clause 15: "I declare that no beneficiary taking any share "or interest under this my will whether absolutely contingently

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"or in reversion shall whether during the lifetime of my family "trustees or after their death challenge call into question or "interfere with anything that my trustees may have done or "which they may have omitted to do in the exercise of the very "wide discretions given by me to my trustees by this my will in "connection with my estate and I declare that in the event of "any such challenge calling into question or interference then "the benefit taken by any such person or persons or charity or "charities under this my will shall be forfeited and in the event "that such challenge calling into question or interference shall "be made by any one or more of the ultimate charity trustees or "charity beneficiaries interested in the ultimate gift under this "my will then the interest taken by any such ultimate charity "trustee or charity beneficiary who shall make such challenge "call into question or interfere shall be forfeited and the capital "and income representing such interest shall pass to the trustees "for King Edward's Hospital Fund."

The testator died on July 26, 1940, and the survivor of his brothers and sister died on October 16, 1955, having left wills which for present purposes were identical so that all four funds devolved in the same way.

On January 1, 1958, the trustees of the will, Barclays Bank Ltd., took out a summons asking whether the charitable institutions, or in some cases their successors, to whom shares of income of the residuary estate had been bequeathed were each absolutely entitled to the share of the capital producing the respective share of income. Before Danckwerts J. a further question as to the validity of clause 15 was also raised. Danckwerts J. decided that the institutions were entitled to the appropriate shares of the capital and that clause 15 was invalid. The Attorney-General appealed against the first part of the decision but the invalidity of clause 15 was not appealed against, though counsel for the Attorney-General submitted (rightly as Lord Evershed M.R. said), that regard might be had to the language of clause 15 as an aid to the construction of clause 11.

Denys Buckley for the Attorney-General.

Mark W. Cockle for Barclays Bank Ltd., the plaintiff trustees.

R. S. Lazarus Q.C. and *Raymond H. Walton* for the first defendants.

Reginald W. Goff Q.C. and *L. H. L. Cohen* for the Stepney Group Hospital Management Committee, the second defendants.

John Pennycuick Q.C. and *Raymond H. Walton* for the Board of Governors of the London Hospital and the Board of Governors of St. Thomas' Hospital, the third and fourth defendants.

Nigel Warren Q.C. and *J. W. Mills* for the Jewish Orphanage and the Home and Hospital for Jewish Incurables, the fifth and sixth defendants.

L. J. Morris Smith for the King Edward's Hospital Fund for

London, the seventh defendant. [It was conceded that the seventh defendant, although represented at the hearing of the appeal, had no interest in the question before the court, as no cross-appeal had been made on the validity of clause 15.]

In addition to the cases referred to in the judgments, the following were cited in argument: *In re Jones, Midland Bank Executor and Trustee Co. Ltd.* v. *League of Welldoers* [1]; *In re Pellew* [2]; *In re Meyers* [3]; *Kerry* v. *Derrick* [4]; *Haig* v. *Swiney* [5]; *Saunders* v. *Vautier.* [6]

Cur. adv. vult.

November 20. LORD EVERSHED M.R. (read by SELLERS L.J.), having stated the facts substantially as set out above, continued: Danckwerts J. decided the first question adversely to the Attorney-General. He relied on the well-established proposition that an indefinite gift of income to an individual carries the right to corpus, and he held that there was, at any rate in the present case, no valid distinction in that respect between an individual and a charitable institution: he therefore concluded that since the gifts in favour of the charities were, in his view, merely indefinite gifts of income, it followed that the charities were entitled to call for distribution of the corpus.

It may be stated here that if indefinite shares of income are given to a number of individuals, they might also claim payment of the corpus on the ground that, being the only persons beneficially interested in the property, they could put an end in any event to the trusts. The question was raised during the argument in this court whether these charities might not, in like manner, claim to put an end to the trusts, and on that basis require payment of the corpus. An answer to that suggestion, however, is that those representing the last two charities, namely, the Jewish Orphanage and the Home and Hospital for Jewish Incurables, had never joined, and would not now seek to join, with the other four charities in preferring such a claim. On their part, Mr. Warren said that he was content to receive, as he suggested was the testator's intention, the proportionate two-eighths shares of the income in perpetuity, claiming only that if the other four charities were entitled to payment of their proportionate shares of corpus, then that his clients also should be similarly treated. It follows that there is no ground for supporting Danckwert J.'s judgment on the basis that all the charities interested were jointly claiming to put an end to the trusts.

On the appeal before us a number of cases were cited which had not been cited before the judge; and to some of these I shall

[1] [1950] W.N. 346; 66 T.L.R. (Pt. 2) 51; [1950] 2 All E.R. 239.
[2] Unreported, Nov. 10, 1953.
[3] [1951] Ch. 534; [1951] 1 T.L.R. 435; [1951] 1 All E.R. 538.
[4] (1602) 3 Cro. 104.
[5] (1823) 1 Sm. & St. 487.
[6] (1841) Cr. & Ph. 240.

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presently allude. There was also a special point taken on behalf of the London Hospital that since it is a body corporate by virtue of a Royal Charter, it should, in any event, be treated as in pari materia in all respects with an individual donee, and so should be entitled to payment of two-eighths parts of corpus, whatever might be the answer as regards the remaining charities. As regards these remaining charities, there is some differentiation in constitution. For example, the first defendant (being the charity called in the will "the Jewish Board of Guardians") has a corporate trustee though the charity is itself unincorporated. The second defendant, the Stepney Group Hospital Management Committee, now stands in the place of the London Jewish Hospital (a corporate charity at the testator's death) by virtue of certain provisions, including particularly section 60 (1) (*b*) of the National Health Service Act, 1946. St. Thomas' Hospital is in a different case from the London Hospital, for it appears that the City of London, which was incorporated by Royal Charter in the sixteenth century, conducts under the charter the purposes of St. Thomas' Hospital, so that the City may be regarded as holding any property given to the hospital for the charitable purposes of the hospital. I have already said that the Jewish Orphanage and the Home and Hospital for Jewish Incurables are unincorporated charities. In the event, however, I think no relevant distinction can be drawn between any of the charities other than the London Hospital.

Mr. Buckley in his argument accepted, as he had to do, the rule in regard to indefinite shares of income given to individuals, but contended that such rule had no application, or no necessary application, to the case of charities. The rule as regards individuals is, according to Mr. Buckley, based on the principle that a testator making an indefinite gift of income to an individual must intend that such individual should have the fullest enjoyment of the income: and that it followed, accordingly, that there could be no one else save the specified individual interested in the property; and, moreover, since the individual was not himself perpetual, the full enjoyment intended could only be achieved if the individual could call for the capital. If this view is right, then, according to the argument, it has no necessary application to a charity. True, it is, that no one other than the charity has any interest in the property: but the charity is perpetual and enjoyment in perpetuity of the income does not require anticipation on the part of the charity. Further, a testator making a gift of income in perpetuity to a charity may fairly be held to intend a benefit to a varying class of persons from time to time.

Mr. Buckley was able to produce authority clearly supporting the first part, at any rate, of his proposition as regards individuals, namely, the absence of any other right in anybody but the named individual to the fund—for example, *Philipps* v.

Chamberlaine.[1] But it seems true to say that there is no judicial statement in the books supporting the reasoning that an individual, not being perpetual, can only enjoy perpetual income by anticipation, that is, by calling for capital. Yet I think this second part of Mr. Buckley's proposition must follow as a matter of logic from the first part. If I give the income of a fund without qualification to A, then A is not, as a matter of construction of the gift, limited to the income accruing during the period of his own life. Equally, there is no limitation as to the way in which he disposes of the income, either when he receives it or in advance. It follows that if true effect is to be given to my intention, as a matter of construction, A must have the right to command the corpus. But these considerations may not apply to a charity. As I have indicated, a charity can effectively enjoy income as such in perpetuity and will, in the natural course of things, apply it for a varying class of beneficiaries. It is clear that if a testator so desires, he can effectively impose trusts limiting the way in which the income is applied, for example, by saying that such income is to be applied for some special purpose of the charity, and effect will be given to such direction. I think it also clear (although those appearing for the charities were not prepared so to concede) that a testator can impose an effective trust of income in perpetuity for the general purposes of a charity, a view which is, in my judgment, supported by the authorities to which I shall refer.

It was argued that an individual to whom an indefinite gift of income was made was entitled to corpus as a rule or matter of law, which took effect independently of and notwithstanding the wishes of the testator interpreted as a matter of construction. I do not accept this view. No doubt in some cases the wishes of a testator, which will be defined as a matter of construction, will be overridden if their result is inconsistent with some principle of law. Thus, a testator may direct in unmistakable terms an accumulation of income for 50 years: but the law will hold such provision ineffective. Similarly (and more to the present point), if a testator provides for perpetual trusts of income in a gift to a non-charitable institution, the gift will be void because of the rule against perpetuities. The books contain many examples of such cases and to some of them I shall presently refer. But no such question arises here. If, on the true construction of his will, the testator intended to give to each of the charities a share of income (and no more) in perpetuity, and if he further intended that the income given to each charity was to be applied for the general purposes of the charity, then, in my judgment, the question whether the charities can call for distribution of the corpus depends on the true interpretation of the scope and extent of the gift which the testator intended to confer. I repeat that, in my judgment, an indefinite gift of income to an individual requires that the individual is entitled to the corpus not by reason of some

[1] (1798) 4 Ves.Jun. 51.

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overriding rule of law, but because only by payment of the corpus can the individual get the full benefit and extent of the gift which, as a matter of interpretation, the testator intended. A similar conclusion does not, I think, follow in the case of an indefinite gift of income to a charity for its general purposes, and if the testator here intended his gifts to be of that character, I see no reason why his dispositions should not be effective.

It seems to me, therefore, that the first question which must be answered is: What did the testator intend? More specifically, did he here intend to impose perpetual trusts of the income of his trust estate for the general purposes of the six charities which he named?

I turn to the language of the will, and I note first that the corpus of the estate is not left to the general trustees of the will (Barclays Bank Ltd. after the deaths of his brothers and sister), but is to be paid over to the Official Trustee of Charity Funds to form a fund entitled "The Levy Family Charitable Trust." It was stated in evidence, and it is a legitimate matter to take into account, that the testator and his brothers and sister all made wills in similar form: so that, on the deaths of his brothers and sister, their estates also were paid to the Official Trustee of Charity Funds and form part of the "Levy Family Charitable "Trust." This circumstance is, I think, emphasised by the reference in clause 9 of the will to the fact that the testator and his brothers and sister had all their lives maintained their property "jointly in a state of community."

Obviously, therefore, it was a highly important feature of the testator's intended gift that the corpus of his estate should form part of this named family trust. It is not, I think, possible to doubt that he intended the trust to be perpetually maintained as a family memorial.

It is true that the testator did not state that the shares of income which he then proceeded to give were to be applied in each case for the general purposes of the named charity: but in the light of what had gone before I cannot doubt as a matter of intention that that is what he meant. I would, therefore, read the gifts to the six charities as if there followed in each case words to the effect "to be applied to the general purposes of the "institution."

Here, I think, some (though slight) support may be had from clause 15. True, the challenge or interference mentioned in the clause seems to be in regard to the administration by his trustees before the final trust took effect in favour of the Official Trustee of Charity Funds, so that, if the clause does not fairly contemplate a challenge at a later date, it cannot so far be prayed in aid of an intention to create perpetual trusts of income. On the other hand, I observe that if one of the charities by a challenge were to forfeit its interest, then the testator provided that "the "capital and income representing such interest" should go to the trustees for the King Edward's Hospital Fund. In such an

event the testator made it clear that King Edward's Hospital Fund took the capital, and thereby seemed to show clearly a distinction between the nature of the contingent interest of that hospital fund and the interests of the six charities named in clause 11.

If, then, I have correctly construed the testator's will and discovered his intention, is there any good reason why effect should not be given to it? With all respect to the judge, I think there is not. I have said more than once that I do not accept the view that there is any rule of law which in such cases overrides intention, and I further do not think that an indefinite gift of income to a charity requires, in order to give effect to it as a matter of construction of the nature and extent of the gift, that the charity is entitled to call for the corpus.

I refer now to some of the cases. I have earlier mentioned *Philipps* v. *Chamberlaine*.[2] In that case, unless the donee of income took the corpus, the result would have been an intestacy, which Arden M.R. was naturally concerned to avoid. The language of the judgment included the following[3]: "I should "apprehend, that where the dividends and interest of the residue "are given absolutely to the trustee and his heirs, upon trust "to pay the interest and dividends to A from time to time without "any limitation of duration, it would carry the whole interest, "even without the aid of the subsequent parts of this clause "directing the shares to be paid at the age of 21, with benefit "of survivorship in case of the death of any of them before "that age; from which, I think, a fair inference arises. It is "impossible to suppose such an absurdity, as would result from "the contrary construction. An absurdity may be so great as to "raise a necessary implication. A judge must divest himself of "common sense to impute such an absurdity to a testator as to "suppose that he gives the interest to them for their respective "lives only, and that, if any one shall die under the age of 21, "then that share given for life only shall survive to the others; "and so, if more than one die under that age; but if any of them "should live to attain 21, in that case it should not go over to "the survivors, but be undisposed of. That part of the clause is "perfectly satisfactory to show, that he did intend to give them "the absolute interest." I emphasise the last sentence: "He "did intend to give them the absolute interest." The conclusion, in other words, is, to my mind, based not upon some prevalent rule of law, but upon the extent of the gift as properly interpreted.

In Fearne's Contingent Remainders, 10th ed. (1844), vol. 1, p. 465, it is stated: "Here we observe, that although only the "dividends and payments of the stock and annuities and use of "the furniture were devised for life to L. A. P. and not the "stock, annuities or furniture themselves expressly; yet it was "held to be the same thing: for as a devise of the rents and

[2] 4 Ves.Jun. 51.

[3] Ibid. 58.

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"profits of land is tantamount to a devise of the land itself; so "pari ratione, a devise of the dividends and payments of stock "and annuities, and of the use of furniture, seems equivalent to "a like limitation of the stock, annuities or furniture themselves; "for such dividends, payments or use, are the only immediate "produce or value of the stock, annuities or furniture." Note again, that the result is arrived at because the devise of the rents and profits is "tantamount to the devise of the land," and that a similar principle is applicable in the case of personalty. It is, as a matter of construction of the gift, the same thing.

In *In re Lawes-Wittewronge*,[4] Warrington J. based his decision that the individual to whom an indefinite gift of income had been given was entitled to corpus for the "obvious" reason that it would be absurd to say that the income arising from the fund was for all time (and I emphasise those three words) to be paid to one person, while the corpus was to belong to someone else. True, he introduced the relevant passage in his judgment by the words[5]: "It is an undoubted rule of law," but he proceeded immediately to add the corrective "or rather perhaps "of construction."

Danckwerts J. regarded the case as covered by the two decisions of *In re Morgan*[6] in the Court of Appeal and *Wharton* v. *Masterman*.[7] The testator in *In re Morgan*[8] had directed his trustees out of the interest and rents of his estate to pay certain annuities—in some cases to a named person or his or her descendants: and to pay the residue of the interests and rents to named charities. Stirling J. held[9]—but we have not the benefit of any report of his reasons—that the annuitants were intended to take for life only, the reference to descendants being by way of substitution of living descendants for an annuitant predeceasing the testator: but that the charities were entitled to corpus. There was no appeal upon the second point, and upon the first point this court upheld Stirling J.'s conclusion. Lindley L.J. no doubt said[10] that he thought that the indications were that the testator did not intend anyone to have the corpus "not even the charitable "institutions." But the last words were in the circumstances pure dictum. The will may well have been construed, or capable of being construed, as not intending to impose any trusts upon the income given to the charities. I do not, therefore, think *In re Morgan*[11] assists the solution of the present case.

In *Wharton* v. *Masterman*[12] the testator had given certain annuities out of income, and subject thereto, he gave the residue of his estate to charities. Though the latter gift was expressed in unusual form, there was no doubt that it amounted to a gift of corpus; but enjoyment of corpus was, of course, postponed until

[4] [1915] 1 Ch. 408.
[5] Ibid. 412.
[6] [1893] 3 Ch. 222.
[7] [1895] A.C. 186.
[8] [1893] 3 Ch. 222.
[9] Ibid. 224.
[10] Ibid. 227.
[11] Ibid. 222.
[12] [1895] A.C. 186.

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the death of the last annuitant. The testator, however, further directed that during the lives of the annuitants the surplus income should be accumulated. The question was whether (since, as was held, the annuitants took no interest in the surplus income), the charities could stop the accumulations and receive surplus income until the death of the last annuitant; and the House of Lords, affirming the view of Stirling J. and the Court of Appeal, held that they could—seeing that subject to the interests in income of the annuitants, they were absolutely entitled to the property. The present question did not, therefore, arise at all. Counsel for the charities in the present case relied, however, on certain language of Lords Macnaghten and Davey. Lord Macnaghten, after saying that there could be no doubt if the residuary legatees were individuals that they could stop the accumulations, inquired whether it made any difference that the legatees were charities. He proceeded [13]: "The charities alone are interested "in the surplus income accruing from year to year. Their "interest is vested and indefeasible. And they may legally apply "what they take under the bequest either as capital or income." Having regard to the nature of the question before the House, the language of Lord Macnaghten cannot, in my judgment, be regarded as authority for the view as respects indefinite gifts of income to charitable institutions, that they stand in all circumstances in exactly the same position as individuals.

The language of Lord Davey was as follows [14]: "And I think "it unsound to make the application of a canon of construction "as to the effect of particular words in a will dependent on "circumstances affecting the quality or character of the donee. "It will be observed that in the present case the gift is to each "charity in a form which would enable the managers to spend the "amount as income, or deal with it as they might think fit. We "have not to deal with a fund to be created by accumulations and "settled as a capital endowment at a future time, as to which "different considerations would arise." Again, the language must be interpreted in the context of the question before the House, though I observe the qualification in the last sentence quoted, and I observe, too, that Lord Davey treated the general question "as a canon of construction"—a view supporting that which I have ventured earlier to state.

If, then, I am right so far in thinking that the nature of the gifts to the charities depends upon the true construction of the will, and if the will should be construed as though it imposed on the gifts of income trusts for the general purposes of the respective charities, there only remains the question whether nonetheless, as a matter of interpretation of the gifts and their intended extent, the charities can call for the distribution of the corpus.

There are, as I have said, numerous and well-known instances in the books (from the first Penzance library case, *Carne* v.

[13] [1895] A.C. 186, 194. [14] Ibid. 200.

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Long,[15] onwards) of gifts of income in favour of non-charitable bodies which have been held void as offending against the perpetuity rule. In *In re Clark's Trust*[16] Hall V.-C. held invalid on that ground a gift "to apply the dividends and income" of a sum of money in aid of the funds of a friendly society. It is true that the named friendly society, having been dissolved, no claim was made on its behalf or on behalf of its members to entitlement to the corpus; but Hall V.-C.'s decision has been since quoted and followed many times as a matter of principle. It was, for instance, so quoted and approved in the Corps of Commissionaires' case of *In re Clarke*,[17] by Byrne J. In that case the gift was a gift of a share in certain property (not, be it observed) of the income of the property) in favour of the committee for the time being of the corps to aid in the purchase of their barracks "or in "any other way beneficial to that corps." Byrne J. held that the gift, in so far as any of its objects were not charitable, was a good gift, since upon its true interpretation the committee could apply at once the whole capital sum for any purpose of their institution, so that no question of perpetuity arose. "When "once it" (i.e., the capital sum) "forms part of the funds of the "corps, it may be dealt with by the governing body . . . in any "way they may think best for the benefit of the corps."[18]

On the other hand, in *In re Macaulay's Estate*,[19] the House of Lords held that a gift of the testatrix's residuary estate to a lodge of the Theosophical Society "absolutely for the maintenance and improvement" of the lodge was bad as involving an indefinite trust of income in favour of a non-charitable institution and, therefore, offensive to the perpetuity rule. Lord Atkin and Lord Tomlin construed the words I have quoted as intended to create an endowment to secure the continuance of the lodge, i.e. (as I understand), as impressing the income of the residuary estate with a perpetual trust for the general purposes of the lodge.

I cite last the later Penzance library case of *In re Swain*[20] before Joyce J. The testator in that case had given the income of his residuary estate on certain trusts in favour of the chess club at Penzance, and subject thereto he gave "the same income to "the Penzance library." The trusts in favour of the chess club having been held void, the question then arose as to the gift over of the income in favour of the Penzance library. Mr. C. J. W. Farwell, for the library, argued that, according to the terms of the gift, the library committee could call for the corpus of the property and dispose of it as they thought fit; so that no question of perpetuity arose. But Joyce J. rejected the argument. "In "the present case," he said,[21] "all that is expressed in the will "is a gift of income out of the estate to this society. Now, a "definite gift[22] of income ordinarily amounts to a gift of the

[15] (1860) 2 De G.F. & J. 75.
[16] (1875) L.R. 1 Ch. 497.
[17] [1901] 2 Ch. 110; 17 T.L.R. 479.
[18] [1901] 2 Ch. 110, 121.
[19] [1943] Ch. note at p. 435.
[20] (1908) 99 L.T. 604.
[21] Ibid. 606.
[22] "Indefinite gift," see *per* Harman L.J., post.

" corpus or capital, but that is only so where there is no intention " express or implied that the donee is not to take more. In the " present case, looking at the circumstances and reading the " whole will, I am of opinion, on the terms of the will itself, that " nothing more was intended to be given to this society than the " annual rents, dividends, and profits. Therefore, in my " opinion, that is a perpetuity or tends to perpetuity on the face " of it, and the gift is void."

All the cases which I have recited relate to gifts in favour of non-charitable institutions. But they establish, in my judgment, that if the true construction of the gift is inconsistent with an intention that the institution can call for capital, then the gift is avoided by the perpetuity rule and cannot be saved on the broad ground that an indefinite gift of income entitles the donee to call for the corpus and put an end to the trusts of income. It is true that no corresponding case has been cited to us relating to a gift in favour of a charitable institution—no doubt for the obvious reason that in such a case no question of invalidity could arise. But is there any ground for supposing that any different principle of construction could apply in the case of a gift of income in favour of a charitable institution? I think not. If upon the true interpretation of the gift a testator intends to create in favour of a charitable institution a perpetual trust of income, for example, by stating that the income is to be applied for ever for the general purposes of the institution (in terms which, if the donee were non-charitable, would cause the gift to fail as offending against the perpetuity rule), is there any ground for saying that the charitable institution can determine the trusts and call for the corpus of the property (as the non-charitable institution, in order to save the validity of the gift, could not do)? I think there is not. In other words, I think there is no " canon " of construction " (to use Lord Davey's phrase) which in such a case says that the intended extent of the gift entitles the charitable donee, if it is to enjoy that which is given as was intended, to call for corpus, and no authority which would support or justify such a conclusion.

I, therefore, think that (subject to the special point raised in its own case by the London Hospital) the court should give effect to the testator's intention as I have interpreted it. As regards the London Hospital, it is no doubt true that, being a corporation incorporated by Royal Charter, it has (according to the terms of the charter) the same capacity to do with its own as an individual. It may, therefore, not be subject to the same control as its co-defendant charities in regard to the application in fact of its property. But the corporation carries on the hospital activities known by its name, and, in my view, the gift of income to the London Hospital should be treated as having impressed upon it (in the same way as the gifts in favour of the other institutions) the qualification " for the general purposes of the hospital." I can see no ground, accordingly, for interpreting the gift in favour

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of the London Hospital differently from the gifts in favour of the other charitable institutions, or for saying that the London Hospital has, according to the terms of the gift in its favour, any right quoad corpus which the other charities have not.

In the circumstances I think that Mr. Buckley has made good his argument for allowing the appeal, and that an order should be made, accordingly, in the terms prayed by the notice of appeal.

SELLERS L.J. The testator intended, as I would read his will, that the whole of the capital of his residuary estate should be kept perpetually intact in the hands of the Official Trustee of Charity Funds to form "The Levy Family Charitable Trust" as a memorial to a family which had conserved money and nurtured charity, and that the proceeds should be enjoyed with equality of income in each eighth share year by year.

All the named charities would be known to be, or would have been assumed by the testator to be, of a permanent character, who as far as could be envisaged, would use year by year for their respective purposes such income as they could command. The nature of these institutions is not similar but is in contrast to that of an individual whose life must end, and who cannot enjoy an income beyond a limited span of years, and from this point of view I would not differentiate the London Hospital.

The beneficiaries, except the two charities for whom Mr. Warren appeared, have not been content with what they were given in the way the testator intended to give it. No doubt in the belief that they could obtain greater benefit for their respective charities by having the capital in their own hands than in the hands of the appointed trustee, they have risked these proceedings. It seems the risk was not great, for clause 15 has been ignored by the judge and there is no appeal against the decision.

I am inclined to think that the testator, far from intending to give the claimants a share of the capital of his residuary estate, intended to disinherit them and to benefit in their place, with the relative capital and interest, the King Edward's Hospital Fund, who, by wise anticipation, were his chosen alternative to those of his original beneficiaries who did not want his benefactions without disputing the manner or the extent of the giving.

If this is heresy to those who breathe the air of Chancery, it is to me, who has not breathed the air so long, a comment which has remained after all the argument and consideration this case has received. According to the testator, if any institution was to have the capital, it was the King Edward's Hospital Fund.

It has been established that an indefinite gift of income to an individual (immediately or after a period of accumulation) would entitle the individual to the capital or fund from which the income was to be derived. I agree with the opinion of Lord Evershed M.R. that this is so not by some overriding rule of law but because only by a payment of the capital could the individual get the full benefit of the gift which, as a matter of interpretation, the testator

intended. A similar conclusion does not seem to me to follow in the case of an indefinite gift of income to a charity for its general purposes.

The authorities reviewed by Lord Evershed M.R. do not require, and no reason, social, practical or economic requires, the court in my opinion to allow the parties in this case to enjoy the benefactions of the testator while discarding the terms on which the benefactions were made.

I agree with the judgments of Lord Evershed M.R. and Harman L.J., and with deference to the experienced views of Danckwerts J., I, too, would allow the appeal.

HARMAN L.J. These proceedings are, on the face of them, concerned only with the affairs of one George Levy, who died in the year 1940, but are in fact likely to control not only his estate, but that of his two brothers, Abraham who died in 1943 and Maurice who died in 1955, and his sister Bertha, who died in the year 1954. The three brothers carried on for many years business together as retailers of footwear and clothing in the Midlands, and they and their sister Bertha appear to have maintained the whole of their properties in common. All four of them left wills in terms which, for the present purposes, may be taken to have been identical, and the present question arose upon the death of the last of them, Maurice, in October, 1955. The Bank is executor and trustee of all the wills. The combined residue of the three brothers falls not far short of a quarter of a million pounds, and the sister also left a large estate, and all four funds devolve in the same way.

The testator's will was made on August 12, 1936. His estate has been fully administered. The relevant parts of the will are in clause 11, which has already been read and I shall not read it again. By clause 15 the testator sought to forfeit the share of any charity challenging or calling in question the terms of his will and purported to give over the forfeited share or shares to the King Edward's Hospital Fund. This clause, however, was declared by the judge to be void and on that point there is no appeal.

The only other question before the judge arose out of the claim of some of the charities to have handed over to them absolutely for their several charitable purposes the share of corpus referable to the income bequeathed to them. The judge accepted this claim, holding in effect that the result of an indefinite gift of income by will in favour of a charity has the same effect as a like gift in favour of an individual, to wit, that the legatee may claim to have paid to him that share of capital to which the income given is referable. The contention made on behalf of the Attorney-General is that this so-called rule is merely a rule of construction or, in other words, a guide to the construction of a will. Where the instrument makes no disposition expressly disposing beneficially of the corpus of a fund or share of which the income is

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given, but leaves the testator's further intention as to its disposition entirely as a matter of inference, it has long been held that the court may, and as a rule should, construe the gift of income with no temporal limit attached if it be to an individual as equivalent to a gift of the capital producing that income. But the appellant argues that this is only an inference to be drawn where no contrary intention appears in the instrument, and that in the present case it is perfectly clear that this was not the testator's intention. Nonetheless it is argued by the legatees that there is a well-settled rule in the case of a gift to individuals and no reason why charities, whether corporate or incorporate, should be treated differently.

The rule is an old one going back at least to the time of Arden M.R., who so held in *Philipps* v. *Chamberlaine*,[23] where the headnote reads: "The capital of the residue passed by implication; "though the interest and dividends only were expressly disposed "of." An explanation is afforded by Warrington J. in *In re Lawes-Wittewronge*[24] in the words which have already been read.

The question is whether this principle applies to charities of which here there are three kinds, namely, unincorporated associations consisting of individuals holding charitable funds upon specific charitable trusts, secondly, corporations under the Companies Acts whose objects are defined by their memoranda of association, and, thirdly, a corporation by charter, which of course can do anything which a natural person can do except in so far as the terms of the charter forbid it. Each of these three classes of persons, of course, hold their endowments upon trusts to which the law allows an indefinite duration because they are charitable, and moneys given to them are devoted to their several charitable purposes whether the gift makes any mention of those purposes or no. It must, as it seems to me, be possible by proper words to add to those endowments and so create a trust of indefinite duration. Were it not so there would have been a short end to cases where the argument turned on whether the donee was intended to have the spending of the capital or no. A good instance is *In re Swain*,[25] a case concerning a library at Penzance, from which the passage has already been cited by Lord Evershed M.R. but as to which I would observe that the judge is misreported because the words used are[26] "a definite gift of income" whereas clearly Joyce J. meant to say "an indefinite gift of "income" and the reporter misunderstood him or misheard him. There was an earlier case about a gift to this same library, *Carne* v. *Long*.[27] In that case the gift was of corpus in terms that might have been construed as an absolute gift to the members, but Lord Campbell L.C., looked at the constitution of the body and concluded that the donees could not under the rules dispose

[23] 4 Ves.Jun. 51.
[24] [1915] 1 Ch. 408, 412.
[25] 99 L.T. 604.
[26] Ibid. 606.
[27] 2 De G.F. & J. 75.

of the capital: he, therefore, held that this gift too tended to a perpetuity and was void. This case is authority for the proposition that a gift to a public body is a gift to it for its work or purposes.

Similarly in *In re Clark's Trust*,[28] where Hall V.-C. comes to the conclusion that a gift of income to a friendly society, not being a gift to a charity, was void as tending to a perpetuity. See also *In re Amos*,[29] a case of a gift to a trade union.

The judge appears to have considered that the case was covered by *Wharton* v. *Masterman*.[30] In my judgment that case is irrelevant. There was no doubt there that the gift to the charity was a gift of capital absolutely. What the testator wished to do was to defer the handing over of the capital for a period while the income accumulated, but it was held that a charity, no less than an individual, being absolutely entitled to corpus, may stop the accumulations and call for the corpus at once. This does not seem to me to govern a case where, on the face of the will, only income is given.

I do not find any reason to differentiate between the legatees according to their constitutions. It is quite clear that the testator intended them all to be treated alike. To each income is given which must, as a matter of construction, be treated as given for the purposes of the work carried on by each, and I cannot see that a difference in the constitution of the donee can make any difference to the quantum of the gift.

I would, therefore, concur in allowing this appeal.

Appeal allowed. Appellant's costs as between solicitor and client out of the estate. Executors' costs, charges and expenses out of the estate. One set of costs as between solicitor and client out of the estate to be shared among the respondent charities. Leave to appeal to the House of Lords refused.

Solicitors: *Treasury Solicitor; White & Leonard; Stephenson, Harwood & Tatham; Birkbeck, Julius, Coburn & Broad; Hanbury, Whitting & Ingle and Pennington & Son; Hyman Isaacs, Lewis & Mills; E. F. Turner & Sons.*

E. D.

[28] L.R. 1 Ch.D. 497.
[29] [1891] 3 Ch. 159; 7 T.L.R. 559.
[30] [1895] A.C. 186.

[COURT OF APPEAL.]

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Hodson and Ormerod L.JJ. and Gorman J.

SOUTH AFRICAN DISPATCH LINE *v.* OWNERS OF THE PANAMANIAN STEAMSHIP *NIKI*.

Shipping—Charterparty—Demurrage—Exceptions clause—Charterparty providing for shipment of wide variety of cargo in Coos Bay/British Columbia range—Exceptions clause excusing charterers from "any "delay if the cargo intended for shipment . . . cannot be . . . loaded ". . . by reason of . . . strikes . . . "—Strike preventing loading of intended cargo of lumber—Extent of delay covered by clause—Charterers' duty to provide alternative cargo within reasonable time—Meaning of "cargo, the"—Intended cargo.

Ships' Names—Niki.

Election or Option — Election or selection — Charterparty — Alternative cargoes.

A single voyage charterparty provided for shipment in four districts in the Coos Bay/British Columbia range, loading rotation to be at the charterers' option, a cargo of lumber and/or timber and/or wheat in bulk and/or lawful merchandise, excluding dangerous cargo. The charterparty contained an exceptions clause providing: " . . . Charterers shall not be responsible for any delay if "the cargo intended for shipment under this charterparty cannot be "provided, delivered, loaded or discharged by reason of . . . "strikes . . . connected in any way with, or essential to the pro-"viding, delivery, loading or discharging of the cargo . . ."

On June 13, 1952, the charterers booked a cargo of lumber at Victoria, British Columbia, intending on that day to order the ship first to Vancouver to load wheat, thence to Victoria to load the lumber, and thereafter to two American ports to complete loading, but on June 16 a strike broke out which prevented the loading of lumber at all British Columbia ports. On June 27, as the strike still continued, the charterers proposed to the owners a variation in the rotation and the loading of an alternative cargo of wheat if it proved impossible to load the lumber because of the strike and, as the owners agreed, the ship, instead of calling at Victoria to load the lumber, took on a further cargo of wheat at Vancouver and sailed direct to Portland, Oregon, where she completed loading on July 31. The owners would not agree to compensate the charterers for the cost of loading the alternative cargo and rearranging the rotation, as they contended that if the vessel had gone to Victoria to load the lumber, the laydays would have begun to run irrespective of the strike.

The issue whether the owners would have been allowed to count time lost at Victoria because of the strike as laytime if the vessel had loaded the intended cargo was referred to arbitration, and the umpire, holding that the charterers would have been protected by the exceptions clause from responsibility for delay in loading caused by the strike, made his award in their favour.

On appeal, Diplock J. gave judgment for the owners. On appeal by the charterers:—

Held, that in the case of a fixed laytime charterparty which imposed on the charterers a duty to load and discharge within the fixed time a wide range of lawful merchandise such as they might select, such an exceptions clause did not exempt the charterers from seeking an alternative cargo when one cargo became unavailable owing to an excepted peril, but merely excused delay in loading for

such time as was reasonably required to obtain the alternative cargo (post, pp. 301, 304–305, 306). Accordingly, in the circumstances, the charterers would not have been entitled to send the ship to Victoria and to count as laytime an indefinite period of waiting until a cargo of lumber became available, so that the shipowners were entitled to succeed.

Bunge y Born Limitada Sociedad v. *Brightman & Co.* [1925] A.C. 799; 41 T.L.R. 652; [1924] 2 K.B. 619; 40 T.L.R. 876 applied.

Decision of Diplock J. [1959] 1 Q.B. 248; [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590 affirmed.

APPEAL from Diplock J.

A dispute arose between the owners of the Panamanian Steamship *Niki* and South African Dispatch Line, charterers of the ship in connection with a charterparty dated June 3, 1952, for a single voyage for a lump sum freight of 185,000 dollars. The dispute was submitted to arbitration in accordance with clause 32 of the charter and an umpire gave his award in the form of a special case.

Under the terms of the charterparty the *Niki* was to proceed for shipment to four districts " in Coos Bay/British Columbia " Range within British Institute Warranty limits . . . maximum " six berths; as ordered by charterers, loading rotation to be " North/South or South/North at charterers' option, with " charterers' option of commencing loading on the Columbia " River or Coos Bay, then British Columbia, thence South to " Columbia River to complete . . . " and a wide range of alternative rotations was provided for. Orders for first loading were to be given by wireless on Captain's application four days before due off Estevan wireless station and the cargo to be loaded was " a full and complete cargo of lumber and/or timber and/or wood " goods and/or wheat in bulk and/or lawful merchandise, exclud- " ing dangerous cargo and explosives . . . " for shipment to " four " safe ports in Cape Town/Lourenço Marques range . . ."

Clause 4 (the exceptions clause) provided: " . . . Charterers " shall not be responsible for any delay if the cargo intended for " shipment under this charterparty cannot be provided, delivered, " loaded or discharged by reason of . . . strikes or lock-outs of " any class of workmen or stoppage of labour connected in any " way with, or essential to the providing, delivery, loading or " discharging of the cargo . . ."

By clause 7 cargo was to be loaded in 14 weather working days, laydays at first loading port to commence 24 hours after receipt of notice of readiness to load, and there were similar provisions for subsequent loading ports. Clause 8 provided for 25 days discharging time and by clause 9 loading and discharging time were to be reversible. Clause 23 provided that laydays were not to commence before July 25 and the cancelling date was July 19.

According to an agreed statement of facts annexed to the special case, on June 13, 1952, the charterers booked 540 mille

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lumber for shipment at Victoria, British Columbia. They had certain prior commitments and their intention on and after June 13 was to load the following cargo on the *Niki* under the charterparty: at Vancouver—4,050 tons wheat, at Victoria—540 mille lumber, and at Coos Bay, and thereafter at Portland, Oregon, U.S.A., to complete with lumber from two other shippers.

On June 16, 1952, a strike of lumbermen broke out in British Columbia which prevented the loading of timber in British Columbia ports. The strike did not affect any United States ports or places within the charter loading range nor did it prevent or delay the loading of wheat in bulk and/or other lawful merchandise at any British Columbia and United States ports or places within the charter loading range. The charterers were in fact able to load 4,900 tons of wheat at Vancouver after the outbreak of the strike had prevented their loading lumber. The strike continued until July 30, 1952.

Meanwhile, on June 27 the charterers exercised their option and declared to the owners their intention to load in the rotation wheat at Vancouver, lumber at Victoria, and thereafter at Coos Bay and Portland, but in view of the position of the strike on that day they cabled the owners proposing a variation in the rotation. That was in the following terms: "*Niki* now dry-docked "Victoria understand ready to load July 1 Vancouver. Present "itinerary 4,050 tons wheat Vancouver 540 lumber Victoria "thence Coos Portland. 540 mille Victoria subject indefinite "delay account Canadian mill strike therefore we make owners "following proposal. Will commence Coos first loading district "then British Columbia completing Portland. If 540 mille "Victoria still unready due strike will take 4,900 tons wheat "provided owners allow 11,000 dollars for loss revenue and cost "restowing lumber."

The owners took the view that under the terms of the charterparty the vessel was not obliged to wait even a reasonable time at Victoria for the 540 mille lumber intended for shipment and that the charterers' proposal was unacceptable. After a number of communications had passed between the parties on July 6 the charterers cabled the following proposal: "We without pre-"judice propose to submit to arbitration the issue whether "owners allowed to count time lost Victoria because of strike "as laytime if vessel loads intended cargo. If owners' contention "correct owners should not compensate charterers for alternative "cargo and cost re-arranging rotation. If owners' contention "wrong owners to pay for expense of bagging 500 tons of grain "and loss of revenue from shipment of grain instead of Victoria "lumber." The owners agreed to submit the issue stated to arbitration and thereupon the alternative rotation was adopted and the alternative cargo of wheat carried.

Whilst the negotiations were proceeding the *Niki* had, in accordance with the charter provisions, proceeded to Vancouver, where notice of readiness was given and accepted on July 2.

The ship loaded 4,900 tons of wheat at Vancouver between July 2 and 9, on which day she sailed for Coos Bay, where she loaded lumber, sailing thence to Oregon to complete loading. The total time used for loading was 15 days and 13 hours 50 minutes. The charterers deducted 11,000 dollars from the freight paid, and that sum was placed in escrow in the hands of agents in New York to await the decision of the arbitrator.

The 540 mille lumber which the charterers declared they intended to ship at Victoria was not identified in the sense that it had been separated out and marked for shipment in the *Niki*. It was not customary to separate, mark or identify lumber for loading in any particular vessel until shortly before the lumber was in fact loaded on the vessel, and there would have been no difficulty or delay about the loading of the lumber if the strike had not occurred.

Before the umpire the charterers contended that at the time they made the booking for the 540 mille lumber, no strike was in existence, nor was a strike inevitable, and they did not and could not know the likely duration of any strike that might thereafter occur; that if the lumber had been loaded, clause 4 of the charter-party would have protected them from responsibility for any delay in the loading thereof caused by the strike and, accordingly, they were entitled to have the 11,000 dollars released to them.

The owners contended, inter alia, that at the time the charterers contended that they had booked the lumber the strike was inevitable and was likely to be of considerable duration; that they must be deemed at that time to have had knowledge of the inevitability and duration of the strike; that therefore clause 4 would not have protected the charterers from delay in loading caused by the strike if the lumber had in fact been loaded and, accordingly, they were entitled to the 11,000 dollars.

The umpire found, in so far as they were questions of fact, and held, in so far as they were questions of law, that on June 13, 1952, and for some days prior thereto it was probable that the strike would break out shortly after June 14 but that it was not inevitable; that on June 13 no reliable forecast could be made of the likely duration of the strike if it were to break out; that on that date the charterers must be deemed to have had knowledge that the strike was probable but not that it was inevitable and they could not be deemed to have had prior knowledge of its likely duration. If the 540 mille lumber had been loaded, clause 4 would in the circumstances have protected the charterers from responsibility towards the owners for any delay in the loading thereof caused by the strike and the owners would not have been able to count time lost because of the strike as laytime.

Accordingly, he awarded that the charterers were entitled to have released to them the 11,000 dollars, subject to the opinion of the court on the question whether, on the facts agreed and found, they were so entitled. If the question be answered in the affirmative his award should stand. If it be answered in the

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negative then in lieu of that award the owners would be entitled to have the 11,000 dollars released to them.

On appeal, Diplock J. reversed the award and gave judgment for the shipowners. The charterers appealed.

Michael Kerr for the charterers.

R. A. MacCrindle for the owners.

The following cases which were cited in argument are not referred to in the judgments: *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food* [1]; *Evera S.A. Comercial* v. *North Shipping Co.*[2]; *Owners of the Steamships Ardgowan, Ardgoil and Buranda* v. *Royal Commission on Wheat Supplies* [3]; *Quinn* v. *Leathem* [4]; *Royal Greek Government* v. *Ministry of Transport (No. 2)* [5]; *Brown* v. *Turner, Brightman & Co.*[6]; *Owners of Steamship Matheos* v. *Louis Dreyfus & Co.*[7]; *Bulman* v. *Fenwick* [8]; *Dobell* v. *Green* [9]; *Pinch & Simpson* v. *Harrison* [10]; *Fitzgerald* v. *Lona (Owners)*.[11]

Cur. adv. vult.

Dec. 18. The following judgments were read:

HODSON L.J. This is an appeal by charterers from a decision of Diplock J. given on November 13, 1958, upon a special case stated by a commercial umpire arising out of the lumber strike in British Columbia in 1952. The case raises a question of the constructions of an exceptions clause in a charterparty of which the relevant words are: "Charterers shall not be responsible for "any delay if the cargo intended for shipment under this charter-"party cannot be provided, delivered, loaded or discharged by "reason of . . . strikes or lock-outs of any class of workmen or stop-"page of labour connected in any way with, or essential to the "providing, delivery, loading or discharging of the cargo." The remaining relevant clauses of the charterparty, and the facts as found by the special case, are set out in the introduction to the judgment of the judge reported in Law Reports,[1*] and need not be repeated. Suffice it to say that the dispute referred to arbitration was the detention of 11,000 dollars which the charterers deducted from the freight paid and placed on escrow in the hands of agents in New York to await decision of the arbitrator.

This deduction of 11,000 dollars followed communications passing between the owners and the charterers which read as follows, June 27, Charterers to owners. "*Niki* now dry-docked

[1] [1959] 3 W.L.R. 665; [1959] 3 All E.R. 434.
[2] [1956] 2 Lloyd's Rep. 367.
[3] (1923) 15 Ll.L.Rep. 81.
[4] [1901] A.C. 495; 17 T.L.R. 749.
[5] (1949) 66 T.L.R. (Pt. 1) 504.
[6] [1912] A.C. 12.
[7] [1925] A.C. 654; 41 T.L.R. 393.
[8] [1894] 1 Q.B. 179; 10 T.L.R. 45.
[9] [1900] 1 Q.B. 526; 16 T.L.R. 204.
[10] (1948) 81 Ll.L.R. 268.
[11] (1932) 49 T.L.R. 77.
[1*] [1959] 1 Q.B. 248; [1958] 3 W.L.R. 718; [1958] 3 All E.R. 590.

" Victoria understand ready to load July 1 Vancouver. Present " itinerary 4,050 tons wheat Vancouver 540 lumber Victoria " thence Coos Portland. 540 mille Victoria subject indefinite " delay account Canadian mill strike. Therefore we make owners " following proposal. Will commence Coos first loading district " then British Columbia completing Portland. If 540 mille " Victoria still unready due strike will take 4,900 tons wheat " provided owners allow 11,000 dollars for loss revenue and cost " restowing lumber." July 6. Charterers to owners: " We " without prejudice propose to submit to arbitration the issue " whether owners allowed count time lost Victoria because of " strike as laytime if vessel loads intended cargo. If owners' " contention correct owners should not compensate charterers for " alternative cargo and cost re-arranging rotation. If owners' " contention wrong owners to pay for expense of bagging 500 tons " of grain and loss of revenue from shipment of grain instead of " Victoria lumber." The owners agreed to submit the issue stated to arbitration, and the main contentions before the umpire and the judge were to the effect, on the part of the owners, that they were entitled to the 11,000 dollars under the charterparty, and on behalf of the charterers that they were protected by the exceptions clause on the footing that if the lumber had been loaded, clause 4 of the charterparty would have protected them from responsibility for delay in the loading thereof caused by the strike, and, accordingly, they were entitled to have the 11,000 dollars released to them.

The argument of the charterers is simple and direct. It is that on the hypothesis which the court is asked to assume the meaning of clause 4 is clear, and that, in order to decide whether it applies in the present case, two facts must be ascertained: (1) What is the intended cargo under this charterparty? (2) Did the strike prevent that intended cargo being loaded? It is said that there is no doubt on the facts found (1) that the intended cargo was the 540 mille lumber which the charterers had booked at Victoria, and (2) that the strike of lumbermen prevented it from being loaded. This being so, it is said that delay in loading the cargo intended for shipment is excused by clause 4 because the clause expressly says so. Accordingly, it is said that if the charterers provided the cargo intended for shipment, and it cannot be loaded because of the strike, they are entitled to keep the ship waiting for the strike to end, and subject only to frustration of the charterparty.

The argument of the charterers is at first sight attractive, but the exceptions clause must be considered against the background of the charterparty as a whole, and the obligations of the charterers contained therein. The charterparty is a fixed laytime charterparty which imposes on the charterers a duty to load and discharge in the fixed time subject only to any exception within which they can bring themselves, otherwise they must pay demurrage. The charterparty is not one to load lumber. The charterers

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could have loaded any lawful merchandise except dangerous cargo, and certain other named goods. The charterparty is not converted into a contract of affreightment for a particular commodity by the nomination of that commodity. The right to nominate carries with it the duty to land a full and complete cargo of one of the range so that, if the charterer cannot load one he has intended to load, prima facie, he has to load some other cargo out of the range. So far as the facts of this case are concerned, the strike at Victoria did not affect other merchandise, and the charterer has a right (though it may be in a given case unprofitable) to change his mind and switch to another cargo.

The delay in clause 4 is delay in the performance of the obligation which, under this charterparty, is an obligation to provide any number of alternative cargoes. The judge said, and I respectfully agree[2]: "If, therefore, the particular cargo in this case, "timber, could not be provided, the charterers were under a duty "to provide another. Their inability to provide the intended "cargo may result, and would result, in their acquiring a reasonable time to make alternative arrangements to provide another "cargo; but it seems to me that that, and that only, is the extent "of the delay caused by a strike affecting only one of the alternative cargoes which the charterer is entitled, and indeed under "a duty, to supply. In this case the strike affected only timber "or lumber. It did not affect wheat or any other of the cargoes "concerned."

I accept the owners' contention that the word "if" has a causal significance, and is equivalent to "caused by the fact "that" rather than equivalent to "so long as," as the charterers contend.

The charterers contend that the words "intended for shipment" following the word "cargo" must show that they are covered by the exception, because it is defined as the cargo fixed on June 13; but cargo "intended for shipment," whether it relates to the cargo fixed on June 13, or any other goods mentioned in clause 1, does no more than extend the word "cargo" from its limited meaning of goods carried on board to something which is going to become cargo when it arrives on board.

It is unnecessary to speculate why the word "intended" was inserted before the word "cargo." It may well have been for the reason given by Diplock J., but it does not, in my view, have the effect contended for by the charterers, that if the cargo fixed on June 13 is delayed by a strike, they are entitled to sit with folded arms until the strike ends. The question must always be what is the delay which flowed from the inability to load the lumber, and the answer given by the judge is, in my judgment, correct, namely, the delay involved in switching to another cargo within the range. There is nothing in the exceptions clause which exempts the charterer from the duty to look for alternative cargo.

[2] [1959] 1 Q.B. 238, 249.

If that were so, he would be protected by his exception clause from a breach of his duty when other cargoes are available, and not only in respect of one particular cargo.

If this is correct, there would, of course, have been a necessity, if the vessel had gone to Victoria, to consider what protection is given by the exceptions clause in respect of the particular delay with which we are concerned.

The charterers' duty would be to make preliminary arrangements, as the judge said, before they sent the ship to Victoria if there was a reasonable likelihood of the strike continuing when the vessel arrived, and to make definite arrangements as soon as it was clear that it would continue. I agree with the judge that they would then be entitled to a reasonable time to make those arrangements.

This seems to me to follow from the reasoning of the judgments in the Court of Appeal in *Brightman & Co.* v. *Bunge y Born Limitada Sociedad*,[3] and by the opinion given by Lord Atkinson in the House of Lords in the same case.[4] Subject to Lord Dunedin's reservations,[5] this case supports the view that where a charterparty permits the loading of a selection of different cargoes, the fact that the exceptions clause would excuse delay in loading one type of cargo does not excuse a failure to load an alternative type of cargo, the loading of which is not affected by an excepted peril, and that, in such a case, the exceptions clause does excuse delay in loading for such time as is reasonably required for the charterers to obtain an alternative cargo.

It is true that in *Bunge's* case the particular question before this court was not decided, since the decision did not turn upon the construction of an exceptions clause, but upon the effect of a prohibition which prevented the loading of a particular cargo out of a range, and the word "cargo" was not, as here, preceded by the word "intended," but the principle involved applies to the situation in this case.

The remaining question is how is the charterer's right to a reasonable time to be dealt with in this arbitration? The vessel never having gone to Victoria, how is this now to avail the charterers, who contend that they should even now be allowed credit for a sum to compensate them for the reasonable time which, in the view of the court, would have been available to them if they had sent the vessel to Victoria, and ask for a remission in order to ascertain what sum (if any) is due to them in this respect?

I do not think the charterers are now entitled to this. They committed themselves, as the telegrams show, to an arbitration on the footing that they were entitled to all or none of the 11,000

[3] [1924] 2 K.B. 619; 40 T.L.R. 876.

[4] Sub nom. *Bunge y Born Limitada Sociedad* v. *Brightman & Co.* [1925] A.C. 799, 814; 41 T.L.R. 652.

[5] [1925] A.C. 799, 808.

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dollars. They could not then bring themselves within the exceptions clause for the purpose of ascertaining what would have been a reasonable time if they had made attempts to obtain an alternative cargo, and not taken the stand that they were entitled to do nothing but wait for the strike to end.

I would dismiss the appeal.

ORMEROD L.J. There is no dispute on the facts of this appeal. They are set out in the statement of facts annexed to the award of the umpire. The question to be decided is whether in the circumstances the appellants are entitled to the protection of the exceptions clause in the charterparty. In considering the effect of that clause it is necessary to consider the nature of the charterparty itself. This is well summed up by the judge when he says: "It was, therefore, a voyage charter with a wide possibility of "variations of port of loading, and one which entitled the "charterer to load a great variety of cargo, including all lawful "merchandise."

The material words of the exceptions clause, which is clause 4 of the charterparty, are: "Charterers shall not be responsible for "any delay if the cargo intended for shipment under this charter-"party cannot be provided, delivered, loaded or discharged by "reason of strikes or lock-outs of any class of workmen or "stoppage of labour connected in any way with or essential to "the providing, delivery, loading or discharge of the cargo." According to the agreed statement of facts it was on June 13, 1952, the intention of the appellants to load certain cargo of a kind and in a rotation there set out, and on June 27, 1952, they declared their intention to the respondents. The intended rotation involved proceeding to Victoria to load timber. On June 16, however, a strike of lumbermen broke out in British Columbia which prevented the loading of timber at Victoria. The appellants' contention is, that on a true construction of the charterparty, they would nevertheless have been entitled to proceed to Victoria, and wait for the strike to end without incurring any penalty. The respondents, on the other hand, submitted that the obligation put upon the appellants by the charterparty was to load the ship within the prescribed time with one or more of the permitted varieties of cargo; and the fact that one of these varieties could not be loaded because of a strike did not entitle the appellants to the protection of the exceptions clause, even though the cargo in question was cargo which the appellants "intended to load." Diplock J. rejected the appellants' contention, but held that the appellants would be entitled in the circumstances to a reasonable time to arrange for an alternative cargo. In his judgment he said[6]: "I think, therefore, "that on the true construction of the exceptions clause, if this "vessel had gone to Victoria—as the charterers were entitled to "send it—they would not have been entitled, as they claimed,

[6] [1959] 1 Q.B. 238, 250.

" to sit with folded arms and keep it there and hold it until the " strike ended on July 30. It would have been their duty to " make alternative arrangements. It would have been their duty " to make preliminary arrangements before they sent the vessel " to Victoria if there was a reasonable likelihood of the strike " continuing when the vessel arrived, and to make definite " arrangements as soon as it was clear that it would continue. " They were entitled to a reasonable time to make those " arrangements, but to nothing more."

This passage from the judgment of Diplock J. crystallises, as I read his judgment, his opinion of the amount of the relief to which the appellants were entitled by virtue of the exceptions clause in the particular circumstances which had arisen.

The issue between the parties as it came before the umpire, and, indeed, as it comes before this court, is contained in a series of cablegrams which passed between the parties between June 27, 1952, and July 7, 1952. The umpire had to decide whether, if the ship had gone to Victoria to load timber pursuant to an order by the appellants on June 27, 1952, the time she would have had to wait until the cargo could be loaded at the end of the strike would have counted as laytime. In the ordinary way, the laytime would commence once the ship was at Victoria ready to load, but it would not so commence if the appellants were exempted from delay under clause 4. The submission of the appellants is really a simple one. It is sufficient, they submit, if they can show (1) what the intended cargo was, and (2) that it could not be loaded by reason of the strike. There could be no question as to the intended cargo. It was clearly defined in the agreed statement of facts. It is equally clear that the timber could have been loaded at Victoria but for the strike, which would have prevented it.

It was argued that in these circumstances, clause 4 must apply; that the ordinary meaning of the words " delay of the " cargo intended for shipment cannot be loaded by reason of " strikes " was such as to cover a case of this kind where the intended cargo had been declared. It was pointed out by Mr. Kerr that the words " cargo intended for shipment " occurred only in clause 4, and that the words used in clause 1 of the charterparty when referring to the obligation to load were " a full " and complete cargo," and that the words in clause 4 must, therefore, be given a narrower meaning.

The judge, in coming to his decision, relied on the authority of *Brightman & Co.* v. *Bunge y Born Limitada Sociedad* in this court,[7] and in the House of Lords.[8] In that case the obligation on the charterers was to load a cargo of " wheat and/or maize " and/or rye," and the exceptions clause provided as follows: " If the cargo cannot be loaded by reason of obstruction beyond " the control of the charterers or the railways the time for loading

[7] [1924] 2 K.B. 619. [8] [1925] A.C. 799.

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" shall not count during the continuance of such cause." There was delay because of a " go-slow " movement on one of the railways used for carrying wheat to the port of loading, and there was further delay because of a prohibition to load wheat imposed by the authorities. It was held that on neither cause for delay could the charterers succeed. Their obligation was to load " wheat and/or maize and/or rye "; and if the cargo intended by the charterers to be loaded was not available, the obligation remained to load with an alternative one. In the Court of Appeal it was held that the charterers were entitled to a reasonable time to see if the prohibition was likely to be removed, and to make arrangements for an alternative cargo, although Lord Dunedin in the House of Lords indicated that he was not satisfied that this question might not require examination at some future time.

Mr. Kerr sought to distinguish *Brightman's* case [9] first by submitting that it was not an authority on the obligation to switch cargoes in the case of an excepted peril, as it was held that the circumstances of the " go-slow " movement did not entitle the charterers to the protection of the exceptions clause. It was a case in prohibition. This, of course, is true, but it would seem that the same reasoning on this point might well apply in the case of an excepted peril as in the case of a prohibition. But the distinction upon which Mr. Kerr chiefly relied was in the difference of language in the exceptions clause. In his submission, the words " cargo intended for shipment under the charterparty " were vital; and if the cargo, the loading of which would have been delayed by the strike, could be brought within the meaning of those words (as was clearly so in this case), then the appellants were entitled to the protection of the clause.

Mr. MacCrindle, for the respondents, argued that this was a fixed time charterparty, the effect of which was to impose upon the charterers an absolute duty to load and discharge within a fixed time, subject to any exceptions in the charterparty. He submitted that the charterparty was not one to load timber, and that the nomination by the appellants of a cargo did not transform it into one. They could have shipped any of a wide range of cargoes. Therefore, in the absence of an express provision to the contrary, the obligation of the appellants to load a full and complete cargo meant that if they were unable to load one cargo, they were bound to load something else. Again the question comes back to the true construction of the exceptions clause. Is there anything in it to negative that duty on the appellants? The appellants argue that the words " cargo intended for shipment " are sufficient to do so. The respondents, on the other hand, say that the word " delay " refers to delay in loading a full and complete cargo, and not to delay in loading the cargo intended for shipment.

In my judgment, the submission of the respondents is the

[9] [1925] A.C. 799.

right one. On the true construction of the exceptions clause, the appellants would not be entitled to wait at Victoria until the strike was settled simply because they had declared that they intended to load timber there. The appellants were under no obligation to elect to load any particular cargo. They had a wide range from which to choose; and if they selected one particular cargo within the range from which to choose, there was nothing in the charterparty to prevent them from changing their minds and substituting another cargo if circumstances seemed to warrant it. The construction contended for by the appellants would mean that the effect of the clause is that the appellants, once having declared their intention of loading a particular cargo at a particular port, could insist on waiting to carry out that intention so long as one of the perils specified in the clause existed, in spite of the fact that their obligation under the charterparty could be discharged by loading other cargoes at other ports within the permitted range. That is not, in my judgment, the meaning of the clause, and I am in full agreement with the view expressed by Diplock J. I would, therefore, dismiss the appeal.

GORMAN J. (read by HODSON L.J.). This is a fixed time charterparty, not a reasonable time. This imposes on the charterers an absolute duty to load or discharge the cargo in the fixed time, subject to the exceptions clause. The charterparty was not a charterparty to load lumber. The charterers had the right to ship a cargo within a wide range. There was a selection of cargoes open to them. The selection of any one of the permitted cargoes did not, in my view, amount to an election in the sense in which the term is generally used. There was upon the charterers a correlative duty, in the absence of exceptions clauses, to load a full load out of the range of cargoes open to their selection. If the charterers cannot load the cargo which they have in mind, they must load another cargo within such range.

The words in the exceptions clause in the charterparty are: "Charterers shall not be responsible for any delay if the cargo "intended for shipment under this charterparty cannot be pro- "vided, delivered, loaded or discharged by reason of strikes." The delay referred to in the clause is the delay in the performance of the obligations for which the charterers would otherwise be liable, that is, the obligation to load a full cargo within the range of cargoes referred to in the charterparty. The conception introduced by the word "if" would seem to be that of causation—that is, that there shall not be responsibility for the delay to which I have referred caused by the fact that the cargo intended for shipment cannot be provided by reason of strikes.

In my view, the expression "intended for shipment" indicates that the charterers had decided, from the permitted range of cargoes, to load one of such cargoes. It is a cargo selected by the charterers out of such range.

In his judgment, Diplock J. considers the reason for the

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insertion of the words " the cargo intended for shipment under the " charterparty." I agree with the judge when he says [10] that it was " necessary to define the extent to which interference with " provision or loading should be brought within the clause, and " to define it very sensibly by limiting it to the cargo which it " was the intention of the charterer to load."

There is nothing in the expression " cargo intended for shipment " to permit the charterer to sit with his arms folded merely because, in a charterparty of this kind, one of the cargoes which happens to have been selected for shipment by the charterers cannot be provided or delivered by reason of a strike. In my view, the judge was correct in saying [11] that this expression was to give the charterer " a reasonable time to make " provision for other arrangements, when the arrangements he " had already made fell through because of the excepted perils." In my view, there is nothing in the exceptions clause to take away from the charterer the obligation to select something else from the permitted cargoes when the excepted peril arose. I do not agree with the contention advanced by Mr. Kerr that the charterer is entitled to adhere to the selection of cargo which he has made, and to rely upon the exceptions clause.

Appeal dismissed with costs.

Solicitors: *Botterell & Roche; Stokes & Mitcalfe.*

F. R. D.

[10] [1959] 1 Q.B. 238, 250. [11] Ibid.

[COURT OF CRIMINAL APPEAL.]

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Cassels, Donovan and Ashworth JJ.

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Jury—Coercion—Judge, by—Criminal law—Threat to jury to keep all night if no verdict within ten minutes—Effect.

Criminal Law—Accessory after the fact—Accessory to accessory—Charge of assisting principal felon—Assistance to accessory to principal felon—Whether indirect assistance to principal.

Criminal Law—Court of Criminal Appeal—Proviso to section 4 (1)*—Coercion of jury—Whether proviso applicable—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso.*

Criminal Law—Venire de novo—Coercion of jury—Whether trial nullity.

It is a cardinal principle of criminal law that, in considering their verdict, a jury should deliberate in complete freedom, uninfluenced by any promise and unintimidated by any threat; for they stand between the subject and the Crown and are one of the defences of personal liberty.

At the trial of three defendants, one of whom was charged with larceny, and the other two as accessories after the fact, the judge, after the jury had been considering their verdict for some two hours, ordered that they be brought back into court and said to them: "In ten minutes I shall leave this building and if, by that time, "you have not arrived at a conclusion in this case you will have "to be kept all night and we will resume this matter at quarter to "twelve tomorrow." The jury retired again and six minutes later brought in verdicts of Guilty. The evidence against all the defendants was cogent. On appeal, in which the prosecution, inter alia, invited the court to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907 [1]:—

Held, that the convictions must be quashed. It was of fundamental importance that in their deliberations a jury should be free to take such time as they felt they needed (subject to the right of the judge to discharge them if protracted consideration still produced disagreement) and, although the evidence was such that any jury would have been amply justified in finding the defendants guilty, it would not be right to apply the proviso to secton 4 (1); the principle at stake was of more importance than the case itself.

Held, further, that the trial was not a nullity in the true sense of the word; that, therefore, the court could not, as an alternative, order a venire de novo.

A person who, knowing of a felony, assists not the principal felon but an accessory after the fact, may indirectly assist the principal felon and can thereby be guilty of himself being an accessory after the fact in respect of the same felony.

APPEALS against conviction.

The appellants, Arthur William Busby, Charles Alexander McKenna and William James McKenna, were convicted at Nottingham Assizes before Stable J. on counts in an indictment charging Busby with the larceny of a number of television and radio sets and other electrical equipment from a motor-van, and of taking and driving away the van without the owner's consent in the county of Nottingham, and Charles and William McKenna with being accessories after the fact in that they knowingly received, comforted, harboured, assisted and maintained Busby and three other named persons.

The trial began on Monday, November 23, 1959, and at the outset the jury were informed that the court could not sit on the Wednesday afternoon, but would rise at one p.m. The court sat late on the Monday and Tuesday, and on the morning of Wednesday, November 25, the judge began his summing-up. At about mid-day he explained to the jury the procedural rules, telling them that once they had retired they could not separate until a verdict

[1] Criminal Appeal Act, 1907, s. 4 (1): "The Court of Criminal Appeal "... shall allow the appeal if they "think that ... the judgment of the "court before whom the appellant was "convicted should be set aside on "the ground of a wrong decision of "any question of law, or that on any "ground there was a miscarriage of "justice, ... Provided that the court "may, notwithstanding that they are "of opinion that the point raised in "the appeal might be decided in "favour of the appellant, dismiss the "appeal if they consider that no substantial miscarriage of justice has "actually occurred."

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had been arrived at, and said that he had to go to London by a certain train, which would mean that he would have to leave the court at about one p.m., and that if they felt that they could not arrive at a verdict before then, he could break off his summing-up and conclude it when he returned at 11.45 on the following morning. After discussion, the foreman of the jury informed the judge that they would require more than three-quarters of an hour to reach a verdict, whereupon the judge, having said that he would catch a later train, finished his summing-up. The jury retired at 12.20 p.m. At 2.20 they returned, asking the judge two questions: first, whether it was possible for William James McKenna to be an accessory after the fact by wittingly helping an accessory after the fact, to which the judge replied: "Yes"; and, secondly, whether, if they were convinced by the evidence that Busby was driving the van in the county of Cambridge, in what way could the indictment be altered, as to which the judge said that it could not be altered at all and that it charged two offences, one, taking an active part in stealing and taking the contents of the van, and the other, driving the van without the lawful authority or permission or knowledge of the owner.

The jury retired at 2.23 and returned to the court at 2.38, when the judge said: "I have disorganised my travel arrange-"ments out of consideration for you pretty considerably already. "I am not going to disorganise them any further. In ten minutes "I shall leave this building and if, by that time, you have not "arrived at a conclusion in this case you will have to be kept all "night and we will resume this matter at quarter to twelve "tomorrow. . . ." The jury retired again at 2.39 and at 2.45 returned, bringing in verdicts of Guilty.

All three appellants appealed on the ground that there was a substantial miscarriage of justice in that, contrary to the principles of the common law, the judge set a time limit within which the jury should return their verdict, threatening that otherwise they could not separate until the resumption of the court on the following morning. William McKenna also appealed on the ground of misdirection in that the judge told the jury that he could be an accessory after the fact to Charles McKenna if they convicted Charles McKenna of being an accessory after the fact to the principal felon, and that he could be an accessory after the fact to Busby even if he did not in fact receive, relieve, comfort or assist Busby.

The facts are more fully stated in the judgment.

J. J. Deave for the appellants William and Charles McKenna.
P. G. Hughes for the appellant Busby.
T. R. Fitzwalter Butler and *D. M. Cowley* for the prosecution.

The following cases were referred to in argument: *Rex* v.

Bushell [2]; *Rex* v. *Hartleigh* [3]; *Crane* v. *Director of Public Prosecutions* [4]; *Reg.* v. *Camborne Justices, Ex parte Pearce* [5]; and *Rex* v. *Neal*.[6]

Cur. adv. vult.

January 15. CASSELS J. read the following judgment of the court:

These three appellants were convicted at Nottinghamshire Assizes on November 25 last before Stable J. of the following offences: Busby of stealing 162 television sets, 120 pocket radio sets, 6 automatic record players, and other valuable electrical equipment from a Dennis motor-van in the County of Nottingham in May last; and also of taking and driving away the same van without the owner's consent. Charles and William McKenna of being accessories after the fact in respect of the same theft.

Busby, a man with a criminal record, was sentenced to three years' imprisonment for the theft, and to six months for taking and driving away the van, these sentences to run concurrently. Charles McKenna, who had a previous conviction in October, 1959, of being an accessory after the fact in respect of the theft of certain other television sets, for which he received a term of 18 months' imprisonment, was now sentenced to two years' imprisonment, the sentence to run as from Commission Day of the Assizes. William McKenna, who had only one minor previous conviction, was put on probation for three years.

All three now appeal to this court, Busby and Charles McKenna by leave of the court, and William McKenna with the certificate of the judge on a point of law peculiar to his case alone. This was whether a person who, knowing of the felony, assisted not the principal felon, but an accessory after the fact, could thereby be guilty of himself being an accessory after the fact in respect of the same felony. The judge ruled that he could, and we agree. Indeed, as a proposition of law this ruling was not seriously disputed before us. The argument addressed to us was that since William McKenna was charged in terms with assisting the principal felon, it would not be enough to justify a conviction that he should be found guilty of assisting an accessory only. But the jury by their verdict found William McKenna guilty of assisting the principal felons. He could do this indirectly by assisting an accessory after the fact to the same felony, and there was cogent evidence that he did so. If, therefore, there were no other ground of appeal in William McKenna's case, there would be no reason for interfering with the verdict.

There is, however, a further ground of appeal common to all

[2] (1670) 6 State Trials 999.
[3] (1908) 1 Cr.App.R. 17.
[4] [1921] 2 A.C. 299; 37 T.L.R. 788.
[5] [1954] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850.
[6] [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438; 33 Cr.App.R. 189.

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three appellants. In the case of Busby and Charles McKenna it is their only ground. It is this: that the judge, after the jury had been considering their verdict for over two hours, called them back into court and threatened to keep them together all night and until 11.45 a.m. the next day unless they arrived at a conclusion within the next ten minutes.

The judge's actual words, according to the transcript of the proceedings, were these: "I have disorganised my travel "arrangements out of consideration for you pretty considerably "already. I am not going to disorganise them any further. In "ten minutes I shall leave this building and if, by that time, "you have not arrived at a conclusion in this case you will have "to be kept all night and we will resume this matter at quarter "to twelve tomorrow. I do not know, and I am not entitled "to ask—and I shall not ask—why in a case which does not "involve any study of figures or documents you should require "all this time to talk about the matter. May I suggest to you "that you go back to your room, that you use your common "sense, and do not worry yourselves with legal quibbles. That is "what you are brought here for: to use your common sense, "bring a bit in from outside. There it is, members of the "jury." The jury thereupon retired again and came back into court six minutes later with verdicts of guilty on the charges above set out. It is now said on behalf of all three appellants that the ultimatum delivered by the judge was so improper that the convictions should be quashed.

In fairness to the judge the following facts should be mentioned: The trial began on Monday, November 23, and at the outset the jury were informed that the court could not sit on the Wednesday afternoon, but would rise at 1 p.m. The court sat until 5 p.m. on the Monday, and until 6.30 p.m. on the Tuesday. On Wednesday morning the judge commenced his summing-up, and at 12 noon he addressed the jury as follows: "Under the rules that govern our procedure, once a summing-up "is finished and the jury retire they cannot separate until the "verdict has been arrived at. If in the middle of a summing-up "a break is requested, the jury can go before the conclusion, and "come back and hear the conclusion of the summing-up the "next day or after the adjournment. The position is this, that "I am very much afraid that I have this engagement and I "cannot escape it. I have to get up to London by the 1.35 "train, which means I shall have to leave here about 10 past 1. "If you feel you cannot arrive at a verdict in this case before "then I can break off my summing-up at this stage. There "won't be very much to add, I can assure you, and you can "come back here tomorrow morning at 11.45 a.m., by which "time I shall have returned from London, and then I can "conclude the summing-up and you can retire and arrive at "your verdict. What I want to guard against is 1 o'clock "coming and you saying, 'We still have not arrived at our

" ' verdict,' in which case I would have to throw this engage- " ment over and it would be very inconvenient and would keep " you all locked up overnight." (The foreman of the jury:) " May " we discuss that, my Lord? " (Stable J.:) " I won't finish my " summing-up; we will have a little break."

The court thereupon adjourned for ten minutes, and upon the resumption at 12.15 p.m. the foreman of the jury informed the judge that the jury would require more than three-quarters of an hour to reach a verdict. This, of course, would mean that if the judge went on to conclude his summing-up, the court could not rise at 1 p.m. as had been arranged. Instead of accepting this position, and concluding his summing-up the next morning, the judge said: " I will catch the later train and I will " now run through the indictment again." Having done this, and finished his summing-up, the judge asked the jury to consider their verdict at 12.20 p.m. They thereupon retired, and were out for two hours. At 2.20 p.m. they returned, asking for guidance upon two questions, and this the judge gave. One question was whether by wittingly helping an accessory after the fact William McKenna could himself be an accessory after the fact, and the judge, as we have already stated, said: " Yes." The other was a question which seemed to indicate that the jury might be convinced that Busby took and drove away the Dennis van in Cambridgeshire but not in Nottinghamshire, as the count in the indictment alleged. They wanted to know if in these circumstances the indictment could be altered. If we may respectfully say so, the judge did not seem fully to grasp the point the jury were making. Otherwise he could have told them that they could say, if they so found, that Busby was guilty of taking and driving the van away in Cambridgeshire. Nothing, however, now turns upon this particular point and the answer which the judge in fact gave, except that the prosecution, very naturally, stresses the fact that the jury's question showed that they thought that Busby was guilty of this offence at any rate in the County of Cambridgeshire.

Having received answers to their two questions the jury retired again at 2.23 p.m. Fifteen minutes later they were apparently brought back into court by order of the judge, and he then delivered to them what has been called the ultimatum to reach a conclusion within the next ten minutes or be kept together all night. We think we ought to state that a jury is, in any event, never locked up in the jury room all night, but if necessary accommodated in an hotel. This jury may, very understandably, not have known this. After the threat (and we regret we can call it nothing else) that failing a conclusion in ten minutes they would be kept together till 11.45 the next morning, the jury arrived at a conclusion adverse to the appellants in six minutes.

It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the

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subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty. To say to such a tribunal in the course of its deliberations that it must reach a conclusion within ten minutes or else undergo hours of personal inconvenience and discomfort, is a disservice to the cause of justice. In this case the ultimatum no doubt fell with added force upon the jury since two of them were women. It may well be that having regard to the steps he had taken from the outset to ensure that the case should finish by mid-day on the third day, steps which included working beyond the normal hours on the Monday and the Tuesday, the judge was understandably irritated by the inconvenient slowness of the jury in reaching a verdict in what he thought was a plain straightforward case. But juries do at times take much longer than a judge may think necessary to arrive at a verdict; there are, after all, twelve of them who have to be unanimous, and the proper exercise of the judicial office requires that irritation on these occasions must be suppressed or, at any rate, kept severely in check. To experience it is understandable; to express it in the form of such a threat to the jury as was uttered here is insupportable.

What then, in these circumstances, should this court do? The prosecution asked originally that a distinction should be drawn between the cases of Busby and Charles McKenna on the one hand, and William McKenna on the other; and that if the judge's ultimatum to the jury were a grievous irregularity, William McKenna's conviction should be quashed, but the other convictions should stand. This was because, in the prosecution's view, the case against Busby and Charles McKenna was overwhelming, but not nearly so strong against William McKenna. Pressed by the court with the strength of the evidence against William McKenna the prosecution finally submitted that his conviction, too, ought in any event to be sustained. In other words, in the case of all three appellants the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied.

We subscribe to the view that the evidence against all three appellants was cogent to a degree. We also agree that it is possible that the jury had little doubt about the guilt, at any rate, of Busby and Charles McKenna. The difficulty, however, is that the opposite view cannot, with complete confidence, be excluded. They had put forward defences which though they may appear to a lawyer to be fanciful, at any rate had the effect that after two hours the jury still had not arrived at a unanimous verdict. At no stage did they say, as they could have done, that they were agreed in the case of some of the prisoners but still not agreed as regards another. And when they were told to reach a conclusion as regards all three prisoners within the next ten minutes or, in default, to remain together all night, it is, at

the very least, a reasonable inference that what their minds concentrated upon in these last ten minutes was not so much the evidence they had to consider, but the inconvenience and discomfort with which they had been threatened. This being so, the court does not think it right to resort to the proviso to section 4 (1). The prosecution also submits, as an alternative, that a venire de novo should be ordered, but this trial was not in the true sense of the word a nullity.

With regret, therefore, the court feels bound to quash these convictions. Although any jury would have been amply justified in finding all these appellants guilty of what was, by whomsoever committed, an extremely serious, well-planned crime, it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement. Plain though many juries may have thought this case, the principle at stake is more important than the case itself.

The appeals are accordingly allowed and the convictions quashed.

In the case of Charles McKenna this will not mean his discharge. He is still serving his sentence of 18 months' imprisonment on another case. In the case of Busby it does mean that he is discharged.

Appeals allowed.

Solicitors: *Registrar, Court of Criminal Appeal; R. A. Young & Pearce, Nottingham.*

J. F. L.

[HOUSE OF LORDS.]

HAMILTON . . . . . APPELLANT;

AND

NATIONAL COAL BOARD . . . . . RESPONDENTS.

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Nov. 25, 26; *Dec.* 15.

Mines and Minerals — Act of 1954 — *Breach of statutory duty — Machinery and equipment — "Shall be properly maintained" — Whether duty absolute — Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 22 (1), 25 (1), 152 — *Mines and Quarries Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 70), *s.* 81 (1).

Words and Phrases — "Properly maintained" — "Maintained."

Statute — Construction — Similar acts — Similar construction of words — Definition section in one Act only — Meaning of "maintained" — Factories Act, 1937, *ss.* 22 (1), 25 (1), 152 — *Mines and Quarries Act,* 1954, *s.* 81 (1).

By section 81 (1) of the Mines and Quarries Act, 1954: "All "parts and working gear, whether fixed or movable, including the

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* *Present:* VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

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" anchoring and fixing appliances, of all machinery and apparatus " used as, or forming, part of the equipment of a mine . . . shall be " properly maintained."

A miner sought damages for injury suffered in the course of his employment, alleging that his employers were in breach of the duty imposed by section 81 (1) of the Act. He averred that his hand had been injured through the absence of stells to anchor a hand-operated winch which had tipped forward and pinned it against a roof girder. He contended that the absence of stells, for whatever reason, constituted a breach of the statutory duty to maintain the winch properly, even though it was unexplained:—

Held, that the words " properly maintained " imposed on the mine owners an absolute and continuing obligation to keep the winch in a proper and efficient state, and did not merely impose on them the duty of properly servicing it (post, pp. 318, 321, 326, 331).

Per Lord Keith. If the apparatus collapsed suddenly from a latent defect which had not disclosed itself before the accident it might be said that it was being properly maintained (post, p. 326).

Smith v. *Cammell, Laird & Co. Ltd.* [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381; *Galashiels Gas Co. Ltd.* v. *Millar* [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319; *Latimer* v. *A. E. C. Ltd.* [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449 considered.

Decision of the Second Division of the Court of Session, 1959 S.L.T. 255 reversed.

APPEAL from the Second Division of the Court of Session.

The appellant, John Hamilton, claimed damages from the respondents, the National Coal Board, for injuries received by him in an accident which occurred in Whiterigg Colliery, East Lothian, on August 19, 1957. His occupation was that of a " ropeman " or " rope splicer," and it was part of his duties to tighten the haulage rope of the main haulage system in the colliery. The haulage was an endless rope haulage operated by an engine closer to the pit bottom end of the haulage. At the end of the haulage further from the pit bottom the haulage ran round a return wheel fitted to a bogie on the haulage rails. In order to tension the haulage, a hand-operated winch was provided by the respondents. This winch, as described by the appellant in his pleadings, consisted of a horizontal drum which was " set in " an open framework of steel which is ultimately bolted on to two " large steel beams of ' H ' cross-section which rest on the " pavement lying along the line of the road. The top of the " framework is about five feet from the ground and the top of it " is about one foot from the roof." The appellant further averred that at the time of the accident the winch was held in position against the weight of the haulage only by a single steel beam fitted across the road against the legs of the roof girders, the top of it, as he claimed, being about 18 inches above ground. It was also said that at the time of the accident the haulage rope led to the upper side of the drum. The averment of fact which formed the basis of the appellant's sole allegation of fault on the part of the respondents was in the following terms: " At the " time of the accident there were no stells set in position between

"the back end of the under-pinned beams and the roof." The appellant's averments were further to the effect that, while he was tightening the rope by using the winch, he placed his left hand on top of the raised part of the framework and that, on the haulage being started, the whole framework tipped forward, pinning his hand between the framework and a roof girder. He averred that the accident was caused by the respondents' failure to comply with a particular part of the provisions of section 81 (1) of the Mines and Quarries Act, 1954.

The Second Division of the Court of Session, upholding a decision of the Sheriff-Substitute of the Lothians and Peebles, dismissed the appellant's case.

Manuel Kissen Q.C. and *A. M. G. Russell* (both of the Scottish Bar) for the appellant.

J. O. M. Hunter Q.C. (of the English Bar, Q.C. of the Scottish Bar) and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the respondents.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Gledhill* v. *Liverpool Abattoir Utilities Co. Ltd.*[1]; and *Woods* v. *W. H. Rhodes & Son Ltd.*[2]

Their Lordships took time for consideration.

Dec. 15. VISCOUNT SIMONDS. My Lords, section 81 (1) of the Mines and Quarries Act, 1954, enacts that "All parts and "working gear, whether fixed or movable, including the anchoring "and fixing appliances, of all machinery and apparatus used as, "or forming, part of the equipment of a mine, . . . shall be of "good construction, suitable material, adequate strength and free "from patent defect, and shall be properly maintained." The only question on this appeal—and it is an important one—is what is the meaning of these last five words.

The appellant, a miner in the employment of the respondents at Whiterigg Colliery, East Lothian, in August, 1957, suffered an injury in the course of his employment. It was his duty to tighten a main haulage rope at the mine whenever it became slack. For that purpose there was provided by the respondents a hand-operated winch contained in a metal frame which rested on the ground but was not bolted to it. The appellant averred that as he was winding the winch he placed his hand on the frame to steady it, and that the whole winch suddenly tipped forward, pinning his left hand between the raised back portion of the framework and a roof girder. This, he averred, was due to the fact that there were no stells in position to steady the winch. Thus the respondents failed to maintain properly the winch,

[1] [1957] 1 W.L.R. 1028; [1957] 3 W.L.R. 117.

[2] [1953] 1 W.L.R. 1072; [1953] 2 All E.R. 658.

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which was part of their statutory duty. It mattered not that the absence of stells was unexplained: it might have been due to the act of a third party or to the development of a latent defect. Nevertheless, the respondents were in breach. If the stells were not there, the statutory obligation properly to maintain the winch had not been observed. This is what is sometimes called an absolute obligation.

My Lords, this view of the statutory obligation did not commend itself to the learned Sheriff-Substitute of the Lothians and Peebles nor to the majority of the Second Division of the Court of Session. The appellant's claim was dismissed; it was held that he had not made a relevant case that the equipment was not "properly maintained." It is clear that all turns on the meaning in their context of those two words.

My Lords, it is impossible to approach this case uninfluenced by previous decisions upon this and other Acts, and I find more assistance in the construction which has been put upon that simple word "maintain" in the context of machinery and works of all kinds, whether under the Factories Acts or the Mines Act or regulations made thereunder, than I do in the words which have been supposed to qualify or define that word. Therefore I go first to a case in this House, *Smith* v. *Cammell, Laird & Co. Ltd.*[1] There the question was as to the meaning of the word "main-"tain" in regulation 31 of the Shipbuilding Regulations, 1931, made under the Factory and Workshop Act, 1901. There was nothing in the context to expand or limit it except a statement of the object to which I refer later. It was held to impose an absolute obligation. I need cite only the words of Lord Russell of Killowen[2]: "The duty being, as I think it is, effectively cast "upon the respondents, is it an absolute duty, or can they "excuse themselves by saying that by competent inspection at "regular and frequent intervals they have done everything "possible to discharge their duty? I think the duty is an "absolute one: the wording is too strong to justify the milder "view. The words 'All staging shall . . . be maintained' point, "in my opinion, to an absolute and not a qualified obligation." The word "absolute" in this connection has become part of the dictionary of the law. Sometimes the word "continuing" is substituted for it. Either word means that, in effect, the employer warrants that the machine or other equipment which he is obliged to maintain will never be out of order. It is, no doubt, a difficult conception, but the employer has his refuge in the escape section of the relevant Act, so far as it applies.

I turn next to *Galashiels Gas Co. Ltd.* v. *Millar*.[3] For it is, I think, upon that case, or rather upon certain observations of the noble and learned Lords who took part in its decision, that the judgments in the Scottish courts have been largely founded

[1] [1940] A.C. 242; 56 T.L.R. 164; [1939] 4 All E.R. 381.
[2] [1940] A.C. 242, 263.
[3] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

and that the respondents now rely. In that case the question arose upon the Factories Act, 1937. The words "properly" "maintain" are contained in section 22 (1) of the Act, but, in addition, in section 152 (a definition section) "maintained" is defined as meaning "maintained in an efficient state, in efficient "working order and in good repair." I have read with great care, and more than once, the speeches in the House in that case, and I think that it is fair to say that the determining factor with at least the majority of their Lordships was the presence of the definition clause. Lord MacDermott, for instance, with whose speech, if I may respectfully say so, I have great sympathy, pointed out that the word "maintain" may be used to indicate the continuance of a particular state or in reference to the acts done to continue or perpetuate that state, and he was guided to the former interpretation by the definition. But though this may be so, it is another thing to say that in the absence of the definition they would have come to a different conclusion. Could they have adopted the second meaning suggested by Lord MacDermott, the "servicing" meaning as it has been called, consistently with the decision in *Smith's* case [4]? I find great difficulty in thinking that they could. In *Smith's* case [4] there was no definition clause, and I see nothing to differentiate it from the present case, except that here we have not a statement of the object for which the plant is required to be maintained but have the qualifying adverb "properly." This word was said by Lord Patrick to be quite inapposite to the former meaning, that is, the continuance of a certain state, and by Lord Mackintosh to be more appropriate to the latter. I cannot give the same weight to the word. If "maintained" simpliciter can properly refer to the continued state of the thing required to be maintained, I see no reason why "properly maintained" cannot make the same reference. Can it be anything more than a negligible indication of the one meaning or the other? It would not, I think, be wise in this area of legislation to found on such refinements of language. It is difficult to suppose that the legislature, knowing from *Smith's* case [4] what meaning must be attributed to the word "maintain" alone, thought to give it a different meaning by adding the word "properly."

I need refer to no other case than *Latimer* v. *A. E. C. Ltd.* [5] In that case section 25 (1) of the Factories Act, 1937, was under review. There again the definition section played its part, and again had its influence upon the decision of some of those who took no part in it. But it was otherwise with the late Lord Asquith of Bishopstone, who expressed the view (which, coming from such a source, I do not easily reject) that the same result should be reached without the definition clause. I need say no more about this case than that it provides neither binding nor persuasive authority for distinguishing cases in which "properly"

[4] [1940] A.C. 242.

[5] [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

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qualifies "maintain" from those where it does not, or cases where there is a definition clause from those where it is absent.

It is in deference to the careful examination of the whole Act by counsel that I make some observations upon it. It is undoubtedly the fact that the words "maintain" and "maintenance" are used on a great number of occasions in the Act and in the regulations made under it, sometimes with, sometimes without, qualification: sometimes followed by an expression of the object which is to be secured, sometimes without such a following. It is, no doubt, desirable that the same meaning should be given to the same word wherever it is used in a statute, though a long experience of statutes has left me with some scepticism upon that principle. So, too, it is reasonable that variations of language should be supposed to intend some difference of meaning. But I cannot find in the fact, that in one statute there is a definition clause and in another there is not, a sufficient reason for departing from a meaning that has already been given to the word that is defined unless the definition itself compels me to do so. Nor does the fact that the word "maintain" is followed, as in *Smith's* case,[6] by words indicating the object of maintaining, for example, to ensure the safety of the workman, make any difference. I should in any case assume in such a context that that was the object. I must conclude, therefore, by saying that, in my opinion, it would be right to follow the course laid out in *Smith's* case[6] and *Millar's* case,[7] and declare that the obligation under section 81 (1) of the Mines and Quarries Act, 1954, is absolute. I do not think that either of the conflicting principles of construction, the one resting on the penal consequences of failure to perform an obligation, the other on the basic purpose of the Act to protect the workman, can usefully be invoked.

The appeal should be allowed with costs here and below.

My noble and learned friend, LORD RADCLIFFE, who is unable to be here, has asked me to say that he concurs in my opinion.

LORD COHEN. My Lords, the question before your Lordships turns on the meaning to be given to the concluding words, "properly maintained," in subsection (1) of section 81 of the Mines and Quarries Act, 1954. That subsection is in the following terms: "All parts and working gear, whether fixed or movable, including the anchoring and fixing appliances, of all machinery and apparatus used as, or forming, part of the equipment of a mine, and all foundations in or to which any such appliances are anchored or fixed shall be of good construction, suitable material, adequate strength and free from patent defect, and shall be properly maintained."

This appeal comes before your Lordships on relevancy, and it is not disputed that if the pursuer is right in contending that the

[6] [1940] A.C. 242. [7] [1949] A.C. 275.

words "properly maintained" impose on the defenders an absolute and continuing obligation to keep the winch (the article of equipment in question in this case) in a proper and efficient state, the pursuer had averred a relevant case of the defenders being in breach of their statutory duty. On the other hand, if, as the defenders argue, these words merely impose on the defenders the duty of properly servicing the winch, the pursuer would not have stated a relevant case.

There appears to be no reported decision on the meaning of the words "properly maintained" where used in the Mines and Quarries Act, 1954, but very similar provisions in the Factories Act, 1937, have been the subject of judicial decision in your Lordships' House. In applying these decisions to the case now before your Lordships it has to be borne in mind that the Factories Act in section 152 contains a definition of the word "maintained" in the following terms: "'maintained' means "maintained in an efficient state, in efficient working order, and "in good repair," and that this definition is not repeated in the Mines and Quarries Act, 1954.

The first of such cases to which I shall refer is *Galashiels Gas Co. Ltd.* v. *Millar.*[7] In that case the question arose under section 22 (1) of the Factories Act, 1937, which provides that every hoist or lift shall be of good mechanical construction, sound material and adequate strength and be properly maintained. It was held that section 22 (1) imposed an absolute and continuing obligation, and that the respondent was entitled to recover even though, as the Lord Ordinary found, all reasonable steps had been taken to provide a suitable lift and to maintain it properly.

The wording of section 22 (1) is very similar to that of section 81 (1) of the Act now under consideration, but all their Lordships referred to the definition and based their decision on the combined effect of section 22 (1) and the definition. The speech of Lord Morton of Henryton is, I think, open to the construction that he might have reached the same conclusion without the definition, but it cannot be said to contain a dictum in favour of the pursuer in the present case. Lord MacDermott pointed out the two possible meanings of "maintain" to which I have referred, and added[8]: "My Lords, had the legislature "thought fit not to define 'maintained' Mr. Guest's submission "on this aspect of the case would have encountered less difficulty. "But when the terms of the definition are regarded the meaning "for which he has contended [that "maintained" means "serviced or looked after or attended to] is, in my opinion, at "once displaced." Mr. Hunter invited us to read Lord MacDermott's speech as indicating that without the definition Lord MacDermott would have accepted Mr. Guest's argument. I do not think this inference is justified. The most that can be said is that Lord MacDermott's neutrality to the argument was more benevolent than that of Lord Morton of Henryton.

[7] [1949] A.C. 275.

[8] Ibid. 287.

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The next case to which I wish to refer is *Latimer* v. *A. E. C. Ltd.*,[9] where the question arose as to the extent of the employers' duty under section 25 of the Factories Act to see that the floors were "of sound construction and properly maintained." The decision was in favour of the employers on the ground that even though in view of the definition in section 152 the obligation must be regarded as absolute it did not apply, to use the language of Lord Porter,[10] "to a transient and exceptional condition." Two of their Lordships in the course of their judgments made some observations as to what the extent of the obligation under section 25 would have been in the absence of the definition. Lord Porter said[11]: "Section 25, were it not for the definition, would "seem merely to provide for sound construction and a proper "state of repair." Lord Asquith of Bishopstone said of the words in section 25[12]: "If these words stood alone and there "were no definition of the word 'maintain' in the statute, for "myself I should be in little doubt as to their interpretation. I "should take them to mean that at the time of its construction or "installation the floor should possess the structural qualities "which a floor ought to possess . . . and that from that time on "the owner of the factory should keep up, prolong or perpetuate "that structural condition." My Lords, I find myself more in agreement with Lord Asquith than with Lord Porter, but before stating my conclusion I would refer to one other decision of this House—*Smith* v. *Cammell, Laird & Co. Ltd.*[13]

In that case the statutory provision in question was contained in the Shipbuilding Regulations, 1931, made under section 79 of the Factory and Workshop Act, 1901, the material provision being as follows: "All staging shall (i) be securely constructed of sound "and substantial material and shall be maintained in such con-"dition as to ensure the safety of all persons employed; (ii) be "inspected at regular and frequent intervals by a competent "person." The appellant had been injured as a result of a defect in the staging and their Lordships held that he was entitled to recover damages on the footing that the obligation imposed by the regulation was an absolute one. Neither the Act nor the regulations contained a definition of "maintained" corresponding to that in section 152 of the Factories Act, 1937, but the regulation did contain a particular direction "to ensure the safety of all "persons employed." Their Lordships do not, however, appear to have placed much reliance on those words in arriving at their conclusion that the duty was absolute. I would refer in particular to passages in the judgments of Lord Atkin, Lord Russell of Killowen and Lord Wright. Lord Atkin[14] asks the question whether the duty imposed by the regulation is absolute, and continues: "or is it to be construed as limited to a duty to take "reasonable care to maintain? . . . I can see no reason

[9] [1953] A.C. 643.
[10] Ibid. 654.
[11] Ibid. 653.
[12] Ibid. 660.
[13] [1940] A.C. 242.
[14] Ibid. 258.

" for not giving the words their ordinary meaning; indeed, " so far as I can see, all the judges in the courts below were of " opinion that upon whomsoever the duty lay there was in fact " a breach. The absolute duty in respect of acts and forbearances " imposed by statutes for the protection of workmen is by this " time a well-known feature of this class of legislation. It is to " be found passim in such Acts as the Coal Mines Acts, and in " the Factory Acts themselves." Lord Russell of Killowen [15] poses the same question and answers it by saying: " I think the " duty is an absolute one; the wording is too strong to justify " the milder view. The words ' all staging shall . . . be main- " ' tained ' point, in my opinion, to an absolute and not a " qualified obligation." Lord Wright says [16]: " The liabilities " imposed by the Factory Act " [in that case the Act of 1901] " . . . create a duty being intended to secure the health and safety " of the workpeople. They are absolute and do not depend on " negligence."

My Lords, the passages I have cited from the judgments in *Smith* v. *Cammell, Laird & Co. Ltd.*[17] lead me to the conclusion that unless there is something in the context to exclude such a construction, a direction such as is found in section 81 (1), contained in an Act, one manifest purpose of which is the protection of workmen, imposes an absolute obligation and not a mere duty to take reasonable care.

Mr. Hunter raised two other points to which I should briefly refer. First, he said that the omission of the definition was a strong point in his favour. I should prefer to adopt the language of Lord MacDermott and say that it merely removes one difficulty from his way. For the reasons I have given I think that even without the definition the word " maintained " in section 81 (1) imposes an absolute obligation.

Secondly, he relied on the word " properly," saying that if Lord Asquith's contention of a similar provision in *Latimer* v. *A. E. C. Ltd.*[18] were correct, the word " so " should be substituted for the word " properly," and he argued that if section 81 (1) imposes an absolute obligation no meaning can be given to the word " properly." It may be that " so " would have been better English, but " properly " makes quite good sense on either construction, and, like Lord Reid (see *Latimer's* case [19]), I see little difference between maintaining a floor or a piece of equipment " properly " and maintaining it " in an efficient state " as required by the definition.

In the result, I find myself in agreement with the reasoning of the Lord Justice-Clerk in the Inner House and I would allow the appeal.

[15] [1940] A.C. 242, 263.
[16] Ibid. 264.
[17] Ibid. 242.
[18] [1953] A.C. 643.
[19] Ibid. 658.

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LORD KEITH OF AVONHOLM. My Lords, the appellant is pursuer in an action of damages brought in the Sheriff Court at Edinburgh against the National Coal Board in respect of injuries received while in their employment in Whiterigg Colliery. The action is based solely on alleged breach of statutory obligation. The Sheriff-Substitute dismissed the action as irrelevant and the Second Division of the Court of Session (the Lord Justice-Clerk dissenting) have refused an appeal against his interlocutor. Against this judgment an appeal has been taken to this House. As the judgments proceeded solely on construction of the statutory obligation in question, it is unnecessary to set out the pursuer's averments further than is necessary to understand the point in issue.

The pursuer avers that while he was operating a winch in a haulage way in the defenders' colliery the winch tipped forward, pinning the pursuer's hand between part of the framework of the winch and a roof girder. The pursuer says this was owing to the absence of stells, or supports, which would have kept the winch in position. The statutory obligation on which he relies is contained in section 81 of the Mines and Quarries Act, 1954, subsection (1) of which is as follows: [His Lordship read the subsection and continued:] The pursuer avers that his accident was caused by the defenders' breach of this statutory duty. The averment proceeds: "The said winch formed part of the equipment "of the said mine at the said colliery. It was accordingly the "defenders' duty to maintain the said winch properly, and in "performance of the said duty to maintain the said winch "securely with stells fitted between the back end of the under-"pinned beams and the roof. In this duty they failed and so "caused the accident. At the time of the accident there were no "stells set in position between the back end of the under-pinned "beams and the roof. But for the defenders' failure in their "statutory duty the accident would not have occurred."

The pursuer would read the words "shall be properly main-"tained" as imposing a continuous obligation to have the equipment at all times conform to the standards previously laid down by the subsection. With reference to the winch this means, he says, to have it at all times in proper and efficient working order. The defenders, on the other hand, would read the words as imposing an obligation merely to attend to, or look after the equipment, an obligation which, with reference to the winch, would cover repairing or servicing it when necessary. This is the issue between the parties. The alternative constructions are very fully and clearly dealt with and developed by the learned Sheriff-Substitute and by their Lordships of the Second Division. The Sheriff-Substitute, and on appeal Lords Patrick and Mackintosh, upheld the defenders' construction. The Lord Justice-Clerk upheld the pursuer's construction. The language used to express the conflicting views may be said to stem from observations and illustrations by Lord MacDermott in this House in *Galashiels*

Gas Co. Ltd. v. *Millar*,[20] a case decided under the Factories Act, 1937, a closely analogous statute, with, however, at least one not unimportant difference, which I shall have to deal with later.

"Maintain" may be a word of ambiguous import but ambiguity may disappear in the context in which the word is used. Looking to what is one, if not the main, object of this legislation, namely, to safeguard the workman in the performance of his duties, and having regard to the context in which the words "shall be properly maintained" appear in section 81, I think they should be construed as meaning to keep in proper order by acts of maintenance before the thing to be maintained falls out of condition. To construe the words as covering the restoration of the thing to be maintained to a proper condition by acts of maintenance after it has fallen out of condition would greatly lessen the protection afforded to the workman. Further, the employer is under an absolute obligation of sufficiency in respect of the provision of the things to be properly maintained, and keeping them in that condition is but a continuation of his initial obligation.

A point that moved both Lord Patrick and Lord Mackintosh was that to give effect to the pursuer's contention the section should have run "and shall be so maintained." But that might be too restrictive. I can conceive of cases where machinery might answer the primary requirements desiderated by the statute and yet, by lack of proper attention, might be in a dangerous or unsafe condition. That is a possibility which the legislature may have thought it wise to anticipate. The fact that section 81 (2) provides for regulations for, inter alia, maintenance of machinery or apparatus in no way detracts from this view. The subsection is expressed to be in addition to subsection (1) and covers construction and installation as well as other things.

To read the statute as imposing an obligation merely to attend to, repair, or service would, I think, introduce difficulties, if that meant something more than the common law duty to take reasonable care to keep the machinery, etc., in safe condition. How much more care and what kind of care? If, on the other hand, it adds nothing to the common law duty of reasonable care, the question arises why Parliament should trouble to tack on an existing common law obligation to a number of specific absolute statutory obligations. To do so would be out of line with the general policy of this type of legislation. There was no need to make maintenance a statutory obligation in order to exclude the defence of common employment, for that had disappeared by the time the Act was passed. Lastly, such a limitation of the words "shall be properly maintained" would be out of line with similar legislation in which the safety of workmen is, one cannot say less, but certainly no more important than that of workers in mines and quarries. Factory legislation is a case in point. True, there

[20] [1949] A.C. 275.

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was a definition of "maintained" in the Factories Act, 1937, as meaning "maintained in an efficient state, in efficient working "order and in good repair," which is absent from the Mines and Quarries Act, a fact much relied on by the judges of the majority in the Court of Session and by the learned Sheriff-Substitute. But too much importance can, I think, be attached to this difference between the two Acts.

There is a close correspondence between many of the safety provisions of the Factory Acts and those of the Mines and Quarries Act. The expressions "shall be maintained" and "shall be properly maintained" occur repeatedly in numerous sections in both Acts. To illustrate, the provisions in section 22 of the Factories Act, 1937, with reference to hoists and lifts, and in section 24 with reference to all parts and working gear, including anchoring and fixing appliances, of every lifting machine, are closely comparable with section 81 of the Mines and Quarries Act here in question, and with other sections such as section 28, which provides that winding and haulage apparatus shall be properly maintained. It is difficult to see why in comparable circumstances, where the peril to the workman in life or limb from a breakdown of lifting or haulage apparatus is no less in one case than the other, the respective Acts should call for a different construction of the words "and shall be properly maintained."

The judicial outlook on cases of this kind has frequently been emphasised. In *Smith* v. *Cammell, Laird & Co. Ltd.*[21] the statutory regulation was: "All staging shall (i) be securely "constructed of sound and substantial material and shall be "maintained in such condition as to ensure the safety of all "persons employed; (ii) be inspected at regular and frequent "intervals by a competent person." The facts are not material. I cite the case only for the observations made on the nature and effect of the obligation. There was no definition of "maintained" in the Factory and Workshop Act, 1901, under which the regulations were made, or in the regulations. The regulation, it will be observed, states the purpose for which all staging had to be maintained, namely, to ensure the safety of all persons employed, but that may indeed be taken generally to be the purpose of obligations imposed on employers under the Factories and Mines Acts, and no particular emphasis was placed upon that express purpose in the speeches in this House. Lord Atkin poses these questions with reference to the occupiers of the staging[22]: ". . . is the duty so imposed an absolute one?: or is it to be "construed as limited to a duty to take reasonable care to main- "tain?: or to maintain only while they are themselves using the "staging?" For present purposes this last question may be ignored. Lord Atkin proceeded: "The absolute duty in respect "of acts and forbearances imposed by statutes for the protection "of workmen is by this time a well-known feature of this class of

[21] [1940] A.C. 242. [22] Ibid. 258.

" legislation. It is to be found passim in such Acts as the Coal " Mines Acts, and in the Factory Acts themselves. A striking " example, as was pointed out by Mr. Shawcross in his powerful " reply, is to be found in the obligation to fence dangerous " machinery which in the Act of 1901 is to be found in section 10. " It is precisely in the absolute obligation imposed by statute to " perform or forbear from performing a specified activity that a " breach of statutory duty differs from the obligation imposed by " common law, which is to take reasonable care to avoid injuring " another." Lord Russell of Killowen said [23]: " The duty being, " as I think it is, effectively cast upon the respondents, is it an " absolute duty, or can they excuse themselves by saying that " by competent inspection at regular and frequent intervals they " have done everything possible to discharge their duty? I think " the duty is an absolute one: the wording is too strong to justify " the milder view. The words ' All staging shall . . . be main- " ' tained ' point, in my opinion, to an absolute and not a qualified " obligation." Lord Wright, with reference to liabilities generally, imposed by the Factory Act, said [24]: " They are absolute and " do not depend on negligence."

Most of the cases to which your Lordships have been referred were cases under the Factories Acts, 1937 and 1948, which contain the definition of " maintained," and when the question of the meaning of " shall be properly maintained " or similar expressions arose the definition was naturally relied on both in argument and judgment. But on occasions some of their Lordships in this House have ventured on observations on the meaning of these words apart from the definition. In *Latimer* v. *A. E. C. Ltd.*[25] Lord Asquith of Bishopstone, with reference to section 25 of the Act of 1937 requiring that " All floors . . . shall be of sound " construction and properly maintained," said: " If these words " stood alone and there were no definition of the word ' maintain ' " in the statute, for myself I should be in little doubt as to their " interpretation. I should take them to mean that at the time of " its construction or installation the floor should possess the " structural qualities which a floor ought to possess—e.g., a level " surface and sufficient strength to bear the stresses to which it is " liable to be subjected—and that from that time on the owner " of the factory should keep up, prolong or perpetuate that struc- " tural condition." Lord Reid in the same case said [26]: " ' Maintained ' is the dominant word throughout and that throws " one back to what is meant by maintaining a floor. I see little " difference between maintaining a floor ' properly,' as required " by section 25 and maintaining it ' in an efficient state ' as " required by the definition."

The case of *Galashiels Gas Co. Ltd.* v. *Millar* [27] was much relied on by the respondents, as proceeding on the definition of

[23] [1940] A.C. 242, 263.
[24] Ibid. 264.
[25] [1953] A.C. 643, 660.
[26] Ibid. 658.
[27] [1949] A.C. 275.

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"maintained" in the Factories Act. That, I think, was clearly so. It was a factor in the case which could not be overlooked. But when one finds such a striking similarity, if not identity, of language used in two statutes having the same general purpose, to protect the workmen in occupations involving the same types of risk, the conclusion, in my opinion, should be, if the matter is in doubt, that Parliament intended them to have the same meaning, unless some compelling reason in the structure of the particular enactment or context of the prohibition or obligation requires an opposite construction.

In this case I would read the words "and shall be properly "maintained" in section 81 (1) of the Act of 1954 as imposing an absolute obligation to keep the equipment in question at all times in a sound state of repair and fit for use. I would make one reservation. This obligation may not involve a higher measure of obligation than would be involved in the initial obligation of providing the parts of the machinery and apparatus referred to in the section. I say this is in view of some observations by Lord Patrick in the Court of Session on the development of latent defects. If a latent defect developed so that it became patent it may be said that the apparatus was not being properly maintained so long as the defect continued to be patent. If the apparatus collapsed suddenly from a latent defect which had never disclosed itself before the accident the position might be otherwise. I consider it unnecessary to express any opinion on the implications arising from the reference to "free from patent defect" in section 81 (1) of the Act of 1954. The matter may come up for consideration in some other case. The section of the Factories Act under consideration in the *Galashiels Gas Co's* case [27] contained no reference to patent defect, though such a reference does exist in some other sections of the Factories Act and was considered in one case in the Outer House by Lord Wheatley in *M'Neil* v. *Dickson & Mann Ltd.*[28]

In my opinion, the Lord Justice-Clerk came to the right conclusion on the construction of the statute, and I would allow the appeal.

LORD JENKINS. My Lords, I agree. This case turns wholly upon the meaning of the words "properly maintained" in section 81 (1) of the Mines and Quarries Act, 1954. [His Lordship read the subsection and continued:]

The question is whether the injunction that the machinery and apparatus to which this provision relates "shall be properly "maintained" means, as the appellant workman contends, that it shall be kept in a state of good repair and safe condition, or, as so far successfully contended by the respondent board, means that it shall be properly serviced and looked after. The former view imports a continuing and unqualified obligation as to the state

[27] [1949] A.C. 275. [28] 1957 S.C. 345.

of the machinery or apparatus which is broken whenever it is not in fact in good repair and safe condition, no matter from what cause; while the latter view imports an obligation to look after and "service" the machinery or apparatus, to establish a breach of which obligation it is necessary to prove not merely that the machinery or apparatus is not in fact in good repair and safe condition, but that its defective state is due to something done or omitted in the performance of the duty of servicing and looking after it.

Requirements as to the maintenance of plant, machinery and so forth expressed in injunctions that the things in question shall be properly maintained, or in comparable terms, were and had for many years been current in cognate protective legislation at the time when the Act of 1954 became law.

Thus, by section 10 (1) (*d*) of the Factory and Workshop Act, 1901, it was provided that the fencing of dangerous parts of machinery "must be constantly maintained in an efficient state "while the parts required to be fenced are in motion," and section 11 of the same Act relating to steam boilers required (by subsection (2)) that "every such boiler . . . must be maintained "in proper condition."

Passing to the Factories Act, 1937, one finds that by section 16 "All fencing or other safeguards provided in pursuance of the "foregoing provisions of this Part of this Act shall be . . . con- "stantly maintained . . . while the parts required to be fenced or "safeguarded are in motion or in use . . ."

Section 22 (1) of the Act of 1937 provides: "Every hoist or "lift shall be of good mechanical construction, sound material "and adequate strength, and be properly maintained."

Section 24 of the Act of 1937 provides (by subsection (1)) that "All parts and working gear . . . of every lifting machine shall be "of good construction, sound material, adequate strength and "free from patent defect, and shall be properly maintained." It will be seen that the requirements here with respect to cranes and lifts are identical with those in section 81 (1) of the Act of 1954 with respect to machinery and apparatus, except that section 81 (1) has "suitable material" whereas section 24 (1) of the Act of 1937 has "sound material."

Section 25 of the Act of 1937 provides (by subsection (1)): "All floors, . . . shall be of sound construction and properly "maintained," and (by subsection (4)): "All ladders shall be "soundly constructed and properly maintained."

Subsection (1) of section 152 of the Act of 1937 defines "maintained" as meaning "maintained in an efficient state, in "efficient working order, and in good repair." The Act of 1954 contains no such definition.

It appears that there has been no previous decision on the meaning of the words "properly maintained" in section 81 (1) or elsewhere in the Act of 1954, which contains many other

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instances of the use of the word "maintained" in conjunction with the word "properly" or otherwise.

There are, however, several cases in which the meaning of the words "properly maintained" in the various provisions of the Act of 1937 to which I have alluded have been considered. These cases, which include the case in your Lordships' House of *Galashiels Gas. Co. Ltd.* v. *Millar*,[29] all accept the meaning of the words "properly maintained" contended for by the appellant in the present case, that is to say, they hold (in effect) that the injunction in the particular provision that the thing in question "shall be properly maintained" imposes an absolute and continuing obligation to keep it in a state of good repair and safe condition.

Were it not for the presence in the Act of 1937 of the definition of the word "maintained" quoted above, which has no counterpart in the Act of 1954, I would have no hesitation in regarding the case of *Galashiels Gas. Co. Ltd.* v. *Millar*[29] as sufficient to conclude the present question in the appellant's favour. The process of construing one statute by reference to another, and treating decisions on the meaning of the latter as determining the construction of the former is a process which should be applied with caution. But in the present case the language, the subject-matter and the intent of (for example) section 24 (1) of the Act of 1937 and section 81 (1) of the Act of 1954 are so closely allied that (apart from the ground of distinction afforded by the omission from the Act of 1954 of the definition contained in the Act of 1937, whatever it may be worth) it would, to my mind, be clearly wrong to give the words "properly maintained" in section 81 (1) a different meaning from that which has been authoritatively assigned to precisely the same words in comparable provisions of the Act of 1937. I confess I would not willingly attribute this to my mind untoward effect to the absence from the Act of 1954 of the definition in the Act of 1937. It would, as I think, be manifestly absurd if the same statutory language applied to two precisely similar machines with precisely similar defects contracted in precisely similar circumstances should give rise to a breach of statutory duty with respect to one of them, but not with respect to the other, merely because the locus in quo was in the one case a mine and the other a factory.

Turning now to the authorities, I should begin with a reference to *Smith* v. *Cammell, Laird & Co. Ltd.*,[30] where it was held that the requirement of regulation 11 (*b*) in Part II of the Shipbuilding Regulations, 1931, that "All staging shall (i) be securely con-"structed . . . and shall be maintained in such condition as to "ensure the safety of all persons employed" imposed an absolute statutory obligation. Lord Atkin said this[31]: "If then the duty "is imposed upon the only occupiers of this shipbuilding yard, "the respondents, is the duty so imposed an absolute one?: or

[29] [1949] A.C. 275.
[30] [1940] A.C. 242.
[31] Ibid. 258.

" is it to be construed as limited to a duty to take reasonable care to " maintain?: or to maintain only while they are themselves using " the staging? I can see no reason for not giving the words their " ordinary meaning; indeed, so far as I can see, all the judges " in the courts below were of opinion that upon whomsoever the " duty lay there was in fact a breach. The absolute duty in " respect of acts and forbearances imposed by statutes for the " protection of workmen is by this time a well-known feature of " this class of legislation. It is to be found passim in such Acts " as the Coal Mines Acts, and in the Factory Acts themselves. " A striking example, as was pointed out by Mr. Shawcross in " his powerful reply, is to be found in the obligation to fence " dangerous machinery which in the Act of 1901 is to be found in " section 10."

The language of the requirement in that case was, of course, different from the language of section 81 (1) of the Act of 1954 which your Lordships now have to construe; but the passage I have quoted is useful for its recognition of the well-settled principle that in protective legislation such as the Acts of 1937 and 1954, a requirement in unqualified terms that a given thing shall or shall not be done, or that a given state of affairs shall be produced, preserved or prevented, imposes an absolute statutory obligation to do or forbear from doing the act in question, or to produce, preserve or prevent the state of affairs in question. The statute may, of course, use language modifying this result, but if it does not, qualifying words such as " so far as practic- " able " are not to be read into it. In this connection I would also refer to the case in your Lordships' House of *John Summers & Sons Ltd.* v. *Frost*,[32] and, in particular, to the observations of my noble and learned friend, Lord Simonds.[33]

Reference should next be made to the case of *Cole* v. *Blackstone & Co. Ltd.*,[34] where an accident happened through the breaking of a rung of a ladder, and the question was whether the ladder had been properly maintained, as required by section 25 (4) of the Act of 1937, and Macnaghten J. held that it had not, and that the obligation imposed by section 25 (4) was absolute. It is clear, however, that the learned judge proceeded wholly on the ground that section 25 (4), read in conjunction with the definition, required the ladder to be maintained " in an efficient state " and " in good repair," and expressed no view as to the effect which the words " properly maintained " might have had apart from the definition.

I may next refer to the *Galashiels Gas Co. Ltd.'s* case.[35] That case concerned a claim under section 22 (1) of the Act of 1937 in respect of the failure of a lift, and their Lordships reached a similar conclusion to that of Macnaghten J. in *Cole* v. *Blackstone*,[36] which was cited with approval. Their Lordships, as of

[32] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.
[33] [1955] A.C. 740, 751 et seq.
[34] [1943] K.B. 615; 59 T.L.R. 374.
[35] [1949] A.C. 275.
[36] [1943] K.B. 615.

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course was to be expected, decided the case on the nature and extent of the duty imposed by the words "properly maintained," as explained by the definition, and it was not necessary for them to consider what the position might have been if the definition had not been there. But looking at the judgments as a whole I find nothing to indicate that they might not have reached the same conclusion if no definition of "properly maintained" had been given in the Act of 1937, though I hasten to add that I do not hazard the opinion that they would necessarily have done so.

The competing views as to the construction of the words "properly maintained" (of course, in that case read in conjunction with the definition) are well described in this passage from the judgment of Lord MacDermott[37]: "My Lords, the word "'maintain' when used in relation to the state or condition of "things is not always used in the same sense. It may be used to "indicate the continuance of a particular state or condition, as "when one says of someone that 'he maintains his buildings just "'as they were.' But on occasion it takes colour from the work "of maintenance and is used in reference to the acts done or "requisite to be done in the course of maintenance, as when one "says of another that 'he maintains his buildings methodically.' "This latter use gives the word 'maintained' in relation to "machinery rather the meaning of 'serviced' or 'looked after' "or 'attended to'—I doubt if there is an exact synonym—and "it was in this sense, according to the appellants' argument, that "the word ought to be read in section 22 (1). If that argument "prevails the appeal should succeed, as the Lord Ordinary has "found that the appellants took 'every practical step to ensure "'that the lift mechanism worked properly and was safe to use,' "and, again, that 'the failure of the brake was one which, "'apparently, nobody could have anticipated or, after the event, "'explain.' My Lords, had the legislature thought fit not to "define 'maintain' Mr. Guest's submission on this aspect of "the case would have encountered less difficulty." It may be noted that Lord MacDermott does not say that apart from the definition Mr. Guest's argument would have succeeded, but only that it would have encountered less difficulty.

The only other case to which I can usefully refer is the case in your Lordships' House of *Latimer* v. *A. E. C. Ltd.*[38] In that case the floors of a factory became covered with flood water mixed with oil by which they were made slippery, and a workman who had slipped on one of these floors and injured his ankle sued his employers for breach of their statutory duty under section 25 (1) of the Act of 1937, and their Lordships, reading section 25 (1) in conjunction with the definition of "maintained" in section 152 (1), held that the employers were not in breach of section 25 (1) by reason of the presence of the oily flood water on the floor which, apart from the fortuitous incursion of this source of danger, was soundly constructed and in an efficient state. My noble and

[37] [1949] A.C. 278, 286–287. [38] [1953] A.C. 643.

learned friend, Lord Reid, observed [39]: "But I do not think that "there is really any ambiguity here. The requirement of the "definition is not that the floor shall be in an efficient state; it is "that the floor shall be maintained in an efficient state. 'Main-"'tained' is the dominant word throughout and that throws one "back to what is meant by maintaining a floor. I see little "difference between maintaining a floor 'properly,' as required "by section 25, and maintaining it 'in an efficient state' as "required by the definition. I have already said that I do not "think that maintaining a floor includes keeping dangerous things "away from it." Lord Asquith of Bishopstone, after reading section 25 (1) of the Act of 1937, observed [40]: "If these words "stood alone and there were no definition of the word 'maintain' "in the statute, for myself I should be in little doubt as to their "interpretation. I should take them to mean that at the time "of its construction or installation the floor should possess the "structural qualities which a floor ought to possess—e.g., a level "surface and sufficient strength to bear the stresses to which it "is liable to be subjected—and that from that time on the owner "of the factory should keep up, prolong or perpetuate that "structural condition."

In this state of the authorities, it is clear that the presence in the Act of 1937 and absence from the Act of 1954 of the definition of the word "maintained" prevents the *Galashiels Gas Co. Ltd's* case [41] from amounting to a decision on the meaning of the words "properly maintained" simpliciter, by which your Lordships should consider yourselves bound to decide the present case in the appellant's favour, and the matter is to that extent at large.

It is therefore necessary to consider de novo but with due regard to their legislative history what meaning should be attributed to the words "properly maintained" in section 81 (1) of the Act of 1954, bearing in mind that the manifest object of that subsection is to protect workmen from being injured by defective plant.

The question is not capable of any great elaboration. In my view, the primary meaning as ordinary English words of the words "properly maintained" when applied to machinery is "to keep "up or preserve in a proper state." It is true that the word "maintain" is sometimes used in relation to machinery, apparatus, etc., to denote the performance upon it of acts of maintenance, that is to say, acts calculated to keep it up or preserve it, but I would regard this as a secondary meaning. As for the expression "servicing" which has been used to describe the latter meaning of the word "maintain," I take it to be a neologism.

Such being, in my view, the prima facie meaning of the words "properly maintained," I may legitimately test it by reference to the use of these words in earlier enactments dealing with

[39] [1953] A.C. 643, 657–658.
[40] Ibid. 660.
[41] [1949] A.C. 275.

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comparable subject-matter. Turning again to the Act of 1901, I find that under section 10 (1) (*d*) "All fencing must be constantly "maintained in an efficient state," and that under section 11 (2) "every such boiler . . . must be maintained in proper condition." In both these instances the word "maintain" is, I think, clearly used in the sense of kept up, kept or preserved. Moreover, I find it difficult to distinguish between the "maintained in proper "condition" of section 11 (2) of the Act of 1901, and the "properly maintained" of section 81 (1) of the Act of 1954. I would here call in aid the observation of Lord Reid in *Latimer* v. *A. E. C. Ltd.*,[42] to which I have already alluded, with respect to section 25 of the Act of 1937: "I see little difference," said Lord Reid,[43] "between maintaining a floor 'properly' as required by "section 25 and maintaining it 'in an efficient state' as required "by the definition." I would also refer again to the observations of Lord Asquith in the same case[44] regarding the meaning of the word "maintained."

There is no doubt that the board's construction of the words "properly maintained" in section 81 (1) would make the protection from injury due to defective plant which the subsection is designed to provide for workmen substantially less effective than it would be on the construction contended for by the appellant. That is always a relevant consideration in cases of this kind, though anxiety to make the protection of the workmen effective should not be allowed to strain against the employer the provisions of a penal enactment (see *per* Lord Porter in *Latimer* v. *A. E. C. Ltd.*[45]).

I have found it impossible to formulate with any degree of certainty or precision the nature and scope of the duty laid upon the respondent board on the construction of the words "properly "maintained," for which they contend; and this surely is in itself a reason for preferring the other construction.

I have already expressed my reluctance to adopt, unless constrained to do so, a construction of section 81 (1) which would make the duty under that subsection different from the duty under the closely comparable provisions of the Act of 1937. In this connection it should be borne in mind that the question whether given premises fall within the category of mines or within that of factories, or partly in one and partly in the other, may well be the subject of considerable doubt and difficulty.

Other things being equal, I think a construction which produces uniformity between the two enactments is clearly to be preferred to a construction which produces anomalies between them. Whatever the intention of the legislature may have been when the definition of "maintained" was omitted from the Act of 1954, it was surely never intended to set it at variance with the Act of 1937.

[42] [1953] A.C. 643, 657–658.
[43] Ibid. 658.
[44] Ibid. 660.
[45] Ibid. 654.

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I am reluctant to differ from the carefully reasoned opinions of the Sheriff-Substitute and Lords Patrick and Mackintosh, but, having considered them with care, I have formed a decided preference for the opinion of the Lord Justice-Clerk, whose views, as therein expressed, substantially accord with my own.

For these reasons I would allow this appeal.

Appeal allowed.

Solicitors: *O. H. Parsons for Simpson & Marwick W.S., Edinburgh; D. H. Haslam for G. F. Grosset.*

F. C.

[COURT OF CRIMINAL APPEAL.]

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Dec. 16, 21.
Lord Parker C.J., Hilbery, Cassels, Salmon and Edmund Davies JJ.
Dec. 18.
Hilbery, Gorman and Paull JJ.

Criminal Law—Fraud—Intent to defraud—Forgery—Uttering forged documents with intent to defraud—Whether economic loss necessary —Forgery Act, 1913 (3 & 4 *Geo.* 5, *c.* 27), *s.* 4 (1).

Criminal Law—Court of Criminal Appeal—Bail—Appeal dismissed—Fiat of Attorney-General applied for—Application for bail—Whether Court of Criminal Appeal has power to grant bail before fiat obtained—Whether an appeal "pending"—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *ss.* 14 (2), 21.

Words and Phrases — "Appellant" — "Pending" — Criminal Appeal Act, 1907, *s.* 21.

The appellant was tried on an indictment which included two counts which charged him with uttering forged documents with intent to defraud, contrary to section 4 (1) of the Forgery Act, 1913.[1] The appellant, as sales manager of Motors (Brighton) Ltd., had witnessed forged hire-purchase agreements on the strength of which certain finance companies had advanced large sums of money to Motors (Brighton) Ltd. The appellant's defence was that he had believed that the agreements were brought into being to enable the finance companies to lend money which they could not ordinarily do because of credit restrictions, and because by their memorandum and articles of association they could not act as moneylenders. He claimed that the purpose of the hire-purchase agreements was to make it appear that the finance companies were advancing money in the way of their business as finance companies, and he accordingly contended that he had had no intention to defraud the finance companies but was merely uttering the documents to mislead the relevant authority who might inspect the records to see that

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

[1] Forgery Act, 1913, s. 4 (1): "Forgery of any document, which is "not made felony under this or any "other statute for the time being in "force, if committed with intent to "defraud, shall be a misdemeanour "and punishable with imprisonment "with or without hard labour for any "term not exceeding two years."

S. 4 (2): "Forgery of any public "document which is not made felony "under this or any other statute for "the time being in force, if com-"mitted with intent to defraud or "deceive, shall be a misdemeanour "and punishable with imprisonment "with or without hard labour for any "term not exceeding two years."

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the credit restrictions were being observed and whose duty it was to prevent their contravention. The jury were directed that this was a sufficient intention to defraud and the appellant was convicted. He appealed on the ground that his intention was merely an intention to deceive and not an intention to defraud, which involved causing some economic loss to the person deceived:—

Held, that provided that the intention was to cause the person deceived to act to his real detriment, it mattered not that he suffered no economic loss. It was sufficient if the intention was to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived. Accordingly, the appeal was dismissed.

Rex v. *Bassey* (1931) 47 T.L.R. 222; 22 Cr.App.R. 160 and observations of Lord Tucker in *Board of Trade* v. *Owen Seth-Smith* [1957] A.C. 602, 622 applied.

On the dismissal of his appeal the appellant applied for the fiat of the Attorney-General to take his case to the House of Lords. Before the Attorney-General had decided whether to grant his fiat or not, the appellant applied for bail to the Court of Criminal Appeal (post, p. 341):—

Held, that in such circumstances the court had the power to grant bail because there was an appeal pending within the meaning of section 14 (2) of the Criminal Appeal Act, 1907.[2]

Rex v. *Thompson*, 33 T.L.R. 506; 12 Cr.App.R. 261 considered.

APPEAL against conviction.

The following statement of the facts is taken from the judgment of the court read by Hilbery J.

The appellant was at all material times the sales manager of a company known as Motors (Brighton) Ltd., which carried on business in Brighton in motor-lorries. One Prater was a director and the secretary of the company. Prater was also a director and the secretary of a company known as Pacca Ltd., which carried on business in London in furniture. One Goodman was also a director of Pacca Ltd. In connection with the business of Pacca Ltd., Prater had dealings with two hire-purchase finance companies, Consortium Finance Ltd., and Masterton Finance and Trading Services Ltd. (hereinafter called the "finance companies"). Between May, 1956, and July, 1957, the finance companies advanced very large sums of money to Motors (Brighton) Ltd. and Pacca Ltd. on hire-purchase agreements and credit sales agreements which had been witnessed by either the appellant or Goodman and which, it was said, were forgeries.

The appellant, Prater and Goodman were all tried at the Central Criminal Court before the common serjeant on an indictment containing six counts charging conspiracy to defraud the finance companies, and also with uttering forged documents with intent to defraud. Goodman pleaded guilty to count 1, the conspiracy charge, and to counts 4, 5 and 6, charging him with uttering false documents with intent to defraud upon which Pacca Ltd. had obtained advances. Prater was found guilty on all

[2] Criminal Appeal Act, 1907, s. 14 (2): "The Court of Criminal Appeal "may, if it seems fit, on the application of an appellant, admit the "appellant to bail pending the determination of his appeal."

counts and the appellant, though acquitted on count 1, was found guilty on counts 2 and 3 charging him with uttering forged documents with intent to defraud, upon which Motors (Brighton) Ltd. had obtained advances. There was no evidence against him on counts 4, 5 and 6, and the jury were directed to, and did, acquit him on those counts. He was sentenced to nine months' imprisonment. By leave of the court he appealed against his conviction on counts 2 and 3.

C. W. G. Ross-Munro for the appellant.

Sir Jocelyn Simon Q.C., S.-G., J. H. Buzzard and *M. D. L. Worsley* for the Crown.

In addition to the cases referred to in the judgment, the following were cited in argument: *Reg.* v. *Wines* [3]; *Rex* v. *Kritz* [4]; *Reg.* v. *Moah* [5]; *Rex* v. *Bennett and Newton* [6]; *Kat* v. *Diment* [7]; *Starey* v. *Chilworth Gunpowder Co.* [8]; *Reg.* v. *Marcus* [9]; *Reg.* v. *Hoatson* [10]; *Reg.* v. *Nash* [11]; *Reg.* v. *Fowler.* [12]

December 16. LORD PARKER C.J. This court is of the opinion that this appeal must be dismissed. The court will give its reasons for dismissing the appeal at a later date.

[On December 18 the appellant, having applied for the fiat of the Attorney-General to appeal to the House of Lords, was granted bail by the Court of Criminal Appeal (Hilbery, Gorman and Paull JJ.) for the reasons stated, post, p. 341.]

December 21. HILBERY J. read the following judgment of the court, in which he stated the facts, and continued: The appellant's defence was that there was no intent to defraud the finance companies. He said that Prater had told him that the finance companies had money lying idle which they were anxious to lend; that they could not do so because of the current credit restrictions; but that they were prepared to do so if they could have documents which would make it appear to anyone inspecting their records that they were advancing money in the way of their business as finance companies. Prater, he said, had informed him that this was further necessary because under their memorandum and articles the finance companies could not act as moneylenders. The appellant said that he believed Prater and, accordingly, that he had no intention to defraud the finance companies but was merely uttering forged documents in order, as it

[3] [1954] 1 W.L.R. 64; [1953] 2 All E.R. 1497; 37 Cr.App.R. 197.
[4] [1950] 1 K.B. 82; 65 T.L.R. 505; [1949] 2 All E.R. 406; 33 Cr.App.R. 169.
[5] (1858) 1 Dears. & B. 550.
[6] (1913) 9 Cr.App.R. 146.
[7] [1951] 1 K.B. 34; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657.
[8] (1889) 24 Q.B.D. 90; 6 T.L.R. 95.
[9] (1846) 2 Car. & Kir. 356.
[10] (1847) 2 Car. & Kir. 777.
[11] (1852) 2 Den. 493.
[12] [1956] Crim.L.R. 330.

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was said, to pull wool over the eyes of anyone who might inspect the records of the companies in order to see that the credit restrictions were being observed.

The common serjeant thereupon properly directed the jury that if they thought that the appellant's story might well be true, they should acquit him on count 1, since the conspiracy alleged was a conspiracy to defraud the finance companies and no one else. The jury, as already indicated, apparently took this view and acquitted the appellant on count 1.

The common serjeant went on to say to the jury that the matter did not end there, since under counts 2 and 3 it was not necessary to allege an intent to defraud any particular person, and they did not do so. He directed the jury that if they were satisfied that the appellant knew that the documents, the subject of these counts, were false, then on his own story he was guilty of the offences alleged in those counts. Thus, in summing up, he said: "It is not incumbent upon the prosecution in these two "counts, as it is in the case of the first count, to prove an intent "to defraud any particular person, and, therefore, if the prosecu- "tion have succeeded in proving against Welham that he was a "party to putting forward documents which he knew to be forged, "and he put them forward with the dishonest intention, as he "himself said, of defrauding the capital issues committee, well, "then he would be guilty upon these two counts." Again he said: "They (the prosecution) have got to prove an intent to "defraud, and Welham's own case is that the intention here in "respect of these bogus documents was to defraud the capital "issues committee by deceiving them in not preventing some- "thing which it was their duty in law to prevent, namely, the "advancing of large sums of money over a certain limit which "was provided by law at the time." Finally, after the jury had retired, and had returned into court to put a question, the common serjeant gave them a further direction to the same effect.

It is true that the appellant's story was that he thought he was being a party to deceiving the capital issues committee, whereas the person who might inspect the companies' books would be an inspector of the Board of Trade, but provided that there was an intent to defraud someone, it matters not who would be defrauded.

It was in these circumstances that the jury returned a verdict of guilty on counts 2 and 3, and the sole question in this appeal is whether the common serjeant's direction was right in law in saying that the appellant's story amounted to an admission of an intent to defraud. If it amounted merely to an intention to deceive, then, since the offences charged were offences against section 4 (1) of the Forgery Act, 1913, where the essential ingredient is an intent to defraud, the direction was wrong.

The classic definition of intent to defraud is that laid down by Buckley J. in *In re London and Globe Finance Corporation*

Ltd.[1] There he said[2]: "To deceive is, I apprehend, to induce a "man to believe that a thing is true which is false, and which the "person practising the deceit knows or believes to be false. To "defraud is to deprive by deceit: it is by deceit to induce a man "to act to his injury. More tersely it may be put, that to deceive "is by falsehood to induce a state of mind; to defraud is by deceit "to induce a course of action."

That passage has been quoted and approved many times by this court. No doubt the last sentence beginning with the words "more tersely it may be put" must be read with reference to what has gone before and was not intended to enlarge the definition. The course of action induced by deceit must clearly be a course of action which involves some real deprivation or injury. But it is said here that the true definition, and that intended to be laid down by this passage, ends with the words: "To defraud is to deprive by deceit." It is said that the essential element in an intent to defraud is an intent to deprive the person deceived of something of value, whether money or a chattel, and thus the causing of some economic loss. This view is well stated by the editor of the 11th edition of Russell on Crime at pp. 1428–1430, and is adopted by Professor Glanville Williams in his Criminal Law at pp. 76–77.

We have, however, come to the conclusion that this is too narrow a view. While, no doubt, in most cases of an intention to defraud the intention is to cause an economic loss, there is no reason to introduce any such limitation. Provided that the intention is to cause the person deceived to act to his real detriment, it matters not that he suffers no economic loss. It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived. Moreover, to hold otherwise would, we think, involve holding that at least one case, *Rex* v. *Bassey*,[3] was wrongly decided, and that the observations of Lord Tucker in his speech in the House of Lords in *Board of Trade* v. *Owen*[4] were misconceived.

Thus, in *Bassey's* case[5] the appellant had produced false documents to the Benchers of the Inner Temple in order to obtain his admission as a student to the Inn. It was argued that at most he intended to deceive, and that the Benchers by admitting him were not being deprived of anything. Swift J., however, in giving the judgment of the court, said[6]: "In this case there was, in "the opinion of this court, evidence on which the jury might "properly say that, in making these forged documents and in "subsequently uttering them, the appellant intended to defraud,

[1] [1903] 1 Ch. 728; 19 T.L.R. 314.
[2] [1903] 1 Ch. 728, 732.
[3] (1931) 47 T.L.R. 222; 22 Cr.App.R. 160.
[4] [1957] A.C. 602; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 11; sub nom. *Reg.* v. *Owen* [1957] 1 Q.B. 174; [1956] 3 W.L.R. 252, 739; [1956] 3 All E.R. 432.
[5] 22 Cr.App.R. 160.
[6] Ibid. 162.

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"because he intended to induce the Benchers to act to their "injury in admitting as a student a person whom, if they had "known the true facts, it was not only their right, but also their "duty, to exclude." There was thus no question of the Benchers being deprived of anything which involved economic loss, and if the present appellant's argument is right, that case was wrongly decided.

In *Board of Trade* v. *Owen*[7] the point decided was that no indictment for conspiracy to obtain a lawful result by unlawful means would lie in England, where the unlawful means and the ultimate object were both outside the jurisdiction. Count 3, however, charged the defendants with conspiracy to defraud a government department in Germany by causing that department to grant export licences. In dealing with that matter, Lord Goddard in this court, after referring to Buckley J.'s definition, said[8]: "It may well be doubted whether a government "department can be said to act to its injury merely by issuing a "certificate which it would not have granted had the true facts "been known. Certainly it has not been deprived of anything. "It is, however, unnecessary to decide this point because of the "view the court has formed on the main question raised by the "certificate of appeal granted by the judge." On appeal, however, to the House of Lords, *Bassey's* case[9] was relied on in argument and Lord Tucker said[10]: "If, however, a conspiracy "of this nature is aptly included in the wide category of con-"spiracies known as conspiracies to creat and defraud and if it "is necessary to aver and prove that the acts designed to be "done or the object to be achieved will result in some person "acting to his detriment, I feel little doubt that a government "department so acts if it issues a licence which enables some-"thing to be done which the department is charged with the duty "to prevent." Both by his reasoning and by the very words he used, Lord Tucker in that passage is, we think, clearly giving tacit approval to the decision in *Bassey's* case.[11] It is true that this passage in Lord Tucker's speech can be said to be obiter, but it is to be observed that all their Lordships were content to approve what he said without qualification. It has been urged that Lord Tucker's observations can be justified on the ground that in that case the person deceived was induced to part with something, namely, the piece of paper by which the licence was granted, and that that licence was, at any rate, in the hands of the deceiver of economic value. Not only, however, was that not the ground on which Lord Tucker made his observations, but it would, in our opinion, have been a highly artificial ground. It would have been absurd if a different conclusion were necessitated had the licence granted been an oral licence.

[7] [1957] A.C. 602.
[8] [1957] 1 Q.B. 174, 187.
[9] 47 T.L.R. 222.
[10] [1957] A.C. 602, 622.
[11] 47 T.L.R. 222.

Reference may also be made to *Reg.* v. *Potter*,[12] a decision of Paull J. on assize. False documents had, in that case, been put forward with the intention of inducing a county council to issue a driving licence. There the judge said[13]: "It was to induce the "county council to take a course of action which they would not "otherwise have taken and which it was not only their right but "their duty not to take if they had known the true facts." It is true that he went on to say that the intent to defraud could be justified on another ground, namely, an intention to cause the county council to part with a chattel, that is, the piece of paper on which the licence was printed, but, in our judgment, the first ground given by him was the correct one.

It is further to be observed that in the earlier editions of the textbooks no suggestion is to be found of the need for an economic loss. Thus, there is no suggestion of this in the earlier editions of Russell on Crime. In the 13th edition of Kenny on Outlines of the Criminal Law, the last edition by that author, it is specifically stated at p. 263 that pecuniary detriment is unnecessary. To the same effect is the 15th edition by Mr. Godfrey Phillips at pp. 301, 302. It is further to be observed that in Stephen's History of the Criminal Law, vol. 2, at p. 121, the following definition is given: "I shall not attempt to construct a "definition which will meet every case which might be suggested, "but there is little danger in saying that whenever the words "'fraud' or 'intent to defraud' or 'fraudulently' occur in the "definition of a crime two elements at least are essential to the "commission of the crime: namely, first, deceit or an intention "to deceive or in some cases mere secrecy; and, secondly, "either actual injury or possible injury or an intent to expose "some person either to actual injury or to a risk of possible injury "by means of that deceit or secrecy." There is no suggestion there that the injury must take the form of an economic loss. Moreover, as there stated, "a risk of possible injury" is enough.

This view is further supported by a reference to the old cases decided before forgery was made a statutory offence, since at common law forgery was the making of a false document with intent to defraud. Thus, in *Reg.* v. *Toshack*[14] the Court of Criminal Appeal decided that counts alleging that the defendant had uttered forged documents with intent to induce the Corporation of Trinity House to issue to him a master's certificate were good counts for forgery at common law. It is true that the indictment set out that the pieces of paper upon which certificates were granted were of the value of one penny each, but Alderson B., in delivering the judgment of the court, did not proceed upon that basis but on the following ground[15]: "It is a very important "public duty which the Trinity House have to discharge,

[12] [1958] 1 W.L.R. 638; [1958] 2 All E.R. 51; 42 Cr.App.R. 168.
[13] [1958] 1 W.L.R. 638, 643.
[14] (1849) 4 Cox C.C. 38; T. & M. 207.
[15] 4 Cox C.C. 38, 41.

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"important to owners of property of this description, and important to the lives of those entrusted to their care; and if insufficient seamen or persons otherwise than of good character and conduct are appointed, the unfortunate subordinates of the ship are often subjected to harsh and improper treatment." It is further to be observed that Erle J. in *Reg.* v. *Hodgson* [16] read the judgment of Alderson B. in the same way. Thus, he said [17] (in reference to *Reg.* v. *Toshack* [18]): "This seems very analogous to forging the certificate in that case. The prisoner used the diploma in his endeavours to get appointed to the poor house. If an incompetent man were appointed to such a situation, in consequence of his appearing to have this qualification, a large class of persons might suffer. I do not see any great distinction between the danger of loss of life at sea through the employment of an incompetent pilot, and the danger of loss of life on land through the employment of an incompetent surgeon."

Perhaps the strongest argument in favour of the view that the intention must be an intention to cause some economic loss is that otherwise there is, for practical purposes, little distinction between an intent to defraud and an intent to deceive. Yet the Act of 1913 in subsections (1) and (2) of section 4 clearly draws such a distinction. While, however, there may be in practice few occasions when a false document is not uttered with intent to defraud, there may well be cases in which the only intent is an intent to deceive. *Hodgson's* case [19] is a good example of that. In that case the defendant had forged a diploma of the College of Surgeons and hung it up in his sitting-room. At the time when he did so he had no intent to cause anyone to act on it, but only to induce those who might come to his room to believe that it was genuine. In those circumstances it was held that there was no intent to defraud and, accordingly, the conviction for forgery was quashed.

Turning now to the facts of this case, the admitted intent of the appellant was by deceit to induce such person as was charged with the duty of seeing that the credit restrictions were observed to act in a way in which he would not act if he knew the true facts. This the appellant was doing in order that he might benefit by getting further loans. In the judgment of this court the appellant was intending by deceit to induce the person deceived to act to his detriment, and thus was intending to defraud. Indeed, on the facts of the present case, it could be said that the appellant was intending by deceit to deprive the person deceived of the opportunity of exercising a right, namely, a right to prosecute for breach of the credit restrictions, thus depriving the community of the protection afforded by them. Accordingly, this appeal is dismissed.

Appeal dismissed.

[16] (1856) Dears. & B. 3.
[17] Ibid. 5.
[18] 4 Cox C.C. 38.
[19] Dears. & B. 3.

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APPLICATION for bail.

The facts are fully stated in the judgment.

C. W. G. Ross-Munro for the applicant.

M. D. L. Worsley for the Crown.

In addition to the case referred to in the judgment, the following were cited in argument: *Millensted* v. *Grosvenor House (Park Lane) Ltd.*[1]; *Rex* v. *Ball*[2]; *Ex parte Blyth.*[3]

HILBERY J. delivered the following judgment of the court: Mr. Ross-Munro applies for bail on behalf of a prisoner named Robert John Welham, whose appeal against his conviction came before the full Court of Criminal Appeal on Wednesday, December 16, 1959. At the conclusion of the hearing on that day the court dismissed the appeal, stating that it would give its reasons for dismissing the appeal later. Mr. Ross-Munro then intimated to the court that his client would apply for the fiat of the Attorney-General, and, indeed, he informs us now that since Wednesday his client has so applied for leave to take that decision of the Court of Criminal Appeal to the House of Lords. Mr. Ross-Munro, in those circumstances, asks the court for bail for his client, who had been on bail pending the hearing of his appeal in the Court of Criminal Appeal. The court expressed some doubt as to whether it had jurisdiction to grant bail and, refusing bail for the time being, gave leave to renew the application for bail, and it is such renewed application for bail that Mr. Ross-Munro makes today.

The question which we have to decide, therefore, is whether this court in those circumstances has jurisdiction to grant bail. There is authority by a decision of this court in *Rex* v. *Thompson*[1] that where a prisoner who has appealed to the Court of Criminal Appeal obtains the fiat, the court has jurisdiction then to grant bail pending the hearing of the appeal by the House of Lords in respect of which the fiat has been granted. But the question that we have to determine is whether, while the application for the fiat is pending, the court has power to grant bail to the prisoner who is making that application for the fiat. By the Criminal Appeal Act, 1907, s. 14, which deals with the admission of appellants to bail, subsection (2) provides: "The "Court of Criminal Appeal may, if it seems fit, on the applica- "tion of an appellant, admit the appellant to bail pending the "determination of his appeal."

No difficulty arises in such circumstances as obtained in *Rex*

[1] [1937] 1 K.B. 717; 53 T.L.R. 406; [1937] 1 All E.R. 736.

[2] [1911] A.C. 47; 5 Cr.App.R. 238.

[3] [1944] 1 K.B. 532; 60 T.L.R. 353; sub nom. *Blyth* v. *Appeal Committee of Lancaster* [1944] 1 All E.R. 587.

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v. *Thompson*,[1] to which I have referred, in applying that section, because when the fiat had been granted there clearly was an appeal pending in the House of Lords from the decision of the Court of Criminal Appeal, and pending in the House of Lords from the decision of the Court of Criminal Appeal by virtue of or under the Criminal Appeal Act, 1907. The question, therefore, narrows itself in the circumstances of the present case into whether, when an appellant's case in the Court of Criminal Appeal has been dismissed, and he expresses a wish to obtain the fiat of the Attorney-General in order that he may appeal to the House of Lords, he is in those circumstances an appellant and has an appeal pending. In those circumstances, one must look to see what is the definition of "appellant" given in the Criminal Appeal Act, 1907. In what is called the definition section, namely, section 21, which is one of those sections which does not define but says what is to be included in an expression used in the Act, "appellant includes a person who has "been convicted and desires to appeal under this Act." If we were to limit the right of an appellant whose appeal has been dismissed by the Court of Criminal Appeal to obtain bail during the period when he is applying for the fiat and the matter of granting the fiat is under consideration, if we were to say he was not within the definition of a person wishing to appeal, so that he becomes an appellant under the Act to whom bail may be granted, we should indeed be limiting the effect of that definition section. We should be saying that, in those circumstances, he is not an appellant until the fiat has been granted, and there is an appeal pending in the House of Lords. That would be treating the person as an appellant who has an appeal actually in being. It is not giving full effect to the words of the definition, which goes further than that, and says that a person is an appellant who desires to appeal under the Act.

The applicant in this case falls, in our view, within that definition because he is a person desiring to appeal under the Act by virtue of the provisions in the Act which give him a right to apply for the fiat, and, if he obtains the fiat, to have his case carried up to the House of Lords. The situation would, indeed, be strange if we had not this power. A man convicted and sentenced to a short term of imprisonment who was granted bail pending the hearing of his appeal in the Court of Criminal Appeal would, if it were otherwise than we are deciding, have no right to do anything except serve possibly the whole of his sentence in prison while the Attorney-General was considering the question of granting his fiat; because if the court dismissed his appeal, but said it would give its reasons for that dismissal later, the necessary delay in preparing those reasons might mean that a time had elapsed such that the man would have served his whole sentence before the fiat could be granted and his appeal taken to the House

[1] 33 T.L.R. 506; 12 Cr.App.R. 261, 278.

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of Lords. It would be strange if those were the circumstances, since once the right to appeal to the House of Lords is given, the decision in *Thompson's* case [2] would apply and the court would have jurisdiction to grant bail. In the circumstances, we think we have the power, and this man should be granted bail in the same recognisances as he was under when his appeal to the Court of Criminal Appeal was pending and, as a matter of convenience, he can enter into those recognisances at Wandsworth prison. Those recognisances can be taken by the governor of the prison in which he is at present detained. Then he must surrender on notice to do so from the prosecution. If the fiat is not granted, of course, he will be sent notice to surrender to this court and he will have to surrender at the time and place designated in the notice given by this court. The sureties will be in the same amount, and if there is any change in the personnel of the sureties, they will have to be accepted by the police.

Application granted.

Solicitors: *Bellamy, Bestford & Co.; Director of Public Prosecutions.*

[2] 33 T.L.R. 506.

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Dec. 21.
Hilbery, Cassels and Edmund Davies JJ.

Criminal Law — Evidence — Accomplice — Corroboration — Warning, whether necessary—Evidence of co-accused.

Criminal Law—Court of Criminal Appeal—Proviso to section 4 (1) *of Act—Failure to warn jury of need for corroboration—Accomplice—Co-defendant—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1), *proviso.*

The appellant was convicted at the Central Criminal Court on one count of conspiring to defraud and on five counts of uttering forged documents. He appealed against his conviction, one of the grounds of his appeal being that the evidence of his co-accused at the trial, Welham, who gave evidence on his own behalf, required to be corroborated, and that there should have been a warning given by the judge of the danger of convicting the appellant on the evidence of his co-accused:—

Held, dismissing the appeal, that although the authorities by no means pointed in the same direction in the case of evidence of a co-accused as distinguished from a Crown witness, in practice it was desirable that a warning should be given to the jury where a witness, whether he was a co-accused or a Crown witness, might have some purpose of his own to serve; however, if there was clear and convincing evidence to such an extent that the court was

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[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

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satisfied that no miscarriage of justice had arisen by reason of the omission of the warning, the court would not interfere.

Rex v. *Garland* (1943) 29 Cr.App.R. 46n. approved.

APPEAL against conviction.

The facts are fully stated in the judgment. The circumstances giving rise to the conviction and the appeal are stated in *Reg.* v. *Welham*, ante, p. 333.

W. R. Fitch for the appellant.

M. D. L. Worsley for the Crown.

In addition to the cases referred to in the judgment, the following were cited in argument: *Rex* v. *Smallman* [1]; *Rex* v. *Heathfield* [2]; *Rex* v. *Wallis* [3]; *Rex* v. *Ashdown* [4]; *Rex* v. *MacDonald* [5]; *Rex* v. *Dean* [6]; *Rex* v. *Martin* [7]; *Rex* v. *Meredith* [8]; *Reg.* v. *Eckersley*.[9]

EDMUND DAVIES J. delivered the following judgment of the court: The circumstances giving rise to the appeal now before this court by Prater have already been sufficiently summarised in the judgment of the court which has been delivered in the appeal of his co-accused, Welham.

Prater, it will be recalled, was convicted on one count of conspiracy and upon five counts of uttering forged documents. His counsel, whose industry is equalled only by the clarity and cogency of his submissions, has urged three matters before this court as being grounds upon which the conviction of Prater should be quashed.

He has said in the first place that Welham was an accomplice. Welham was called on his own behalf, and it is said that, although a co-accused and not a Crown witness, his evidence required to be corroborated, that there should have been a warning given by the common serjeant of the danger of acting upon his evidence. The second ground is that one of the Crown witnesses, Truman, was likewise an accomplice, and that there should have been a warning given of his testimony and the danger of acting upon it unless corroborated. The third ground was that neither Welham nor Truman could corroborate each other.

As to the third ground, there has been no sort of contest; it is too well established. In relation to the first matter, that Welham was called on his own behalf and was an accomplice, and that a warning should have been given of the danger of acting upon his uncorroborated evidence, the authorities by no means point in the same direction. We have been referred to a number of cases where judgments have been delivered by learned judges of high

[1] (1914) 10 Cr.App.R. 1.
[2] (1923) 17 Cr.App.R. 80.
[3] (1922) 38 T.L.R. 724; 16 Cr.App.R. 171.
[4] (1916) 12 Cr.App.R. 34.
[5] (1928) 21 Cr.App.R. 33.
[6] (1924) 18 Cr.App.R. 21.
[7] (1934) 24 Cr.App.R. 177.
[8] (1943) 29 Cr.App.R. 40.
[9] The Times, June 18, 1953.

authority, by Channell J. in *Rex* v. *Scott*,[1] by Lord Alverstone C.J. in *Rex* v. *Martin*,[2] and by this court recently in *Rex* v. *Barnes*[3] on the one hand; on the other hand, by Avory J. in *Rex* v. *Barrow*,[4] by Humphreys J. in *Rex* v. *Garland*,[5] and again by the last-named judge in *Rex* v. *Rudd*.[6]

For the purposes of this present appeal, this court is content to accept that whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve. It is to be observed that in *Davies* v. *Director of Public Prosecutions*,[7] which went to the House of Lords, Lord Simonds, in initiating what was described as the third proposition, deals with the matter in these terms[8]: "Where the judge fails to "warn the jury in accordance with this rule, the conviction "will be quashed, even if in fact there be ample corroboration "of the evidence of the accomplice, unless the appellate court "can apply the proviso to section 4 (1) of the Criminal Appeal "Act, 1907. The rule, it will be observed, applies only to "witnesses for the prosecution."

This court, in the circumstances of the present appeal, is content to found itself upon the view which it expresses that it is desirable that in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts, and in *Rex* v. *Garland*[9] Humphreys J., delivering the judgment of this court, used words which this court finds completely apposite to the circumstances of the present case, namely, that it is clear that if there be clear and convincing evidence to such an extent that this court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction to the jury, this court will not interfere.

On those grounds, and bearing in mind also the proviso to section 4 (1) of the Act of 1907, this court sees no reason to disturb the finding of the jury in respect of the first ground relied on by counsel for the appellant. I should have said in dealing with the first ground that it is to be remembered that the appellant gave no evidence on his own behalf and none was called for him. Truman was called as a witness for the prosecution, and a number of suggestions were made to him, of course, on instructions by counsel appearing for the appellant which appear to have been wholly denied by Truman. This court has looked in vain

[1] (1909) 2 Cr.App.R. 215.
[2] (1910) 5 Cr.App.R. 4.
[3] (1940) 56 T.L.R. 379; [1940] 2 All E.R. 229; 27 Cr.App.R. 154.
[4] (1934) 24 Cr.App.R. 141.
[5] (1943) 29 Cr.App.R. 46n.
[6] (1948) 64 T.L.R. 240; 32 Cr.App.R. 138.
[7] [1954] A.C. 378; [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507; sub nom. *Reg.* v. *Davies* [1954] 1 W.L.R. 214.
[8] [1954] A.C. 378, 399.
[9] 29 Cr.App.R. 46n.

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at the transcript of the summing-up, and has listened in vain, with respect to Mr. Fitch, for any satisfactory indication that there was material upon which the common serjeant would have been justified in presenting Truman to the jury as being an accomplice. As my brother Hilbery said, it is easy to make suggestions to a witness. That is one thing. More than that is required to cloak a witness for the Crown or any other witness with the garment of an accomplice. This court is unable, on the material before it, to hold that it is shown that any warning was in prudence called for, for it is by no means satisfied that there was any material upon which Truman could properly be described as an accomplice. Here, again, had the matter arisen, this court is satisfied that there was ample and overwhelming evidence of a compulsive character which would have necessitated the court saying that this conviction ought not to be quashed.

For these reasons, shortly stated, this court is of the opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

[COURT OF APPEAL.]

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Hodson and Pearce L.JJ.

FALLON *v.* CALVERT.

[1955 F. No. 439.]

Evidence—Witness—Recall—Official Referee—Report by Official Referee ordered by judge—Evidence given at trial by defendant—Jurisdiction of Official Referee to recall defendant—R.S.C., Ord. 36A, *rr.* 2, 7, 9.

In an action for commission on the defendant's earnings, in which the defendant had given evidence, reference was made by a judge to the Official Referee under R.S.C., Ord. 36A, r. 2, to hear and report on the gross earnings of the defendant over a period of five years. The Official Referee directed that the defendant should attend before him to assist in making the report with the object that the defendant should be cross-examined. The defendant contended that the Official Referee had no jurisdiction to make the order:—

Held, that, although a judge has no power to call a witness without the consent of the parties, the defendant, having already given evidence could, at any time, be recalled by the judge; that proceedings before the Official Referee amounted to a continuation of the trial; that the right to recall was not personal to a particular judge but a right of the court; and that the Official Referee had, therefore, on the true construction of Order 36A, r. 7, jurisdiction to make the order.

In re Enoch and Zaretzky, Bock & Co. [1910] 1 K.B. 327 distinguished.

APPEAL from the Official Referee.

On November 4, 1959, His Honour Percy Lamb Q.C., Official

Referee, directed the defendant, Eddie Calvert, to attend before him to assist in making a report pursuant to an order of Paull J. dated April 23, 1959. The defendant appealed from that order on the ground that the Official Referee had no jurisdiction to make such an order.

The following statement of facts is taken substantially from the judgment: The plaintiff, Sebastian John Joseph Fallon (professionally known as Jack Fallon) was a manager and agent for theatrical artistes, and the defendant was a professional trumpeter. The claim of the plaintiff, in substance, was a claim for commission on the defendant's earnings due to him under a contract in writing. The defendant counterclaimed rectification of that agreement.

At the trial before Devlin J. evidence was given by the plaintiff, the defendant and others. Details of the defendant's earnings were not given, but the defendant admitted through his counsel that he had sworn a false answer to interrogatories, and that his books contained false entries.

On March 3, 1959, the judge made an interim order containing, inter alia, the following paragraph: "It is ordered that the "defendant do within seven days from the date hereof deliver to "the plaintiff a list of the gross earnings of the defendant as a "solo artiste or for himself and orchestra for a period of five "years commencing on November 1, 1951." No order for an account had so far been made, although a claim for an account was included in the statement of claim.

The defendant's purported compliance with this order of Devlin J. did not satisfy the plaintiff, and on April 23, 1959, Paull J. by consent made an order containing the following paragraph: "And it is ordered that this matter be referred to an "Official Referee to hear and report on the gross earnings of the "defendant as a solo artiste or for himself and orchestra for a "period of five years commencing on November 1, 1951."

On November 4, 1959, the Official Referee made the order directing the attendance of the defendant before him, which was the subject of the present appeal.

John G. Wilmers for the defendant.
Frank Whitworth for the plaintiff.

The following cases, in addition to those cited in the judgment, were referred to in the argument: *Armory* v. *Delamirie* [1]; *In re Taylor*.[2]

Cur. adv. vult.

Dec. 18. The judgment of the court was read by PEARCE L.J., in which he stated the facts and continued: On attending before the Official Referee the plaintiff was minded to secure the attendance of the defendant for cross-examination in order to establish,

[1] (1722) 1 Stra. 505.
[2] (1890) 44 Ch.D. 128.

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if he could, the extent of the earnings on which commission would be due, having in his possession (as we were told) certain contracts between the plaintiff and third parties which would or might assist to that end.

It is conceded by both counsel that the real object of the Official Referee in ordering the defendant to attend the hearing was to procure that he should enter the witness-box to answer the cross-examination of plaintiff's counsel. The plaintiff can, of course, ensure the defendant's attendance by a subpoena, but in that case his counsel would have to call and examine the defendant as his own witness.

In a civil suit the function of a court in this country (unlike that of courts in some other countries) is to decide cases on the evidence that the parties think fit to call before it. It is not inquisitorial. *In re Enoch and Zaretzky, Bock & Co.*[1] decided that a judge or umpire had no right to call a witness in a civil action without the consent of the parties. Fletcher Moulton L.J., in dealing with a previous case of *Coulson* v. *Disborough*[2] said[3]: "One of the learned judges, the Master of the Rolls, Lord Esher, "does, however, give utterance to a dictum which has been relied "on by counsel for the respondents. He says this[4]: 'If there "'be a person whom neither party to an action chooses to call as "'a witness, and the judge thinks that that person is able to "'elucidate the truth, the judge, in my opinion, is himself "'entitled to call him.' If that means to call him when either "side objects, I am satisfied that there is no basis for that "dictum; but it must be remembered that there is no suggestion "in the report or the judgments that the witness was called by "the judge against the will of either of the parties. It certainly "was not necessary for the decision; and the consequences to "which it would lead if so interpreted are such that I am satisfied "that the Court of Appeal would never have given in the form "of a mere dictum a decision so wide-reaching and so destructive "of the fundamental principles of our laws of procedure. It does "not purport to be based on any course of reasoning, and no "authority was cited for it."

In *Rex* v. *Harris*[5] the Court of Criminal Appeal said[6]: "As to "the first point, it has been clearly laid down by the Court of "Appeal in *In re Enoch and Zaretzky, Bock & Co.*,[7] that in a civil "suit the judge has no right to call a witness not called by either "party, unless he does so with the consent of both of the parties. "It also appears to be clearly established that that rule does not "apply to a criminal trial where the liberty of a subject is at stake "and where the sole object of the proceedings is to make certain "that justice should be done as between the subject and the "State." We cannot find, therefore, that the court has any

[1] [1910] 1 K.B. 327.
[2] [1894] 2 Q.B. 316; 10 T.L.R. 429.
[3] [1910] 1 K.B. 332.
[4] [1894] 2 Q.B. 318.
[5] [1927] 2 K.B. 587; 43 T.L.R. 774.
[6] [1927] 2 K.B. 594.
[7] [1910] 1 K.B. 327.

power of its own notion to order a defendant to attend the hearing of a civil suit for the purpose of calling him as a witness.

In the present case, however, the defendant has already given evidence, and the Official Referee is conducting what amounts to a continuation of the trial, which has not yet been concluded by a final judgment. In general, a judge has power to recall a witness who has given evidence, though he would not have had power to call him initially. In *Rex* v. *Seigley* [8] Hamilton J. said [9]: "A prisoner, when once he has made himself a witness, "is liable, like any other witness, to be recalled for the purpose "of answering such questions as the judge permits to be put to "him." Taylor on Evidence, 12th ed., para. 1477, states: "The "judge has always a discretionary power, with which the court "above is very unwilling to interfere, of *recalling witnesses* at "any stage of the trial, and putting such questions to them as "the exigencies of justice require." This passage was approved by the Court of Criminal Appeal in *Rex* v. *Sullivan*.[10] And the principle, so far as civil cases are concerned, has never been doubted. If a party chooses to give evidence, he submits himself to the court to be asked all such questions as justice requires until the case is concluded.

Under R.S.C., Ord. 36A, r. 2: ". . . the Court or a Judge may ". . . refer to an Official Referee for inquiry and report any "question or issue of fact arising therein; and, unless the Court "or a Judge otherwise orders, the further consideration of the "cause or matter shall stand adjourned until the receipt of the "Official Referee's report." That is the course that has been pursued here. In hearing the reference, the Official Referee has under Order 36A, r. 7: ". . . the same jurisdiction, powers and "duties (including the powers of attachment and committal and "discretion as to costs) as a judge, exercisable or, as the case may "be, to be performed as nearly as circumstances admit in the like "cases, in the like manner and subject to the like limitations." Had the judge continued the trial himself instead of adjourning to the Official Referee the "question or issue of fact" on the accounts, he could have recalled the defendant in order that he might be asked questions about them. On the face of it, under the words of rule 7, the judge's power to recall could be exercised by the Official Referee at this stage of the trial "in the like "manner and subject to the like limitations," unless that right of recall is in some way personal to the particular judge who heard the defendant give evidence in the first place. We see no reason why the right to recall should be regarded as the personal right of a particular judge rather than the right of the court which is properly seised of the matter at the time in question.

We are confirmed in this view by Order 36A, r. 9. On receipt of the Official Referee's report, the court may (a) adopt it in whole or in part; (b) vary the report; (c) decide the question or

[8] (1911) 6 Cr.App.R. 106.
[9] Ibid. 107.
[10] [1923] 1 K.B. 47.

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issue originally referred to him on the evidence taken before him either with or without additional evidence. If, in this case, the learned trial judge adopted course (c), it is clear, we think, that he could at that stage recall the defendant. It seems unreal to suppose that there is an intervening stage during which the court that is investigating the matter with all the powers of the trial judge is unable to recall the defendant.

It is suggested on the defendant's behalf that it would be a wrong use of discretion to recall the defendant since, it is said, the onus is still on the plaintiff. We do not agree. In this case the plaintiff has proved that the defendant is an accounting party, and (by admissions) that he has kept false books and lied in interrogations in respect of the amounts received by him. That calls for some answer by him. Merely supplying through his legal advisers lists not verified in evidence by himself is no answer. Had the judge ordered an account to be taken (as he might well have done) the defendant would have had to verify his account by affidavit (R.S.C., Ord. 33, r. 4), and he could have been cross-examined on his affidavit after due notice given of the items to which the plaintiff objects. If no evidence from the defendant were available, it may be that the court would try to secure justice by drawing inferences; but, in fact, the defendant, who knows the truth of the matter, is available to be recalled. We cannot in such circumstances see that it would be a wrong use of discretion if the court were to recall him in the hope of finding out the truth.

We therefore dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker; J. H. Williams, Dartford.*

I. G. R. M.

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Lord Evershed M.R., Romer and Sellers L.JJ.

In re APEX FILM DISTRIBUTORS LTD.

[No. 00179 of 1954.]

Company — Winding up — Contributories — Call on contributories — Liability of past members — Whether call effective — Date for fixing liability — Companies Act, 1948 (11 & 12 *Geo.* 6, c. 38), *ss.* 212, 214 — *Company Winding Up Rules*, 1949 (*S.I.* 1949, *No.* 330), *r.* 88.

In the compulsory winding up of a company the liquidator made a call on the present member of the company, the "A" contributor, and at the same time notified those members who had transferred their shares within the year preceding the winding up (the "B" contributors) that if the call was partially or wholly unproductive a

call would be made on them. Nothing was received from the A contributor and the liquidator, being then satisfied that he was unable to contribute anything, wrote to the B contributors. After receipt of that notification, the B contributors purchased certain debts of the company which were owing before they had transferred their shares.

On appeal from a decision that their liability had not been reduced by the amount of the debts thus purchased, it was conceded (contrary to the decision of the trial judge) that the later notification was not an effective call on the B contributors, but it was submitted that the first call was effective as against the B contributors:—

Held, (1) that, although the first call was valid as regards the A contributors, it was not an effective call on the B contributors, first, because at that date they were not under any liability to contribute; and, secondly, because the notification warning them that a call on them would be made if necessary negatived any intention by the liquidator that there was already a call on them (post, pp. 356, 358).

(2) That, accordingly, the extinguishment of the debts operated to reduce the liability of the B contributors, as there had been no call on them.

In re Blakely Ordnance Co., Brett's Case (*No. 2*) (1873) L.R 8 Ch.App. 800 followed.

Quaere whether the liability of the B contributories is fixed at the date of call or at a later date (post, pp. 355, 357).

In re Greening, Marsh's Case (1871) L.R. 13 Eq. 388; and *In re City of London Ins. Co. Ltd.* [1932] 1 Ch. 226; 48 T.L.R. 169 considered.

Decision of Wynn-Parry J. reversed [1959] 3 W.L.R. 8; [1959] 2 All E.R. 479.

APPEAL from Wynn-Parry J.

By an order dated March 23, 1954, Apex Film Distributors Ltd., hereinafter called "the company," was ordered to be wound up compulsorily on a petition presented on February 26, 1954. At all material times the issued capital of the company consisted of 42,000 7½ per cent. redeemable preference shares of £1 each, on which 10s. per share had been paid; 42,000 10 per cent. preferred ordinary shares of 5s. each on which 2s. 6d. per share had been paid; and 150 deferred shares of £1 each, all of which were fully paid up.

On July 23, 1953, the holders of 41,600 of the redeemable preference shares and 41,600 of the preferred ordinary shares transferred their respective holdings of these shares to one Arnold Williams, who held the balance of each class of share. At the commencement of the winding up Williams, therefore, was the only A contributory, the B contributories being the transferors of the shares transferred on July 23, 1953, as above mentioned.

On December 14, 1955, the committee of inspection resolved that a call of 10s. per share on the redeemable preference shares and a call of 2s. 6d. per share on the preferred ordinary shares should be made by the liquidator on all the contributories of the company. On December 20, 1955, the liquidator duly made the

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call in accordance with rule 88 of the Winding Up Rules,[1] and within the ambit of the requisite form 53 which was filed as required by the rule. By a letter dated the same day he gave notice to Williams to pay in respect of the call £26,250 on or before January 3, 1956, with interest at 4 per cent. as from that date until payment. The next day he wrote as follows to each of the B contributories, enclosing a copy of the resolution of the committee of inspection: "As you are aware, you were included "in the list as a 'B' contributory in respect of (blank) . . . "redeemable preference shares, (blank) . . . preferred ordinary "shares, the calls on which total £(blank). A formal claim for "the amount of the total call on all the issued shares, of both "classes, has been made against the 'A' contributory demanding "payment by January 3, 1956, but in the event of non-payment "or only part-payment by him, a claim for any balance out-"standing, on the shares shown above, will be made against you, "having regard to the provisions of section 212 of the Companies "Act, 1948.[2]"

Nothing whatever was recovered from Williams. According to an affidavit sworn by the liquidator on June 18, 1957, Williams had been ordered by the court on March 5, 1956, to pay the sum of £26,250 on or before March 12, 1956, or subsequently within four days after service of the order on him. The order was served on March 23 but Williams failed to pay the sum or any part of it and stated that he was unable to do so. He submitted to an examination as to his means and made a statutory declaration as to them, subsequently amplified by a further statutory declaration. These declarations showed that he had no free assets

[1] Companies (Winding Up) Rules, 1949, r. 88: "When the liquidator "is authorised by resolution . . . to "make a call on the contributories "he shall file with the registrar a "document making the call in the "form 53 in the Appendix with such "variations as circumstances may "require."

[2] Companies Act, 1948, s. 212: "(1) In the event of a company "being wound up, every present and "past member shall be liable to con-"tribute to the assets of the company "to an amount sufficient for payment "of its debts and liabilities, and the "costs, charges and expenses of the "winding up, and for the adjustment "of the rights of the contributories "among themselves, subject to the "provisions of subsection (2) of this "section and the following qualifica-"tions." [Subsection (2) related to directors and managers, and the relevant qualifications were: "(*a*) A "past member shall not be liable to "contribute if he has ceased to be a "member for one year or upwards "before the commencement of the "winding up." This qualification did not exclude the applicants, the B contributories.] "(*b*) A past mem-"ber shall not be liable to contribute "in respect of any debt or liability "of the company contracted after he "ceased to be a member; (*c*) A "past member shall not be liable to "contribute unless it appears to the "court that the existing members are "unable to satisfy the contributions "required to be made by them in "pursuance of this Act; (*d*) in the "case of a company limited by "shares, no contribution shall be "required from any member exceed-"ing the amount, if any, unpaid on "the shares in respect of which he is "liable as a present or past mem-"ber. . . ."

S. 214: "The liability of a con-"tributory shall create a debt (in "England of the nature of a "specialty) accruing due from him at "the time when his liability com-"menced, but payable at the times "when calls are made for enforcing "the liability."

of any value. His principal source of income, that is his salary as managing director of National Screen Service Ltd. amounted, after deduction of P.A.Y.E. income tax, to £71 10s. per week. The liquidator said that on August 31, 1956, he obtained a garnishee order nisi against Williams' bank account with a New York bank, but that that had proved abortive as the account had only 15s. in it. He made a further unsuccessful attempt to garnishee Williams' salary from the National Screen Service Ltd. He continued: "My committee of inspection and I "respectfully submit that we have taken all reasonable steps "open to us to obtain payment from Mr. Williams of the amount "due from him. From the inquiries and investigations which we "have made, we have come to the conclusion that Mr. Williams "is unable to satisfy the contributions required to be made by "him under the Companies Act, 1948, and we accordingly desire "to proceed against the 'B' contributories."

On May 3, 1957, the liquidator wrote again to the B contributories: "In my letter of December 21, 1955, I informed you that "the committee of inspection had sanctioned a call on all the "contributories and gave details of the number of shares in "respect of which you were included in the list of 'B' contribu-"tories. I further explained that, in the event of non-payment "of the call by the 'A' contributory, a claim would be made "against you, having regard to the provisions of section 212 of "the Companies Act, 1948. No payment has been made by the "'A' contributory and I therefore enclose a formal notice claim-"ing the sum of £(blank) from you." The formal notice was similar to the original notice to Williams: "Take notice that the "committee of inspection in the winding up of this company have "sanctioned a call . . . The amount due from you as a 'B' "contributory in respect of the call, in accordance with section "212 of the Companies Act, 1948, is as follows": and then the calculation was made. "This total sum should be paid by you "direct to me at my office, 27 Martin Lane . . . on or before "May 17, 1957"; and there was added a note about interest.

At a later date one or more of the "old debts" of the company was released or extinguished, the total sum involved was said to be over £13,000.

On June 21, 1957, the liquidator issued a summons for a four-day order against the B contributories in respect of calls made on them. In the course of preparing the evidence the liquidator reduced from £24,289 1s. 9d. to £22,472 17s. 8d. the amount of the debts, namely, "the old debts" incurred by the company prior to July 23, 1953.

On February 25, 1959, the registrar made an order for a total payment by the B contributories of £22,504, allowing a margin of just over £1,000 in respect of the costs of the liquidation. This order, however, was not drawn up.

Following that order the debts of two creditors who had proved in the liquidation and which were owed by the company

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before July 23, 1953 (when the B contributories transferred their shares), and amounted to £13,853 18s. 11d., were purchased by eight of the B contributories and transferred into the name of Film Finances Ltd. That company, by a deed dated March 2, 1959, released the Apex company, the liquidator and the contributories from all liability for those debts.

On March 18, 1959, an application by eight of the B contributories was made to the registrar, asking him to recall his order of February 25, 1959, and to reduce the amounts to be paid by the B contributories by taking into account the deed of release. The registrar refused that application, and on March 18, 1959, he made an order, which was duly completed, on the B contributories for the payment of calls calculated to produce a total of £22,504. On a motion for a declaration that the liability of the B contributories had been reduced by £13,853 18s. 11d. by the release of the two debts mentioned above, Wynn-Parry J. declared that the debt of the B contributories became payable on call and could only be extinguished by payment, and that their liability had not been reduced by the purchase after the call of the debts in question. The eight B contributories appealed. During the hearing of the appeal it was conceded by counsel for the liquidator that the notification of May 3, 1957, was not an effective call on the B contributories since form 53 of the Appendix to the Companies (Winding Up) Rules, 1949, had not been filed as required by rule 88. Counsel submitted that the call made on December 20, 1955, was effective as against the B contributories.

G. B. H. Dillon for the applicants, eight of the B contributories.

K. W. Mackinnon Q.C. and *M. M. Wheeler* for the respondent liquidator.

In addition to the cases referred to in the judgments the following were cited in argument: *Webb* v. *Whiffin*[3]; *Helbert* v. *Banner* (*In re Barned's Bank*)[4]; *Williams* v. *Harding*.[5]

Cur. adv. vult.

Dec. 15. Lord Evershed M.R. This case is concerned with a question which (for obvious reasons) rarely comes before the court, namely, the liability, in a winding up of an insolvent company, of the B contributories. The extent of such liability is defined by section 212 of the Companies Act, 1948, which I shall presently read so far as it is relevant; but the extent has also been stated in summary form by Eve J. in *In re City of London*

[3] (1872) L.R. 5 H.L. 711.
[4] (1871) L.R. 5 H.L. 28.
[5] (1866) L.R. 1 H.L. 9.

Insurance Co. Ltd.,[1] and I gratefully adopt what that learned judge said. "Their liability to contribute is created by statute, "and is restricted to so much of the amount left unpaid on their "shares by their associated A contributories as does not exceed "the balance of the debts and liabilities of the company, con- "tracted before they respectively ceased to be members, which "remains unpaid after the assets of the company and the contribu- "tions of the A contributories have been applied pari passu towards "the payment of all the debts of the company whenever "contracted."

The question more precisely debated before us may be stated thus: Is there some point of time (and if so, what is it?) when the liability of the B contributories must be taken (subject at most to adjustment to allow for errors in estimation and the like) as fixed so as not thereafter to be capable of reduction as the result of total or partial extinguishment of debts contracted before they (that is, the B contributories) ceased to be members?

It is conceded (since *In re Blakely Ordnance Co., Brett's Case (No. 2)*[2] that the liability is not fixed at the date of the winding up, but that it may be reduced as a result of dealings with the "old debts" (as I will call them) up to the date of the call made on the B contributories for their contribution. But it is said by the liquidator in this case, and it was held by Wynn-Parry J. in the court below, that the liability is crystallised at the date of such call and cannot be affected by anything done thereafter. This view is said to be supported by the terms of section 214 of the Act and by the language and the reasoning of Lord Selborne L.C. in *Brett's Case (No. 2)*[3] above mentioned—language quoted by the judge, but which I need not repeat. On the other hand, it is said that there is no logic nor justice in drawing the line at the date of the call (or, indeed, at any other point short, at any rate, of final distribution); and this view is said to be supported by the decision of Bacon V.-C. in *In re Greening, Marsh's Case*,[4] and by Eve J. in the case I have already mentioned, *In re City of London Insurance Co. Ltd.*[5]; and also by the uniform views expressed in every edition of Buckley on the Companies Acts, and in the relevant volumes of Halsbury's Laws of England.

Without multiplying citation, I refer to a passage in Buckley, 13th ed. at p. 434: "The rules, then, which have been established "with respect to the contributories of a company in liquidation "and the application of their contributions may be briefly stated "in some such form as the following. . . ." There follow five heads in Roman numerals, and the fifth is: "If, before a call is "made upon the B list, or before payment of such call, the debts "in respect of which a B contributory was, having regard to sub- "section (1) (*b*)" (that is, of section 212) "liable to contribute, "or any of them, are in any manner released or extinguished in

[1] [1932] 1 Ch. 226, 230; 48 T.L.R. 169.
[2] (1873) L.R. 8 Ch.App. 800.
[3] Ibid. 810.
[4] (1871) L.R. 13 Eq. 388.
[5] [1932] 1 Ch. 226.

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" whole or in part, his liability to contribute to the assets of the " company is (subject to any question as to the costs of the " winding up) thereby pro tanto discharged." Against the words " or before payment of such call " reference is made to a note, and in the note is a citation of *Marsh's Case*,[6] which I have already mentioned.

[His Lordship stated the facts, read sections 212 and 214 set out above, and the relevant winding-up rule 88, commenting that sections 212 and 214 appeared to have remained substantially and (so far as relevant) entirely in the present form since the Companies Act, 1862, the corresponding sections being sections 38 and 75 respectively, his Lordship went on:] There is no doubt, I think, that the call of December 20, 1955, was a valid call under the Act and in accordance with rules; but it was not, and could not be, in my judgment, an effective call for any purpose on the B contributories. I say that for two reasons: first, at that date the B contributories were not under any liability, since the conditions under section 212 for such liability, and particularly the condition in qualification paragraph (*c*) of that section, were not then satisfied—(*c*) being (as it will be remembered) in this form: " a past member shall not be liable to contribute unless " it appears to the court " (or, I would add, to the liquidator) " that the existing members are unable to satisfy the contributions " required. . . ."

The second reason for my conclusion is that it is quite clear from the liquidator's letter to the B contributories of December 21, 1955, that he, the liquidator, did not himself so regard it.

[His Lordship referred to the affidavit evidence of the liquidator, summarised above, and went on:] Wynn-Parry J. decided the present case on the basis that the liquidator's letter to the B contributories of May 3, 1957, amounted to a call. Mr. Mackinnon before us conceded that this cannot be so, since the requirement of the winding-up rules,[7] and particularly rule 88 and the appended form 53, which is required to be used on the occasion of a call, had not been complied with; and in the circumstances Mr. Mackinnon was compelled to say that what the liquidator did on December 20, 1955, amounted to a call on the B contributories for the purposes of section 214: that is to say, he contended that the debt which section 214 states to be created became payable, at the time when that call was made on December 20, 1955, by the contributories. But, in my judgment, this cannot be sustained. Whatever be the exact construction of section 214, and particularly of the phrase at the beginning of the section, " The liability of a contributory " in its context, the B contributories were, at December 20, 1955, by virtue of the clear terms of section 212, and particularly subsection (1) (*c*), under no liability at all: so that there was then nothing capable of being called or of crystallising—and this view is plainly in accordance

[6] L.R. 13 Eq. 388.

[7] Companies (Winding Up) Rules, 1949.

(as I earlier stated) with what the liquidator thought and intended according to the letter that he wrote on December 21, 1955, and according to the evidence of his affidavit.

The matter may, I suggest, be tested by asking: Could the liquidator, on January 4, 1956 (which was the day after the date fixed for payment by the A contributory in his notice of December 20 to Mr. Williams) have sued the B contributories as for a specialty debt? In my judgment, the answer to that question must quite plainly be in the negative. Such an action would not have laid, because at that time the liquidator could not establish, in terms of section 212, that the B contributories were under any liability whatever.

The result, then, seems to me to be inevitable: there has been since December 20 no other call which satisfies the requirements of the Act and the regulations; so that any extinguishment of old debts, whole or partial, which has so far occurred must, on the admitted authority of *Brett's Case (No. 2)* [8] operate to reduce the liability of the B contributories.

This conclusion is sufficient to dispose of the present case in favour of the appellants; and I prefer, for my part, to express no concluded view upon the more general, but interesting and difficult, question which has been argued before us. Wynn-Parry J. thought that *Marsh's Case* [9] could not be treated as an authority, since the point was not really argued but rather assumed; and he further pointed out that *Marsh's Case* [9] was decided before *Brett's Case (No. 2)*,[10] but that the ratio of the latter was that the date of the effective call was the determining date.

It must be said that Mr. Dillon, to my mind, has produced at any rate a formidable argument the other way, particularly in light of the consistent statements in all the editions of Buckley and Halsbury (which were not referred to by Wynn-Parry J. in his judgment) and of Eve J.'s judgment in 1932. But if the date of the effective call is not the determining date, then it is clear to my mind that it is a difficult question to say what is the correct date. For example, what is the position if an "old debt" is wholly or partially extinguished after a B contributory has paid the whole or part of a call? What is the position if there are successive calls and some change has occurred in the "old debts" between the two? Is the result the same or different for B contributories (a) when an "old debt" is at some stage after a call extinguished, and (b) when the liability of an A contributory, properly regarded at the time of the call as worthless, is then wholly or partially but unexpectedly discharged?

In the circumstances of the present case, these questions are academic, and I prefer, therefore, to leave them open, expressing no view of my own upon them and thinking that a decision on them should await a case when such a decision is necessary—

[8] L.R. 8 Ch.App. 800.
[9] L.R. 13 Eq. 388.
[10] L.R. 8 Ch.App. 800.

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which I think all the more important since (as I stated at the beginning of my judgment) cases concerning the liability of B contributories are only likely to arise very rarely, and may arise in very special circumstances which it is impossible to forecast.

For the reasons I have stated, I think that the appeal should be allowed.

ROMER L.J. I agree. It is expressly provided by section 212 (1) (*c*) of the Companies Act, 1948, that a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act. In other words, the liability of the B contributories to contribute on a winding up does not arise at all unless it appears to the court (or, by delegation, the liquidator) that the A contributories are unable to satisfy the calls made upon them; and the B contributories' liability is in any case limited to the extent of the A contributories' default. It was thought when this case was before Wynn-Parry J. that the call on the B contributories which was relevant for consideration was made on May 3, 1957, by which date it had become apparent that the A contributory had defaulted on his liability; and the problems which would have arisen upon that footing were argued before the judge and decided by him. In the course, however, of the discussion before this court it transpired that the call which the liquidator made on the B contributories by his letter and notice of May 3, 1957, was not in fact effectual inasmuch as form 53 of the appendix to the winding-up rules was not filed as required by rule 88. The only occasion upon which form 53 was filed was on December 20, 1955, upon which date the liquidator made a call upon all the contributories of the company, both A and B; and, accordingly, Mr. Mackinnon conceded that it was upon that call alone that he could rely. Upon that basis it is quite clear that, by reason of the provision of the section 212 (1) (*c*) above referred to, the liability of the B contributories has never yet arisen; for on December 20, 1955, the liquidator did not know and could not know to what extent (if at all) the A contributory would default in his contribution. It is plain from the liquidator's circular letter of December 21, 1955, to the B contributories that he did not regard himself as already having made a claim on them; and, indeed, his letter of May 3, 1957, shows that he did not regard a claim as having been made upon them even up to that date. In addition, there is ample evidence that for a long period after December 20, 1955, the liquidator made constant but unsuccessful efforts to obtain the contribution for which the A contributory was liable.

The position, then, quite shortly, is that no effectual call had been made on the B contributories by March 2, 1959, upon which date two of the "old" debts in respect of which these contributories would be liable by reason of the A contributory's default were released; nor has any valid call been made upon them since.

It follows from this *Brett's Case (No. 2)*,[11] that the release of these debts operated to reduce, to the value of the debts, the liability of the B contributories.

Upon this point, therefore, the appeal must be allowed; and, with Lord Evershed M.R., I prefer to express no opinion on the points with which Wynn-Parry J. dealt in his judgment, but which, as it now appears, do not in fact arise for decision in the present case.

LORD EVERSHED M.R. I have been authorised by Sellers L.J. to say that he concurs in the judgments which have just been delivered.

Appeal allowed, with costs of appeal and of hearing before Wynn-Parry J. Registrar's order to be varied.

Solicitors: *Allen & Overy; Linklaters & Paines.*

E. D.

[11] L.R. 8 Ch.App. 800.

[HOUSE OF LORDS.]

ELMDENE ESTATES LTD. . . . . APPELLANTS;

AND

WHITE . . . . . RESPONDENT.

H. L. (E.)*
1959
Dec. 7, 8.
1960
Jan. 21.

Landlord and Tenant—Rent restriction—Premium—Paid to third person—Grant of tenancy conditional on sale of house at undervaluation—Person requiring premium—Demand by landlords' agents—Benefit not received by landlords but by separate though associated company—Meaning of "premium"—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 40), *ss.* 2, 18.

Contract—Construction—Substance or form of transaction—Rent restriction—Need to look at reality (post, p. 363).

Judicial Precedent—Statute—Construction—Penal statute—Decision in favour of subject affecting subsequent property rights—Rent restriction—Illegal premium (post, p. 366).

Statute—Construction—Penal Act—Mischief aimed at—Landlord and Tenant (Rent Control) Act, 1949, *s.* 2 (post, p. 364).

Words and Phrases — "Premium" — "Pecuniary consideration — "Paid."

By section 2 of the Landlord and Tenant (Rent Control) Act, 1949: "(1) A person shall not, as a condition of the grant, renewal "or continuance of a tenancy to which this section applies, require "the payment of any premium in addition to the rent. . . . "(5) Where, under an agreement made after March 25, 1949, any

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

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"premium has been paid which . . . could not lawfully be required "under the foregoing provisions of this section . . . the amount of "the premium, or so much thereof as could not lawfully be required "... shall be recoverable by the person by whom it was paid: . . ."

By section 18 (2): "In this Act . . . the expression 'premium' "includes any fine or other like sum and any other pecuniary con- "sideration in addition to rent."

As a condition of obtaining for the plaintiff the grant of a tenancy of a dwelling-house within the scope of the Rent Acts, a firm of estate agents, C. & C. Ltd., required the plaintiff and his wife to sell their house to a property company, P.T.E. Ltd., for £500 less than the market value. The tenancy was granted by the defendant company, which was closely associated by shareholding and directors with the other two companies, though the benefit of the £500 was not transferred to the defendant company. The plaintiff brought proceedings to recover the sum of £500 from the defendant company as an unlawful premium:—

Held, (1) that the defendant company was requiring the payment of a "premium" within the meaning of section 18 (2), since this was in substance a consideration stated in terms of money, although disguised by the cloak of a sale of property at an undervalue (post, p. 364).

"Pecuniary consideration" includes any consideration sounding or expressed in terms of money whereby there is a benefit to the landlord or a detriment to the tenant (post, pp. 367, 372).

(2) That the transaction was not removed from the operation of the Act by the fact that the premium was required to be paid, not to the defendant company, nor to any person on its behalf, but to a third party, since it could not be supposed that the legislature intended that a landlord might lawfully require the payment of a premium for the benefit of a wife, a son, a daughter or a third party (post, pp. 363, 365, 368, 373).

Rex v. *Birmingham* (*West*) *Rent Tribunal* [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198 distinguished.

Remmington v. *Larchin* [1921] 3 K.B. 404; 37 T.L.R. 839 considered.

Decision of the Court of Appeal [1959] 3 W.L.R. 185; [1959] 2 All E.R. 605 affirmed.

Appeal from the Court of Appeal (Lord Evershed M.R., Ormerod and Willmer L.JJ.).

This was an appeal by the appellants, Elmdene Estates Ltd., from an order of the Court of Appeal dated April 28, 1959, allowing with costs the appeal of the respondent, William Alfred White, against the judgment of Judge Leon given on October 29, 1958, in Willesden County Court in an action brought by the respondent against the appellants.

The facts are fully stated in the opinion of Viscount Simonds.

L. G. Scarman Q.C. and *C. F. Dehn* for the appellant company.

R. E. Megarry Q.C. and *Henry Palmer* for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Henderson* v.

Arthur [1]; *Inland Revenue Commissioners* v. *St. John's College, Oxford* [2]; *King* v. *Earl Cadogan* [3]; *B. G. Utting Ltd.* v. *Hughes* [4]; *In re Cosh's Contract* [5]; *Crespigny* v. *Wittenoom* [6]; *Hutton* v. *Lewis* [7]; *Maclay* v. *Dixon* [8]; *Inland Revenue Commissioners* v. *Marquess Camden* [9]; *Temple* v. *Lewis* [10]; *Montagu* v. *Browning* [11]; *Larocque* v. *Beauchemin* [12]; *Navarro* v. *Moregrand Ltd.* [13] and *Gardner & Co. Ltd.* v. *Cone.* [14]

Their Lordships took time for consideration.

Jan. 21, 1960. VISCOUNT SIMONDS. My Lords, in June, 1958, the respondent, William Alfred White, instituted proceedings in the Willesden County Court to recover from the appellant company the sum of £500 which he alleged to have been a premium required to be paid by him contrary to the provisions of the Landlord and Tenant (Rent Control) Act, 1949.

The precise facts are of so much importance that I propose to state them in the words of the learned county court judge. He said:

"The facts as I found them to be were as follows: At the "relevant time the plaintiff and his wife were joint owners of "174, The Heights, South Harrow (hereinafter called '174') "where they lived. The house was subject to a mortgage, pay- "ments under the mortgage deed were in arrear and the plaintiff "and his wife decided that the only way out was for them to sell "174, repay the mortgage money out of the price obtained and "obtain a flat. They had nowhere to go, they were compelled to "leave their own house and were just the sort of people whom a "landlord who wanted an illegal premium would have liked to "meet. They were just the sort of people for whose benefit "section 2 of the Act of 1949 was passed.

"During their quest for a flat they passed the window of "Clifford and Clifford Ltd. (hereinafter called 'Clifford') who "were estate agents, and they saw advertised in the window a "self-contained flat to let unfurnished. They went in and asked "if the flat was available and if they could see it. Clifford's "representative, a Mr. Williamson, replied to their question with, "'Have you got a house to sell?' They said 'Yes' and Mr. "Williamson then said he would take them over the flat, 108, "Welldon Crescent. They went to see it and liked it.

[1] [1907] 1 K.B. 10; 23 T.L.R. 60.
[2] [1915] 2 K.B. 621.
[3] [1915] 3 K.B. 485.
[4] [1939] 2 K.B. 231; 55 T.L.R. 556; [1939] 2 All E.R. 126.
[5] [1897] 1 Ch. 9.
[6] (1792) 4 T.R. 79.
[7] (1794) 5 T.R. 639.
[8] (1943) 170 L.T. 49; [1944] 1 All E.R. 22.
[9] [1915] A.C. 241.
[10] [1954] 1 Q.B. 22; [1953] 3 W.L.R. 762; [1953] 2 All E.R. 1130.
[11] [1954] 1 W.L.R. 1039; [1954] 2 All E.R. 601.
[12] [1897] A.C. 358; 13 T.L.R. 336.
[13] [1951] 2 T.L.R. 674.
[14] [1928] Ch. 955.

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"It was conceded on behalf of the defendants that the tenancy "offered and subsequently granted was one to which the Rent "Restriction Acts and in particular the Act of 1949 applied. Mr. "Williamson then made it plain to the plaintiff and his wife "that they could not have the tenancy of the flat unless they "were prepared to sell 174 at £500 less than its fair market value. "I was satisfied that the fair market value of that house was at "the time between £2,300 and £2,400, and that Clifford knew this "very well, and on behalf of the defendants required the plaintiff "and his wife to sell it to purchasers who turned out to be "Pegasus Training Estates Ltd. (hereinafter called 'Pegasus') at "£500 less than its value.

"The plaintiff and his wife thought it over and, as they had nowhere else to go they felt they had no alternative but to agree.

"They accordingly sold 174 to Pegasus for £1,800 and received "in return from the defendants a tenancy of 108, Welldon "Crescent at a weekly rent of £1 15s. I hold that the sale by "the plaintiff and his wife to Pegasus of 174 at an undervalue "amounting to £500 was required by Clifford acting for the "defendants as a condition of the tenancy being granted by "the defendants to the plaintiff."

The learned judge further pointed out the close interrelation of the three companies, viz., the appellant company, Pegasus and Clifford, but I do not attach any importance to this matter. He held that the transaction was not colourable or a sham. It is, no doubt, sufficiently explained by the interrelation.

In these circumstances the respondent brought his action. He founded on section 2 (1) of the Act to which I have referred, which provides that "A person shall not, as a condition of the "grant, renewal or continuance of a tenancy to which this section "applies, require the payment of any premium in addition to the "rent." Subsection (5) of the same section provides that: "Where, under an agreement made after March 25, 1949, any pre-"mium has been paid which, or the whole of which, could not law-"fully be required under the foregoing provisions of this section . . . "the amount of the premium, or so much thereof as could not law-"fully be required . . . shall be recoverable by the person by whom "it was paid: . . ." Subsection (6) provides that a person requiring any premium in contravention of the section should be liable on summary conviction to a fine not exceeding £100, and that the court by which he was convicted might order the amount of the premium, or so much thereof as could not lawfully be required under the section, to be repaid to the person by whom it was paid. By section 18 it was enacted that in that Act the expression "premium" included any fine or other like sum, and any other pecuniary consideration in addition to rent. I do not think it necessary to refer to any other sections of the Act.

Two questions arose. Did the appellant company require the payment of a premium within the meaning of the Act as the

condition of a grant of a tenancy? If they did, was the transaction nevertheless removed from the operation of the Act by the fact that it was required to be paid, not to them nor to any one on their behalf, but to a third party?

Both these questions the learned judge would have decided in favour of the respondent but felt himself bound to decide the second of them against him by the decision of the King's Bench Divisional Court in *Rex* v. *Birmingham (West) Rent Tribunal.*[1] Upon appeal the Court of Appeal unanimously allowed the appeal of the respondent. I have no doubt they were right.

My Lords, it is not quite clear that in the *Birmingham* case [1] the ratio decidendi was that a premium could not be unlawfully required within the meaning of the section unless it was required to be paid to the person making the requisition or to someone on his behalf. But, undoubtedly, the court made observations which asserted that construction. It is therefore important that your Lordships should state clearly that this is not a tenable view. The Act does not say so, and I see no reason for reading into it words which are not there and which, if they were, would go far to defeat its purpose. It cannot be supposed that the legislature intended that a landlord could not lawfully require the payment of a premium for his own benefit, but could do so for the benefit of a wife, a son, a daughter or any third party.

Upon what I have called the first question the learned judge held that the transaction amounted to the payment of a pecuniary consideration, and in this he was upheld by the Court of Appeal.

My Lords, it has been said before, and it must be said again, that in the consideration of questions arising under the Rent Acts the court must look at the substance and reality of a transaction not its form: see, e.g., *Samrose Properties Ltd.* v. *Gibbard.*[2] Of the real nature of this transaction no doubt can be entertained. It was born of the determination of the landlords to obtain a considerable sum of money in addition to the rent as a condition of the grant of a tenancy. It was carried out by requiring the sale of a house at an undervalue of £500. The respondent suffered a pecuniary detriment of that amount: the appellant company (or a third party to whom it surrendered that advantage) obtained a comparable benefit. If this is not a pecuniary consideration moving from the respondent, I do not know what those words mean. That there was consideration cannot be denied. Was it not pecuniary? That word is defined as meaning "of, belonging "to or having relation to money." There may be transactions in which it is difficult to say whether the consideration is pecuniary. The line dividing valuable consideration which is pecuniary from that which is not is a twilight line, but on one side of it in broad noonday is the transaction in which one party says to the other: "I will not grant you a tenancy unless you sell me a house for

[1] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 198.

[2] [1958] 1 W.L.R. 235; [1958] 1 All E.R. 502.

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"£500 below its value." It is in substance, and I would be inclined to say in form also, a consideration stated in terms of money, and it is not disguised by the cloak of a sale of property at an undervalue.

The appellants sought to rely on fine distinctions between the language of the Act of 1949 and that of earlier Acts, but they appeared to me trivial and by no means to justify any departure from the plain meaning of the words we have to construe. They sought, too, to get some help from the word "payment" in the subsection. The transaction, they said, did not involve any payment by the respondent. That may be conceded. But, since pecuniary consideration includes something other than (a) a premium as commonly understood, (b) a fine, and (c) any other like sum, it is clear that the word "payment" must be given an extended meaning to cover whatever the pecuniary consideration may be.

Finally, the appellants urged that as the Act imposed a penalty for the breach of its provision, they should be given the benefit of any ambiguity in its terms. I have already indicated that I find no difficulty in determining on which side of a line that may not be easy to draw this case falls. There is no such ambiguity as to justify the invocation of the important principle asserted by Scrutton L.J. and Atkin L.J. in *Remmington* v. *Larchin*[3] and recently reasserted in this House.[4] Nor, I think, would your Lordships be over ready to apply it where a landlord deliberately contrives just the mischief that the Act is intended to avert, but claims that its provisions are susceptible of a meaning which provides a way of escape for him.

The appeal should, in my opinion, be dismissed with costs.

Lord Radcliffe. My Lords, in the month of August, 1952, the appellants granted the respondent a tenancy of a first-floor flat at 108, Welldon Crescent, Harrow, at a weekly rent of £1 15s. In the same month the respondent and his wife, at the direction of the appellants, conveyed the freehold of their house, 174, The Heights, South Harrow, to a limited company, Pegasus Training Estates Ltd., for the sum of £1,800. The only feature of this convenient exchange that might be thought to have been at all unusual was that, as the appellants and the respondent both knew, the fair market value of 174, The Heights at that time was between £2,300 and £2,400.

The sale of the house to Pegasus for £1,800 was not due, however, to any impulse of benevolence on the part of the respondent and his wife. On the contrary, it was a sacrifice to which they had to submit in order to obtain the accommodation at 108, Welldon Crescent, of which they were in need. Upon their first

[3] [1921] 3 K.B. 404; 37 T.L.R. 839.

[4] See *London & North Eastern Railway Co.* v. *Berriman* [1946] A.C. 278, 313–314; 62 T.L.R. 170; [1946] 1 All E.R. 255.

inquiry of the appellants' estate agents, who were advertising the vacancy, they were met with the pregnant question: "Have you "got a house to sell?" As the negotiation proceeded it was made plain to them that they could not have the tenancy of the flat unless they were prepared to sell their house for £500 less than its fair market value.

Nor was the conferment of this benefit on Pegasus an act of inexplicable benevolence on the part of the appellant company. It so happened that of its 5,000 issued shares of £1 each, 1,000 belonged to a Mr. Melville Francis Van Dooren, who also held 2,500 of the 6,600 issued shares of £1 each in Pegasus: a Mable Victoria Van Dooren, having the same address as Mr. Melville, held another 1,000 shares of the appellants and another 2,500 shares of Pegasus: while 1,000 shares in each of the companies belonged to a Mr. Elmer John Van Dooren. Thus, the Van Dooren family can be seen to have enjoyed a certain community of interest in the fortunes of the two companies.

The tenancy of the flat at 108, Welldon Crescent, is one within the protection of the Rent Restriction Acts. The sole question in this appeal is whether the appellants required "the payment "of [a] premium in addition to the rent" within the meaning of section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, so as to render the amount of the premium recoverable by the respondent under subsection (5) of the same section. They do not dispute that if what was done on their behalf did amount to a contravention of section 2 (1), the amount of the premium can be recovered from them despite the fact that it was Pegasus which was the immediate recipient of the benefit of the respondent's concession.

Several points were taken by the appellants in the course of their argument to the effect that the prohibition contained in section 2 (1) did not apply to their ingenious transaction. The first was that, to be within the Act, the "premium" had to be paid to the landlord himself and not to any other person, so that, even if payment of a sum of money or its equivalent had been required in this case, it was not a premium within the meaning of the section. This reading was said, and I think rightly said, to have been adopted by the Divisional Court in *Rex* v. *Birmingham (West) Rent Tribunal*,[5] in which Lord Goddard C.J. said: "In the present case I prefer to base my judgment on the proposi-"tion that, on its true construction, this Act was intended to "apply only to a pecuniary consideration paid to the landlord."

In my opinion that is not the right construction of the Act. The words of the section do not require that the prohibited payments should be only those made to landlords themselves. So far as the tenant is concerned, the cost of accommodation is raised against him just as much if he hands his money over to someone else as it is if he hands it directly to the landlord. The landlord,

[5] [1951] 2 K.B. 54, 58, 59.

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on the other hand, gets his benefit out of the tenant if the premium is paid at his order to his creditor, to his son or to any other person or purpose he nominates no less than if he receives what is paid directly into his own hands. I think, therefore, that there is a breach of section 2 when the premium is paid to a third party, provided that the payment is made at the landlord's direction.

Then it was said that, even if this might have been the right construction before 1951, it would be wrong to adopt it now after the *Birmingham* decision [6] had stood for eight years, particularly as a breach of the section had certain penal consequences. The Court of Appeal were not moved by this form of argument, and I cannot say that I am. I dare say that since 1951 some landlords have taken tribute of this kind in reliance upon what was said in the *Birmingham* case.[6] For all I know, Messrs. Clifford and Clifford Ltd., the agents of the appellants, had the relevant volume of the Law Reports open on the table before them when they laid down their condition that Pegasus was to have the respondent's house at £500 below its value. I should not be much surprised. But, after all, the primary duty of the House is to attribute what it believes to be the right meaning and effect to a general Act of Parliament passed for the protection of tenants of rent-controlled premises, and I do not think that we should ever get very far if a decision of a Divisional Court were to be treated as settling an important point of interpretation for all time merely because it was given eight years ago.

The next points that were taken were that the benefit conferred on Pegasus by the conveyance of the house for £1,800 was not a premium, that no payment had been made in the mere conveyance at an undervalue, and that the consideration which the sacrifice of £500 represented was not a pecuniary consideration within the meaning of section 18 (2) of the Act. All these aspects of the argument can be presented separately: but I have put them together because, in my view, they all depend on the answer given to the one question: Was there a "pecuniary" consideration afforded in this case? If there was, then it was by virtue of section 18 (2) a "premium": and, if it was a premium, then I should find no difficulty in saying that whatever passed it over to the recipient was a payment of it.

The expression "premium" includes any fine or other like sum, and any other pecuniary consideration in addition to rent. Not every consideration given or suffered to obtain a letting is then a premium for the purpose of this Act. It must be pecuniary. On the other hand, the term "premium" evidently extends to considerations beyond the simple lump sum in addition to rent which is the ordinary form of premium or fine. The appellants suggest that the words "pecuniary consideration" are satisfied by including in "premium" monetary instruments such

[6] [1951] 2 K.B. 54.

as cheques and bills. In my opinion, that is not a natural interpretation and, in any event, it is much too restricted. Judging by the context of the Act there is, I think, a pecuniary consideration, whenever the benefit obtained by the landlord or the detriment suffered by the tenant is expressed in terms of money. If it is so expressed, the particular means adopted of passing the consideration from giver to taker is not significant.

Now, in this case I do not think that there is any doubt that on the facts found by the county court judge what was required of the prospective tenants on behalf of the landlords was the sum of £500, to be taken out of the value of the house that they were to make over to Pegasus. The transaction was in all respects equivalent to what would have taken place if they had sold 174, The Heights, at its agreed fair market value of £2,300/£2,400 and handed back £500 to the purchaser. If that had been done, £500 would have been paid in cash at and to the order of the landlords. Although we must take the words of the statute as we find them, and we are not to treat "pecuniary consideration" as a mere synonym for any consideration whatsoever, I do not think that the distinction between what is and what is not "pecuniary" depends upon purely formal differences in the method of transferring the stipulated amount. What is important is that the landlords made it plain that their price was £500, and that this sum was furnished out of the resources of the tenant, which were reduced by the same amount.

I would dismiss the appeal.

LORD COHEN. My Lords, I agree.

LORD KEITH OF AVONHOLM. My Lords, I agree. On the first point, whether we find here a "premium," I proceed upon the construction of the definition of "premium" in section 18 (2) of the Act. Some meaning must be found for the words "other "pecuniary consideration" in the definition, other than payment in cash. Payment in cash to a landlord is met by the words "any fine or other like sum." It was suggested that "any other "pecuniary consideration" would include payment by cheque. That would lead nowhere because, unless the cheque was honoured, there would be no payment at all and, if it were honoured, there would be a payment in cash if the cheque were cashed and, in effect, a payment in cash if it resulted in a transfer of credit from the drawer's bank account to the payee's bank account. I cannot think that the definition was introduced to cover fine distinctions of this kind. In my opinion, the phrase "any other pecuniary consideration" is apt to cover any other consideration that sounds in money to the tenant, either in the way of involving him in a payment of money or of forgoing a receipt of money. Forgoing a debt due by the landlord to the tenant would be a case in point. The difficulty arises, I think, not in giving the phrase such a construction, but from the fact that in section 2

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of the Act "premium" is linked with the word "payment." Can a tenant be said to have *paid* a premium if he has agreed to discharge a debt due to him by the landlord? I would say "Yes." If such discharge is a pecuniary consideration he has satisfied the landlord's demand for a premium by agreeing to the discharge, and such satisfaction in the context of this Act is, in my opinion, equivalent to payment.

There remains the question whether the payment of a premium must be to the landlord. This links up in some measure with the definition of "premium." It cannot be in all respects so confined, for section 2 (2) of the Act prohibits any person from requiring payment of a premium as a condition of the assignment of a tenancy. This would apply, I think, to a landlord whose consent was necessary to an assignment, but it clearly covers a tenant who demands a premium as a condition of assigning his tenancy. This, however, is the result of express statutory enactment and may be said to assimilate the position of an assignor to that of a landlord. This leaves unresolved the question whether the payment required to be made must be made to the landlord (or the assignor), or to someone on his behalf, in order to constitute a breach of the statute. The matter must depend on what is to be implied from the language used. No express words refer to payment to the landlord. Reliance was placed by counsel for the appellants on the words "in addition to the rent" in section 2 (1) and "in addition to rent" in the definition. In the definition the words are probably necessary as, without them, the words "any "other pecuniary consideration" would, if taken literally, include rent. From the words in section 2 (1) no safe inference can, in my opinion, be drawn. On any view, the premium is in addition to the rent. Nor is the fact that the premium may be recoverable from the landlord, under section 2 (5), or may be ordered to be repaid by the landlord under section 2 (6) conclusive on the point. (It is immaterial to this case to consider whether it can be recovered from the recipient of the premium.) If the landlord is the person who has required the premium to be paid as a condition of his granting a tenancy, to whomsoever it is to be paid, section 2 (6) of the Act empowers the court which convicts him of an offence to order the premium to be repaid to the person by whom it was paid. By parity of reasoning subsection (5) of section 2 would seem to provide that it should be recoverable from the landlord by civil suit, in like case, without that subsection yielding a necessary inference that, therefore, it must have been received by him. As the Master of the Rolls said in his judgment in the Court of Appeal,[7] there is no logical reason why a payment made to the landlord should be recoverable as being unlawful and one made by his order to a son, or a trustee, or an associated company, should be protected as being lawful. In my opinion, this second point taken for the appellants falls with the first.

[7] [1959] 3 W.L.R. 185, 193; [1959] 2 All E.R. 605.

I would dismiss the appeal.

LORD JENKINS. My Lords, I also agree.

In this case the plaintiff (now respondent), William Alfred White, sued the defendants (now appellants), Elmdene Estates Ltd., in the Willesden County Court for £500, claiming that in the circumstances hereinafter mentioned the defendants had, within the meaning of sections 2 (1) and 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949, required the payment of a premium of that amount in addition to the rent as a condition of the grant to the plaintiff of a tenancy of a flat at No. 108, Welldon Crescent, Harrow, being a tenancy to which the Rent Restriction Acts, 1920 to 1949, applied; and that he was, accordingly, entitled to recover from the defendants the sum in question (which he had, in fact, paid in the way I am about to describe) as an unlawful premium under the provisions of section 2 (5) of the Act of 1949.

The facts as found by the learned judge, which are not in dispute, have been fully stated in the opinion delivered by my noble and learned friend, Lord Simonds, and I need not repeat them at length. He has also sufficiently referred to the relevant provisions of the 1949 Act, which, for the purposes of this opinion, may therefore be taken as read.

The defendants admit that the tenancy of the flat was a tenancy to which section 2 of the Act of 1949 applied, and that, if the defendants had required and received a simple payment by the plaintiff to the defendants themselves of £500 in cash as a condition of granting the tenancy, the £500 would have been an unlawful premium under section 2 (1) and recoverable as such under section 2 (5).

The defendants did not, however, require or receive the £500 in actual cash; but they did require as a condition of the grant of the tenancy that the plaintiff and his wife should sell a house (No. 174, The Heights, Northolt Park), of which they were joint owners, at a price of £500 less than its fair market value. In compliance with this requirement the plaintiff and his wife in fact sold the house, not to the defendants themselves, but, by the direction of the defendants, to another company, Pegasus Training Estates Ltd. (hereinafter called "Pegasus"), at the stipulated undervalue.

The plaintiff's contention was that the benefit secured by the defendants by means of the sale at an undervalue of £500 constituted a premium of that amount within the meaning of sections 2 (1) and 18 (2) of the Act of 1949, and that, for the purposes of section 2 of that Act, the completion of such sale amounted to payment of such premium. He contended further that the fact that the defendants chose to require that the sale should be made to Pegasus instead of being made to themselves was irrelevant.

The defendants, on the other hand, contended that the benefit

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arising from the sale of the house at an undervalue of £500 was not a "premium," either in the ordinary sense of the word or within any of the wider meanings assigned to it by section 18 (2). They contended further that, even if a benefit of this sort was otherwise capable of constituting a premium within the meaning of the Act of 1949, the benefit here in question was outside the scope of section 2 (1) of the Act, which only applied to a premium paid to the person granting the tenancy, whereas in the present case, the payment constituted by the completion of the sale of the house at the stipulated undervalue was made, not to the defendants as the landlords, but to a third party, namely, Pegasus.

The learned county court judge, in the course of his careful and most helpful judgment, said that if the sale of the house had been to the defendants he would have been prepared to hold that the sale at an undervalue amounted to a premium within the meaning of that word as defined by section 18 (2) of the Act of 1949. He went on to observe, and I entirely agree, that "it would be very "odd if a proposed landlord could say to a proposed tenant 'you "'can have a tenancy but only on the terms that you sell me "'your wife's necklace, which is worth £1,500, for £1,000' with- "out it being held that that was a pecuniary consideration in "addition to the rent."

Later in his judgment the learned judge said this: "I "certainly held, however, that the payment, if it was a payment, "was made to Pegasus at the direction of or on the request of "the defendants, and upon that finding it seemed to me that the "plaintiff had brought his case within the section. He had "proved to my satisfaction that the defendants had, as a con- "dition of granting a tenancy, required the payment (to Pegasus) "of a pecuniary consideration in addition to the rent."

From these and other passages in the judgment of the learned judge it is plain enough that, if he had been free to do so, he would have had little hesitation in deciding the case in the plaintiff's favour. He was, however, confronted with the case in the Divisional Court of *Rex* v. *Birmingham (West) Rent Tribunal*,[8] in which the view was expressed that in order to constitute a premium within the meaning of section 2 (1) of the Act of 1949 the payment in question must be made to the landlord and not to some third party. The learned judge, though with some reluctance, felt (as I think quite rightly) that he was bound to follow this decision, with the result that the defendants were entitled to succeed on the second branch of their argument because the "payment" here in question was made to Pegasus and not to the defendants as landlords.

Accordingly, by his order dated October 29, 1958, the learned judge gave judgment for the defendants with costs.

In the Court of Appeal the case of *Rex* v. *Birmingham (West) Rent Tribunal*[8] was distinguished and, while held right on its

[8] [1951] 2 K.B. 54.

own facts, was disapproved in so far as it contained observations to the effect that no sum could be a premium within the meaning of section 2 (1) of the Act of 1949 if it was paid to some nominee of, or to the order of, the landlord, instead of being paid to the landlord himself.

On the question whether the £500 provided by the sale of the house at an undervalue of that amount was, in other respects, a premium within the meaning of the Act of 1949, the Court of Appeal took the same view as the learned county court judge had expressed, but to which, in view of the *Birmingham* case,[8] he had felt unable to give effect, and held that it was such a premium.

Accordingly, it was held in the Court of Appeal that the undervalue of £500 amounted to a premium within the meaning of the Act of 1949, and that it was not excluded from the operation of the Act by the circumstance that the sale was made to Pegasus at the direction of, or on the request of, the defendants instead of being made to the defendants themselves.

The Court of Appeal also decided in the plaintiff's favour two subsidiary questions which were not pursued in this House, the first being whether the £500 could be recovered from the defendants in view of the fact that it had been received by Pegasus and not by the defendants themselves; and the second being whether in view of the fact that the plaintiff and his wife were joint tenants of the house, and the wife was not joined as a co-plaintiff, the plaintiff could recover the whole of the £500 or only half of it.

Accordingly, on April 28, 1959, the Court of Appeal gave judgment allowing the appeal and directing judgment to be entered for the plaintiff for the sum named with costs. From that judgment the defendants have now appealed to your Lordships' House.

In his able argument for the defendants Mr. Scarman relied on the words " payment . . . in addition to the rent " in section 2 (1), and the reference to the " person by whom " the premium " was paid " in section 2 (5) and (6) as showing that the prohibition is confined to the actual payment of money, or to transactions equivalent or analogous to the actual payment of money, and contended that in the present transaction there was no actual payment of money or transaction equivalent or analogous to the payment of money. He did not succeed in making clear to me where the line was to be drawn once the criterion of actual payment in cash was abandoned. Moreover, the narrow construction he would place on the words " payment of any " premium " appears to me to attribute no effect to the words " any other pecuniary consideration " in the extended interpretation of the expression " premium " contained in section 18 (2). Mr. Scarman placed some reliance upon section 3 of the Act of 1949, which provides that excessive prices for furniture, etc., are to be treated as premiums, on the ground (as I understood his

[8] [1951] 2 K.B. 54.

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argument) that if the words " any other pecuniary consideration " were wide enough to cover the present transaction, they would also cover transactions of the kind contemplated by section 3, which would thus become otiose. I cannot attach any weight to this submission. Section 3 can well be accounted for as a provision made ex abundanti cautela to meet an obvious mode of evasion which might or might not otherwise be caught. Moreover, section 3 covers cases in which there has been no quantification by the parties of the reasonable price or the excess over that price, and in such cases it might well be difficult, in the absence of a special provision, to apportion the total price between purchase-money and premium. Mr. Scarman also traced through earlier enactments (beginning with the Act of 1915) the history of the prohibition of premiums now appearing in section 2 of the Act of 1949, and sought to spell out of various changes in the language in which it has been expressed from Act to Act the conclusion that it is now to be regarded as confined to actual payments in money, or to transactions involving something equivalent or analogous to actual payment in money. Having given the best consideration I can to this part of Mr. Scarman's argument, I find it impossible to justify by reference to the other enactments to which he has referred, the narrow meaning which he seeks to place upon the provisions of the Act of 1949, with the construction of which your Lordships are now concerned. Mr. Scarman also referred to cases under legislation in the reign of George III designed to prohibit or restrict the sale of life annuities, in which a narrow construction had been placed on the expression " pecuniary consideration." I can derive no assistance from the various cases referred to in the course of the argument as bearing upon the meaning of the words " premium," " fine," " pay " or " payment " in other contexts and other Acts.

Returning to the language of sections 2 (1) and 18 (2) of the Act of 1949, it appears to me that the expression " pecuniary " consideration " must be intended to include benefits which would not or might not fall within the description of a premium or fine or other like sum. It appears to me further that given a benefit amounting to a " pecuniary consideration " moving from a prospective tenant to a prospective landlord, the " payment " of it must include any means appropriate to the subject-matter by which the consideration or benefit in question is passed from the one to the other.

Without attempting any exhaustive definition of the expression " pecuniary consideration," I may, at all events, safely say that the example given by my noble and learned friend, Lord Keith of Avonholm, of the forgoing of a debt owing to the prospective tenant from the prospective landlord would be within it, and that the cancellation of the debt would amount to payment of the " pecuniary consideration " in question, although no money actually passed.

In the present case the sale of the house at an undervalue was clearly consideration. It was, moreover, consideration which had a specific value in money, namely, £500, being the amount of the undervalue required by the defendants. On completion of the sale Pegasus, which became the purchaser at the direction or on the request of the defendants, gained, and the plaintiff lost, the £500. In short, the defendants required as a condition of granting the tenancy a consideration assessed at the sum of £500, which was to be provided by the sale of the house by the plaintiff and his wife at a price less by £500 than the price which could otherwise have been obtained for it, and directed or requested that the sale should be made to Pegasus instead of to the defendants. In these circumstances, I fail to see how the defendants could, with any semblance of truth, claim that they had not required a pecuniary consideration of £500, to be satisfied, or, in other words paid, by the sale of the house at an undervalue of that amount.

As to the *Birmingham* case,[9] I entirely agree with the Court of Appeal that it cannot be supported so far as it proceeds on the general proposition that no sum can, in any circumstances, be a premium within the meaning of the Act of 1949 unless it is paid to the prospective landlord. There may, of course, be cases in which prospective tenants, with a view to obtaining tenancies, make payments to persons other than the prospective landlords for some consideration other than the granting of the tenancies in view. Examples are to be found in the sums paid by prospective tenants to the builders who were converting the property into flats in the *Birmingham* case,[9] and in the sum paid to the sitting tenant to vacate the premises in *Remmington* v. *Larchin*.[10] Payments such as these might well be held to fall outside the category of premiums because they are not payments required as a condition of granting the tenancy.

But if the payment in question is in fact required by the prospective landlord as a condition of granting the tenancy, I cannot see why the payment should be any the less a premium because the landlord chooses to stipulate that it should be made to a third party designated by him. Illegality apart, the landlord is master of the situation and can demand any payment he pleases to be made to himself or to any third party he may please to designate. He can decide to receive the payment himself and pay it over to any third party he chooses immediately after receipt, and the fact that he requires payment to be made directly to the third party of his choice cannot, so far as I can see, make any difference.

Mr. Scarman did not contend before your Lordships that if the pecuniary consideration here in question was not prevented from being a premium within the meaning of the Act by the circumstance that it was received by Pegasus at the direction

[9] [1951] 2 K.B. 54.

[10] [1921] 3 K.B. 404.

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or on the request of the defendants, instead of being received by the defendants themselves, that circumstance would prevent it from being recoverable from the defendants under section 2 (5).

For these reasons, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *J. H. Milner & Son; M. Phillips & Co.*

F. C.

[PRIVY COUNCIL.]

J. C.* 1960 *Jan.* 19.

KHATIJABAI JIWA HASHAM . . . . . APPELLANT;

AND

ZENAB (AS LEGAL REPRESENTATIVE OF H. G. HARJI) . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Vendor and Purchaser—Specific performance—Premature action—Signed contract for sale of land—Immediate repudiation by vendor—Claim by purchaser, before date fixed for completion, for order for specific performance—Principles applicable—Form of order.

Eastern Africa—Kenya—Vendor and purchaser—Contract for sale of land—Specific performance.

Privy Council—Concurrent findings of fact—Exception to rule—Conflict of evidence—Improbability of finding—Importance of contemporary documents (post, pp. 380, 381).

Contract — Mistake — Unilateral — Innocent misrepresentation (post, p. 381).

Estoppel—Deed, by—Non est factum—Fraud or duress—No false statement (post, p. 381).

A contract, signed by the defendant on February 19, 1954, for the sale by her to the plaintiff of a 2-acre plot of land in Nairobi, provided, inter alia, for payment of a deposit immediately and the balance of the purchase price on presentation of documents of title to be executed by both parties within six months from the date of the contract. The defendant repudiated the contract—and tore it up—within a few minutes of signing it on the ground that she had never agreed to sell the whole 2 acres but only an area of half an acre. On July 2, 1954, some weeks before the last day for completion—August 19—the plaintiff instituted proceedings claiming specific performance of the contract of February 19. The defendant contended, inter alia, that the plaint was issued prematurely, and that the plaintiff should have waited until there had been a failure to perform the contract within the period fixed thereby, notwithstanding that she had previously intimated her refusal to do so:—

Held, that the plaintiff was entitled to an order for specific performance. The fallacy of the defendant's contention consisted

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* *Present*: LORD TUCKER, LORD DENNING, the RT. HON. L. M. D. DE SILVA.

in equating the right to sue for specific performance with a cause of action at law. In equity all that was required was to show circumstances which would justify the intervention by a court of equity. The order for specific performance often fell into two parts, the first being of a declaratory nature and the second containing consequential directions. The first of the forms in Seton's Judgments and Orders, 7th ed., vol. 3, p. 2136, was clearly suitable to a case where the time for performance might not have arrived even at the date of the order, but in such a case, in the event of subsequent non-performance the court would not require the issue of a fresh writ before making the consequential directions for performance. The court would not, of course, compel a party to perform his contract before the contract date arrived, and would give relief from any order in the event of an intervening circumstance frustrating the contract.

While the defendant's contention was not supported by any authority, there was no express decision in any English case to the contrary, but the view that the plaintiff was entitled to an order for specific performance accorded with the decisions in the Canadian cases of *Roberto* v. *Bumb* [1943] 2 D.L.R. 613 and *Roy* v. *Kloepfer Wholesale Hardware and Automotive Co. Ltd.* [1951] 3 D.L.R. 122, affirmed in [1952] 1 D.L.R. 158, and by the Supreme Court of Canada in [1952] 2 S.C.R.(Can.) 465. There was nothing in the Indian Contract Act (applicable in Kenya) to compel acceptance of the contrary view (post, p. 376 et seq.).

Dictum of Lord Sumner in *Leeds Industrial Co-operative Society Ltd.* v. *Slack* [1924] A.C. 851, at 866; 40 T.L.R. 745 not followed.

Marks v. *Lilley* [1959] 1 W.L.R. 749, 752; [1959] 2 All E.R. 647 considered.

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 29 of 1957) from a judgment of the Court of Appeal for Eastern Africa (Sinclair V.-P., Briggs J.A. and Connell J.) (March 15, 1957) affirming a judgment of the Supreme Court of Kenya (Harley Ag.J.) (January 13, 1956) whereby specific performance by the appellant of a contract in writing dated February 19, 1954, between the appellant and Haji Gulamhussein Harji for the sale by the appellant of a plot of land in Nairobi was decreed at the suit of the said Harji.

The respondent was the widow and executrix of Harji, since deceased. The parties to the proceedings in the courts in East Africa will be referred to as plaintiff and defendant.

The contract sued upon was for the sale by the defendant of a plot, No. 209/58/1, measure 2·04 acres or thereabouts, together with all the buildings thereon situate on Sclatters Road, Nairobi, in complete vacant possession for the sum of Shs. 100,000 payable as to Shs. 15,000 on the execution of the contract and the balance on presentation of documents of title to be executed by both parties within six months from the date of the agreement. This contract was signed by the defendant on February 19, 1954, but was repudiated by her within a few minutes of signature on the ground that she had never agreed to sell the whole 2-acre plot but only an area of half an acre.

On July 2, 1954, between six and seven weeks before the last day for completion, viz., August 19, the plaintiff issued his plaint.

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It was contended on behalf of the defendant that the plaint was issued prematurely, on the ground that the plaintiff, having elected to affirm the contract (instead of treating the anticipatory breach as putting an end to it so far as the future obligations of either party were concerned), kept it in being for all purposes, and the anticipatory breach by the defendant (which would, if accepted as a breach, have afforded a cause of action for damages) would not avail the plaintiff to support a claim for specific performance. He must wait until there had been a failure to perform the contract within the period fixed thereby, notwithstanding that the defendant had previously intimated her refusal to do so.

The further facts are stated in the judgment of the Judicial Committee.

1959. Nov. 23, 24, 25, 26, 30; Dec. 1, 2. *Sir Frank Soskice Q.C.* and *Alan Campbell* for the appellant.

Geoffrey Cross Q.C. and *Ralph Millner* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Hochster* v. *De La Tour* [1]; *Frost* v. *Knight* [2]; *Johnstone* v. *Milling* [3]; *Bettesworth* v. *St. Paul's* [4]; *Webster* v. *Cecil* [5]; *Blay* v. *Pollard and Morris* [6]; *L'Estrange* v. *F. Graucob Ltd.* [7]; *Solle* v. *Bucher* [8]; *Bell* v. *Lever Brothers Ltd.* [9]; *Foster* v. *Mackinnon* [10]; *Hunter* v. *Walters* [11]; *U Ba Maung* v. *U Chit Hlaing* [12]; *Smith* v. *Heptonstall* [13]; *Eshelby* v. *Federated European Bank* [14]; *Salt* v. *Cooper* [15]; *Wilson* v. *Northampton and Banbury Junction Railway Co.* [16]; *Connecticut Fire Insurance Co.* v. *Kavanagh* [17]; *Howatson* v. *Webb* [18]; *Tamplin* v. *James* [19]; *Van Praagh* v. *Everidge* [20]; *Baldwin* v. *Baldwin* [21]; *Smith* v. *Hughes* [22]; *Torrance* v. *Bolton.* [23]

1960. January 19. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above, and continued: No authority for the defendant's proposition was cited, but it is true to say that there is no express decision in any English case to the contrary. Their Lordships are of opinion that the fallacy of the submission consists in equating the right to sue for specific performance with a cause of action at law. In equity all that is required is to show circumstances which

[1] (1853) 2 E. & B. 678.
[2] (1872) L.R. 7 Ex. 111.
[3] (1886) 16 Q.B.D. 460.
[4] (1728) 1 Bro.P.C. 240.
[5] (1861) 30 Beav. 62.
[6] [1930] 1 K.B. 628.
[7] [1934] 2 K.B. 394.
[8] [1950] 1 K.B. 671, 692; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.
[9] [1932] A.C. 161, 217; 48 T.L.R. 133.
[10] (1869) L.R. 4 C.P. 704.
[11] (1871) L.R. 7 Ch.App. 75.
[12] A.I.R. (1941) Rang. 27.
[13] A.I.R. (1938) Rang. 134.
[14] [1932] 1 K.B. 254.
[15] (1880) 16 Ch.D. 544, 552.
[16] (1873) L.R. 9 Ch. 279.
[17] [1892] A.C. 473; 8 T.L.R. 752.
[18] [1907] 1 Ch. 537; [1908] 1 Ch. 1.
[19] 15 Ch.D. 215, 220.
[20] [1902] 2 Ch. 266; 18 T.L.R. 593; [1903] 1 Ch. 434; 19 T.L.R. 220.
[21] (1922) 128 L.T. 10.
[22] (1871) L.R. 6 Q.B. 597.
[23] (1872) 8 Ch.App. 118.

will justify the intervention by a court of equity. The purchaser has an equitable interest in the land and could get an injunction to prevent the vendor disposing of the property. The order for specific performance often falls into two parts. The first can be of a declaratory nature and the second contain consequential directions. The first of the forms in volume 3 of the seventh edition of Seton's Forms of Judgments and Orders, at p. 2136, is clearly suitable to a case where the time for performance may not have arrived even at the date of the order, but in such a case, in the event of subsequent non-performance the court would not require the issue of a fresh writ before making the consequential directions for performance. The court will not, of course, compel a party to perform his contract before the contract date arrives, and would give relief from any order in the event of an intervening circumstance frustrating the contract. Their Lordships cannot accept as conclusive the sentence relied upon by counsel for the defendant in the dissenting speech of Lord Sumner in *Leeds Industrial Co-operative Society Ltd.* v. *Slack*,[1] which was a case dealing with recovery of damages in lieu of an injunction, and which did not call for decision of the question now under discussion. On the other hand, the view expressed above accords with the decisions in the Canadian cases of *Roberto* v. *Bumb* [2] and *Roy* v. *Kloepfer Wholesale Hardware and Automotive Co. Ltd.*,[3] affirmed in the Court of Appeal [4] and by the Supreme Court of Canada,[5] and with the views expressed in the American Re-Statement of the Law of Contract, Vol. 2, s. 360, as well as in Williston on Contracts, Vol. 5, pp. 3708–3709. And in volume 2 of the fourth edition of Williams on Vendor and Purchaser the following passage occurs at p. 1001: "It has been mentioned that, "as a rule, either party to a contract to sell land is entitled to "sue in equity for specific performance of the agreement. This "right is, in general, founded on a breach of the contract, but "not in the same manner as the right to sue at law. The court "has no jurisdiction to award damages at law except in case of a "breach of the contract; while the equitable jurisdiction to order "an agreement to be specifically performed is not limited to the "cases in which at law damages could be recoverable." Support for this view is also to be found in the reasoning of Vaisey J. in *Marks* v. *Lilley*,[6] although the actual decision was concerned with a question of costs. Their Lordships accordingly agree with the decision of the Supreme Court of Kenya and the Court of Appeal for Eastern Africa in rejecting this contention, and holding that there is nothing in the Indian Contract Act to compel acceptance of the contrary view.

The next submission on behalf of the defendant was that, in any event, there was no concluded contract between the parties,

[1] [1924] A.C. 851, 866; 40 T.L.R. 745.
[2] [1943] 2 D.L.R. 613.
[3] [1951] 3 D.L.R. 122.
[4] [1952] 1 D.L.R. 158.
[5] [1952] 2 S.C.R.(Can.) 465.
[6] [1959] 1 W.L.R. 749, 752; [1959] 2 All E.R. 647.

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because the contractual document relied upon was never signed by the plaintiff or executed by him before the defendant repudiated it. This point was never pleaded, is inconsistent with the action of counsel for the defendant in accepting the burden of proof at the trial and making the opening speech, does not appear to have been argued in the courts below, is not dealt with in any of the judgments and does not appear in the appellant's Case or Reasons. In these circumstances their Lordships cannot entertain it, nor can they give effect to it as relevant to the exercise of discretion in ordering specific performance, since there may have been circumstances, which have never been investigated, from which it could be inferred that the signature of both parties to the document was not required.

Their Lordships will now turn to the defences relied upon at the trial, the success or failure of which depend upon the ascertainment of the facts.

The principal defence was the alleged fraudulent misrepresentation by the plaintiff to the effect that an option to purchase given by the defendant to the plaintiff on February 18, 1954, and the contract in writing dated February 19, 1954, related to a half-acre plot (which she had previously told the plaintiff she was willing to sell), whereas, in fact, these documents referred to a 2-acre plot, and that the said documents written in English, which language she did not understand, were never translated or read over to her in Gujerati. Her case was that at a meeting with the plaintiff in a bazaar in Nairobi early in February, 1954, at which her son Sadru Din was present, she had told the plaintiff that she wished to sell land comprising half an acre with a building on it, being one portion out of four subdivided plots next to the Mayfair Hotel, for Shs. 100,000. Sadru Din gave evidence to the like effect. It was proved in evidence that Sadru Din was not in Nairobi at the date in question, and the trial judge found he had given false evidence and the defendant had suborned him to commit perjury. These findings are not now disputed. The plaintiff's version of this conversation, which was accepted by the trial judge, was to the effect that the defendant had told him she had land over 2 acres with a building on it in Sclatters Road which she wished to sell, and for which she wanted Shs. 100,000. He asked for an option at this price for one week, but she was only willing to give him one for three days. They agreed to meet next day at about 9 a.m., when she would give him the option. The meeting took place and the defendant signed the option which appears at p. 377 of the record. It is headed:

"Re my House on Slater Road adjoining Mayfair Hotel, "Nairobi" and proceeds: "In consideration of Shs. 5/- five I "hereby give you option to purchase the above property for "Shs. 100,000 net one hundred thousand. The above property is "over 2 two acres and subdivision is completed, . . . The house "of above property will be given in vacant possession with all "vacant land contain

" This option is good up to 22nd February 1954 up to 1 p.m. " to your or to your nominis."

The defendant's evidence was that this document was never read over or translated to her. She signed and her signature was witnessed by her cousin, a girl aged about 17, called Amina Hasham. Amina gave evidence to the same effect.

The plaintiff's case was that the option was read over to her by him and also by Amina, who knew English. The next day, February 19, 1954, the agreement sued upon was signed at the office of a Mr. Ishani, an advocate of the Supreme Court, who had prepared the contract on the plaintiff's instructions. The defendant's case was that as a result of a telephone message from a Mr. Sultan she went to his shop, where she found the plaintiff, and from there all three of them went to Mr. Ishani's office. Ishani asked her whether the plot belonged to her alone and whether the option was binding on her, to both of which questions she answered " Yes." Thereupon Ishani wrote something on a piece of paper and sent it out to be typed. Two or three typed papers were brought back and Ishani told her to sign one, which she did. She said she wanted Shs. 25,000 down in cash, the plaintiff said he would pay Shs. 15,000 and then went up to Shs. 20,000, when Ishani intervened and said Shs. 81,000 was due to the Diamond Jubilee Trust on mortgage, to which she replied that she would make her own arrangements with the Diamond Jubilee Trust. At this point in the discussion Mr. Sultan remarked: " Oh, two acres are mentioned here," she said she was struck with horror and tore up the document she had signed. Her version was supported by Sultan, who was called as a witness for her. Ishani was also called by the defendant to say he never read or explained the document to her. He and Sultan also corroborated her evidence as to the conversation immediately prior to her tearing up the document.

The plaintiff's evidence was to the effect that before the defendant signed the agreement Ishani, who is the defendant's nephew, had read and explained the document to her. He said that the defendant objected to the cash payment of Shs. 10,000 mentioned in the contract before she signed it when Ishani reached that part of the agreement as he read it to her in Gujerati. Ultimately she agreed to Shs. 15,000 and a cheque for this amount was made out and handed to her. She then signed the agreement.

After signing she inquired whether he had resold the plot to Hashambhai. On being told that Hashambhai was the sub-purchaser she flew into a rage and tore up the document. On the same day Mr. Akram, an advocate, wrote on her instructions a letter setting out her version as outlined above of the circumstances in which she had torn up the document, and charging the plaintiff with fraud. Also on the same day a letter was written by Mr. Khanna, the plaintiff's advocate, which contained the following paragraph: " After signing the agreement it appears

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"you changed your mind, putting forward the excuse that you "were only selling the house and part of the land and not the "whole of the 2·04 acres, and tore up the stamped and signed "agreement and went away, declining to go through with the "completion of the transaction."

This letter is, of course, strong corroboration of the defendant's version of the reason she gave for acting as she did. The plaintiff, however, in his evidence persisted in his version, and in the course of his cross-examination gave evidence which was obviously false, and from which he ultimately resiled only in reply to a leading question in re-examination when he was recalled more than two months after his previous denials. It is now common ground that his earlier answers on this subject were deliberate falsehoods.

Out of this conflict of evidence, and with the plaintiff and defendant both having given what is now admitted to have been false evidence on parts of their cases, the trial judge had to be satisfied that the defendant, who had accepted the onus, had made out her case for rescission on the ground of the plaintiff's misrepresentation as to the contents of the documents which she had signed. The judge, having seen the witnesses in the box and having had the advantage, denied to an appellate tribunal, of forming an estimate as to their honesty and reliability, said in dealing with the events of February 19: "I regret to say that I "cannot trust any account of what then took place except the "account of the plaintiff." He did not give his reasons for rejecting the evidence of the defendant and her witnesses, but he had found that she had suborned one of her witnesses to commit perjury and must have felt that he could put little reliance on her other witnesses.

The Court of Appeal for Eastern Africa considered that the trial judge had not attached sufficient importance to the untruthful answers given by the plaintiff with regard to the reason given by the defendant for tearing up the agreement on February 19. They accordingly proceeded to re-examine the whole of the evidence in detail and to form their own assessment thereon, with the result that they arrived at the same conclusion as the trial judge.

Their Lordships have been invited to go through the same process with a view to reaching the conclusion that although fraud had not been proved, none the less the court should have given the defendant relief on the ground of mistake.

There are certain features in the case which have given their Lordships some anxiety. The most important of these are the following: (1) In a case of this nature a court will always give great weight to the contemporary documents, and the two letters, one from the defendant's advocate and the other from the plaintiff's, both show—as is now admitted—that the reason given by the defendant for tearing up the document was that which she had given in evidence. Whether or not it was the real reason or

only her excuse, of course, remains to be decided. (2) The very unusual fact of a party tearing up a document almost immediately after having signed it. (3) The fact that the defendant would on the evidence admittedly have been out of pocket on the basis of the agreement of February 19, 1954. (4) That the document was written in a language which she could not read.

Their Lordships have, accordingly, reviewed the whole of the evidence in the light of the above considerations and having regard to the pleadings. In this connection reference must be made to paragraph 11 of the defence. It reads as follows: "In the further "alternative the agreement sued upon was entered into by "mistake in that the terms thereof have been drawn up so as to "contravene the intention of the parties by purporting to refer "to the whole of the plot 58/1 L.R. 209 as aforesaid, whereas as "it should have referred to the said portion of land only." This is a plea of mistake common to both parties which was not the case made by the defendant. Treating it, however, as a plea of unilateral mistake it could, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of the plaintiff or by some misleading conduct on his part. In the present case the vital issue was whether the option and agreement were or were not read over and explained to the defendant. If she failed to satisfy the court on this issue there could be no ground for mistake on her part attributable to any conduct of the plaintiff. On the other hand, if she succeeded it is difficult to see how the plaintiff could have escaped a finding of fraud. It is for this reason that their Lordships consider that the trial judge was right in saying that the issue of mistake could carry no weight in view of the facts as he found them.

As stated above, their Lordships have carefully considered the whole of the evidence with the aid of the detailed examination and analysis thereof by counsel on each side and have arrived at the conclusion that the defendant has not made out a case for interfering with the findings of fact by the trial judge and the Court of Appeal, and that on these findings her claim for rescission on the ground of mistake cannot succeed.

It was also contended for the defendant that on the facts a defence of non est factum had been established. This plea, which means that the document is a nullity, requires proof of a false statement as to the nature as distinct from the contents of the document. This distinction is often a question of degree, but in the present case such defence is not open to the defendant since no false statement by anyone, other than that relied upon in support of the allegation of fraud, was alleged or proved, and the alleged misrepresentation by the plaintiff has been rejected. It accordingly is not necessary to decide whether the difference between the two acres and half an acre in the circumstances of

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this case would have been a difference as to the nature or contents of the document.

It should be stated that other defences were raised in the pleadings to which it is necessary to make passing reference. One was that the defendant never dealt with the plaintiff as a principal but merely employed him as her agent to find a purchaser. This issue was decided against her and is not now relied upon. A defence of undue influence was abandoned at the trial, and a further defence of rescission by mutual consent was not persisted in before the Court of Appeal.

It is necessary, however, to refer to the defence of undue influence which is contained in paragraph 10 of the defence, because the facts there set out were in substance relied upon before their Lordships in support of a submission by counsel for the defendant that the case was not one in which a court should in the exercise of its discretion order specific performance. The particulars to paragraph 10 of the defence are as follows: "The plaintiff in his "capacity as an agent for the defendant for the sale of the said "portion of land had gained active confidence of the defendant; "the defendant is an aged woman unable to read or write in the "English language, the land described in the option and agree-"ment of sale is of a value greatly in excess of Shs. 100,000; the "said consideration is unconscionable and the nature of her acts "in signing the said option and agreement of sale was not "explained to or understood by the defendant."

In view of the abandonment of this plea and the findings of the trial judge and the Court of Appeal to the effect that the option and agreement were in fact read and translated to the defendant—a finding for disturbing which no sufficient grounds have been shown—their Lordships do not consider that a case has been made out for interfering with the discretion exercised by the trial judge, and approved by the Court of Appeal, in ordering specific performance of the contract of February 19, 1954.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Theodore Goddard & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

C. C.

[QUEEN'S BENCH DIVISION.]

LONGHURST *v.* GUILDFORD, GODALMING AND DISTRICT WATER BOARD.

1959 *Nov.* 19, 20, 27.

Lord Parker C.J.

[1958 L. 764.]

Factory—Definition—Pumping station—"Altering" or "cleaning" an article—Water—Whether an "article"—Whether pumping station a "factory"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1), (6), (9).

The plaintiff was employed by the defendants at one of their pumping stations. In the course of his employment he was injured when his right hand was caught in the transmission machinery of a pump house at the station. The purpose of the pump house was to put the water under pressure after it had been filtered in the filter house. The plaintiff brought this action for damages, alleging negligence at common law and breaches of statutory duty under section 13 of the Factories Act, 1937:—

Held, (1) that water could be an "article" within the meaning of section 151 (1) of the Factories Act, 1937.

Ferens v. *O'Brien* (1883) 11 Q.B.D. 21 and *Cox* v. *S. Cutler & Sons Ltd.* [1948] W.N. 345; [1948] 2 All E.R. 665 applied.

(2) That the process of filtering the water in the filter house of the station was the altering or cleaning of an article within the meaning of that section.

Wiltshire County Valuation Committee v. *London Co-operative Society Ltd.*, 66 T.L.R. (Pt. 1) 1016; [1950] 1 All E.R. 937 distinguished.

(3) But that the putting of water under pressure in the pump house was not an altering of water or an adapting for sale of water and, being something other than one of the processes for or incidental to what was carried on in the filter house, the pump house was not, and did not form part of, a factory within the meaning of the Act. Accordingly, there being no common law negligence, the plaintiff's claim failed.

Thurogood v. *Van Den Berghs and Jurgens Ltd.* [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682 distinguished.

ACTION.

The plaintiff, Nicholas Alexander Irwin Longhurst, was employed by the defendants as an engine driver at their pumping station at Hambledon in Surrey. On February 1, 1958, fairly early in the afternoon, the plaintiff met with a serious accident when he got his right hand caught in the bite formed by a belt and pulley, and as a result the whole of his right arm had to be amputated just below the shoulder. At the time of the accident, the plaintiff was in charge of the station, and had worked there for some seven years, and for a long time before that he had been working at other stations. The station at Hambledon consisted of a fenced-in area of some 64 acres, in which water was collected from springs and brought down to a filter house. The water came

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

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by gravity to the filter house, passing through filters to extract any foreign matter, and from there it went down to a large concrete tank, which extended under the filter house and also under the whole or part of the intervening space between the filter house and another house called the pump house. On the way to the concrete tank from the filters it received some chlorine solution in order to chlorinate the water, which solution was fully disseminated in the water in the tank. Apart from the filters and the chlorination plant, there was only a small Pelter engine used for cleaning the filters in the filter house. In the pump house there was one large engine and pump and two smaller engines and pumps which took the water out of the concrete tank, put it under pressure and forced it along the mains. Part of the water put under pressure went to a reservoir which was at a higher level and from which it fell by gravity to feed the houses in the district, and part of it went direct through the mains also to houses in the district. The floor of the pump house consisted partly of concrete and partly of quarry tiles round the pumps.

The accident probably occurred between 2 p.m. and about 4.30 p.m. on the afternoon of Saturday, February 1, 1958, when the plaintiff was in charge of the station. The plaintiff was found some time after 8 p.m. on that day hanging over some guard rails by a machine in the pump house, almost unconscious, although he was muttering complaints about his back. His right hand was found completely mangled, as if it had gone into the bite of the belt and pulley. There was blood on the floor and the plaintiff was found to be wearing a gauntlet glove on his left hand, and the glove which at some time had been on his right hand was lying on the ground under the pulley showing marks of having been through the bite.

The vital point of the machine for the purposes of the case was the bite between a pulley consisting of five rather sharp edges with grooves in between and the belt, which was really four belts joined together and which ran in the grooves of the pulley. There were guard rails about 3 feet high. At the position opposite the bite formed by the belt and pulley, the top guard was horizontally about 13 inches from the edge on the side of the pulley, and in the vertical it was about 6½ inches above. The plaintiff, when he was found, had both arms over the top guard rail and was standing square to the pulley, his right arm being caught and kept by the rotation of the pulley between the side of the pulley and the bearing.

The plaintiff brought this action against the defendants for damages in respect of his injuries, alleging that the defendants were in breach of the duty owed by master to servant at common law and further, or alternatively, for their breach of statutory duty under section 13 of the Factories Act, 1937.[1] It was alleged

[1] Factories Act, 1937, s. 13 (1): "Every part of the transmission machinery shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working

by the plaintiff that the pumping station was a factory within the meaning of the Factories Act, 1937, as defined in section 151 (1), (6), (9) of that Act.

The defendants denied that they had been guilty of negligence or breach of statutory duty.

G. G. Blackledge Q.C. and *Peter Perrins* for the plaintiff.
F. W. Beney Q.C. and *E. W. Eveleigh* for the defendants.

In addition to the cases referred to in the judgment, the following were cited in argument: *Burns* v. *Joseph Terry & Sons Ltd.*[2]; *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners*[3]; *Read* v. *Croydon Corporation*[4]; *Hoare* v. *Truman, Hanbury, Buxton & Co.*[5]

LORD PARKER C.J., having stated the facts, said that he was satisfied that the plaintiff remembered very little of what happened, and that he (his Lordship) was quite unable to make any findings as to the exact circumstances in which the accident occurred and could find no breach of common law duty. He continued: The position does not end there, however, because there is the alternative claim of breach of statutory duty under the Factories Act. The first question that arises is whether this pumping station or any part of it was a factory. As to that there is little authority and it is, perhaps, significant that there is no case in which a water works or a pumping station has been held to be a factory. Indeed, if I understand the evidence aright, it is the general view of all public authorities who carry out the duties of supplying water that such premises as these are not factories. The relevant statutory provisions are, of course, section 151 (1), (6) and (9). [His Lordship read section 151 (9) and (1), and continued:] This being a public authority, by reason of subsection (9) I am not concerned with the question of trade or gain.

" on the premises as it would be if " securely fenced."

S. 151 (1): " Subject to the pro- " visions of this section, the expression " ' factory ' means any premises in " which, or within the close or cur- " tilage or precincts of which, persons " are employed in manual labour in " any process for or incidental to any " of the following purposes, namely:— " . . . (*b*) the altering, . . . clean- " ing . . . of any article; or (*c*) the " adapting for sale of any article; " being premises in which, or within " the close or curtilage or precincts of " which, the work is carried on by " way of trade or for purposes of gain " and to or over which the employer " of the persons employed therein has " the right of access or control: . . . " (6) Where a place situate within the " close, curtilage, or precincts forming " a factory is solely used for some " purpose other than the processes " carried on in the factory, that place " shall not be deemed to form part " of the factory for the purposes of " this Act, but shall, if otherwise it " would be a factory, be deemed to be " a separate factory. . . . (9) Any " premises belonging to or in the " occupation of . . . any . . . public " authority shall not be deemed not " to be a factory, . . . by reason only " that the work carried on thereat is " not carried on by way of trade or for " purposes of gain."

[2] [1951] 1 K.B. 454; [1951] 1 T.L.R. 349; [1950] 2 All E.R. 987.

[3] (1882) 7 App.Cas. 694.

[4] 55 T.L.R. 212; [1938] 4 All E.R. 631.

[5] (1902) 71 L.J.K.B. 380; 18 T.L.R. 349.

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It is also conceded that this plaintiff was engaged in manual labour. Accordingly, the only provision that I have to consider is whether in any part of the precincts there was a process for or incidental to the altering or cleaning of any article, or the adapting for sale of any article. Those are the only words which could possibly, I think, apply.

The first question, therefore, is whether water can come under the description of "article." As I have said, it has apparently always been assumed that it does not. But, at the same time, I do not quite know what meaning one could fairly give to "article" which would cut out water. It is no good saying: "Oh, but "water is a natural element"; there are clearly plenty of natural elements which undoubtedly would be articles. It has been held in *Ferens* v. *O'Brien* [1] that water may be the subject of a larceny at common law. Reference was also made to water in *Cox* v. *S. Cutler & Sons Ltd.* [2] What was there being considered was gas. But Scott L.J., in dealing with the matter as to whether gas was an article, said this [3]: "The word 'article' is not defined either in "that section"—that is the section in question here—"or in "section 152, the general definition section. It must, therefore, be "given its ordinary meaning in the English language," and then he refers to certain dictionary meanings. He continues, a little further down the page: "I can see no reason for not regarding all three "substances"—those were the three gases that he was considering —"whether in their solid, liquid or gaseous states, as 'articles.' "So, too, with regard to water and steam. Aerated water is "obviously an article. Steam under pressure can be supplied by "appropriate pipes and sold. Coal gas is bought and sold." The reference there to water is clearly obiter, but, at any rate, it is some support for the view that water, at any rate in some form, can be an article. For my part, I see no reason why it should not be, and I would hold that under section 151 water can be an article.

The next question, then, is whether in any part of the precincts there was a process being carried on for the altering or cleaning of any article or the adapting for sale of any article. The difficulty in regard to adapting for sale is, of course, the question of whether in the supply of water it can properly be said that there is a sale, but I put that out of consideration for a moment. What is said here is that here was a duty which is to be found in the Water Act, 1945, in the Third Schedule, paragraph 31, which is to this effect: "The undertakers shall provide in their mains "and communication pipes a supply of wholesome water sufficient "for the domestic purposes of all owners and occupiers of "premises within the limits of supply who under the special Act "are entitled to demand a supply for those purposes." Accordingly, what they have to do is to make available a supply of wholesome water, and for that purpose they take water as it

[1] (1883) 11 Q.B.D. 21.
[2] [1948] 2 All E.R. 665.
[3] Ibid. 667.

comes from the springs; they put it through the filter to take away any extraneous matter, and they then purify it or disinfect it by means of chlorination. It is said that what goes out then is something different from what comes into the filter house: that wholesome water fit for drinking goes out; water which cannot be sold as wholesome water comes in, and that that process can fairly be said to be the altering or cleaning of an article. I have come to the conclusion that that argument should succeed. It is said that that is not really consistent with the decision of the Divisional Court in what is called the "milk" case—*Wiltshire County Valuation Committee* v. *London Co-operative Society Ltd.*[4] The matter there under consideration was whether the hereditament in question fell to be derated. It is to be observed that the definition of "factory" for the purposes of the De-Rating Act is to be the definition of "factory" in the Factories Act. It was there held that the process of cleaning and cooling the milk was not adapting an article for sale within the meaning of "factory," for nothing was done to turn an unfinished article into a finished one or anything analogous thereto, and, therefore, the premises were not a factory and so entitled to be derated as an industrial hereditament. Now be it observed that all that was done in the "milk" case was to filter or clean the milk and cool it. Those processes were not done for the direct purpose of sale but in order to enable the milk to be safely carried, that is, carried without deterioration, to another place where it was going to be pasteurised. But, leaving out the question of removing any extraneous matter, the process was, and was really treated in the judgment as, the process of cooling. I do not see how it can be said that milk before and after cooling has been altered in any way or that the milk was adapted for sale by being cooled. The milk in that case was drinkable both before and after it had been cooled. It seems to me that here something very much more is done by the chlorination, and that something which is not drinkable in the proper sense before as wholesome water has been altered, and has become wholesome water which it is the duty of the defendants to supply.

I was also referred to what is called the "beer" case—*Sedgwick* v. *Watney, Combe, Reid & Co.*[5] but for the purposes of the present case I get, I think, little help from that because the question in that case was whether the process in question was or was not a mere prelude to distribution. It is clear that in that case beer which was undrinkable came into the premises and went out carbonised and bottled and labelled for sale, and, therefore, looked at in that way, it was clearly an adapting for sale. As I have said—although there is, I think, no direct authority on this—I hold that there was here the altering or cleaning of an article. That being so, it is really unnecessary to consider whether there was an adapting for sale. There was clearly, I think, an adapting, but I find it unnecessary to decide whether the supply

[4] 66 T.L.R. (Pt. 1) 1016; [1950] 1 All E.R. 937.

[5] [1931] A.C. 447; 47 T.L.R. 308.

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of water by a public authority can be said to create a contract of sale.

So far, therefore, I am with the plaintiff, but the next question that arises, and I think the most difficult question, is the effect of subsection (6). [His Lordship read subsection (6) and continued:] What is said here on behalf of the defendants is this: granted that the filter house being part of the precincts, was a place where the processes of cleaning or altering or adapting were carried out, yet the pump house, which was also within the same precincts, was used for quite a different purpose and not a purpose which of itself would make it a factory. The defendants say that any altering, cleaning or adapting which took place came to an end when the water was in the concrete tank; it had then been filtered and chlorinated, and that all that took place in the pump house was nothing to do with that altering or cleaning or adapting, but was merely putting the water under pressure in order to force it along to the houses that it had to supply. Again I find that there is little useful authority on this. I have been referred to the well-known case of *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*[6] Of course, that was quite a different case because in the engineering shop in that case a bit of machinery was being tested, which bit of machinery was clearly necessary for the making of margarine in the main factory and, as such, the testing there was incidental to the process of the making of margarine. Here it is said that the pumping was in no way incidental to the filtering or the cleaning; that that had already been done, and that this was a separate and new process being carried out in the pumping house. As I understand it, Mr. Blackledge's real case here is that whether or not the pump house can be split, as it were, from the precincts under subsection (6), what is being done in that pump house is every bit as much a matter of alteration or adapting for sale as what is done in the filter house. As he puts it: here is the duty of a local authority to provide wholesome water. It is a duty which, under that paragraph to which I have referred, is to provide that supply in the mains and communication pipes. That, he says, as the Act indeed contemplates, can only be done by putting pressure on the water, and what is being done in the pump house is again an alteration or an adapting for sale, namely, putting pressure on the water. I confess I find it very difficult to accept that argument. Granting that water is an article; granting that the making of wholesome water is the altering, cleaning or adapting of an article, it seems to me that all that is done in the pump house is to put pressure on to that article. And, bearing in mind that this is a penal provision, I find it almost impossible to say that water under pressure, that is, not aerated water or carbonised water, but just water being forced along a pipe, is any different from water, and that there has been any altering or cleaning or adapting by putting pressure on it.

[6] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

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It seems to me that the effect of the pressure is just a matter of transport: instead of having tankers to take the water from the concrete tank and deliver it to individual houses, it is forced through the mains to those individual houses. I cannot bring myself to think that the putting of water under pressure for that purpose is an altering of water or an adapting for sale of water. In those circumstances, I have come to the conclusion, rather reluctantly, I think, because I am sorry for this plaintiff, that this action must fail. As I have said, I can find no breach at common law, and, so far as the Factories Act is concerned, although I go with the plaintiff's argument a long way, I think that he fails by reason of subsection (6) in that what is being done in the pump house is something other than the processes for or incidental to what is carried on in the filter house. Accordingly, in my judgment, this action must fail and there must be judgment for the defendants.

I understand, however, that this matter may well go further, and in case it does I would like to add this. If I had found any liability on the part of the defendants I should have found no contributory negligence on the part of the plaintiff. As I said earlier, it may be that he was doing a very stupid thing, but in the state of the evidence and bearing in mind that the onus of proof of contributory negligence is on the defendants, I would have been unable to find any contributory negligence.

[His Lordship considered the question of the damages which he would have awarded the plaintiff had he been able to find liability, and having assessed these at £4,500 general damages plus £745 special damages, a total of £5,245, concluded:] There must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors: *Darracotts; William Charles Crocker.*

[PRIVY COUNCIL.]

EDWARD LISO MUNGONI . . . . . APPELLANT;

AND

ATTORNEY-GENERAL OF NORTHERN RHODESIA . . . . . RESPONDENT.

J. C.†

1960 *Jan.* 25.

ON APPEAL FROM THE SUPREME COURT OF RHODESIA AND NYASALAND.

Crown—Servant—Delegation of powers—Distinction between power and duty—Duty interwoven with power—Emergency regulations—Power to detain—Duty to be satisfied—Power of Governor to depute any powers—Meaning of "power"—Northern Rhodesia.

† *Present*: LORD TUCKER, LORD DENNING, the RT. HON. L. M. D. DE SILVA.

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Emergency Legislation—Public safety or order—Delegation of powers—Detention order, duty of Governor to be satisfied of necessity for—Power of Governor to make—Power to delegate powers—Whether duty can be delegated—Emergency Powers Regulations, 1956, of Northern Rhodesia, regs. 16 (1), 47.

Northern Rhodesia.

By regulation 16 of the Emergency Powers Regulations, 1956, of Northern Rhodesia, made by the Acting Governor of Northern Rhodesia under powers conferred by the Emergency Powers Orders in Council of 1939 and 1956: "(1) Whenever the Governor is satisfied that for the purpose of maintaining public order it is necessary to exercise control over any person, he may make an order . . . directing that such person be detained . . . ", and regulation 47 provided that "The Governor may . . . depute any person . . . to exercise all or any of the powers conferred on the Governor by these Regulations . . ."

The Acting Governor of Northern Rhodesia having (with certain exceptions not here material) by instrument delegated "all the powers" conferred on him by the regulations to the Provincial Commissioner, Western Province, the latter, stating that "I am satisfied that for the purpose of maintaining public order it is necessary to exercise control over" the appellant, an African resident in Northern Rhodesia, in purported pursuance of regulations 16 (1) and 47 made an order for his detention. In an action for damages for wrongful arrest and detention the appellant contended, inter alia, that regulation 16 (1) put a *duty* on the Governor to be satisfied that it was necessary to exercise control before he exercised his *power* to make a detention order, and that his authority under regulation 47 to delegate applied only to *powers* and did not authorise him to delegate his *duty* to be satisfied, which he was bound to fulfil himself personally; the order for detention was, therefore, it was alleged, invalid:—

Held, that the power and the duty under regulation 16 (1) were so interwoven that it was not possible to split the one from the other so as to put the duty on one person and the power in another; the regulation contained not so much a duty, but rather a power coupled with a duty, and he who exercised the power had to carry out the duty. In delegating his functions under regulation 16 (1) the Governor could delegate both the power and duty together to one and the same person—he could not delegate the power to another and keep the duty to himself. The requirement that he was to be satisfied was a condition or limitation on the exercise of the power, and when regulation 47 authorised him to delegate the power to any person, it authorised him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they were also duties. Accordingly, the detention order made by the Provincial Commissioner was valid.

Liversidge v. *Anderson* [1942] A.C. 206; 58 T.L.R. 35; [1941] 3 All E.R. 338 considered.

Judgment of the Federal Supreme Court of Rhodesia and Nyasaland [1958] R. & N. 710 affirmed.

APPEAL (No. 14 of 1959), by special leave in forma pauperis, from a judgment of the Federal Supreme Court of Rhodesia and Nyasaland (September 10, 1958) allowing the appeal of the present respondent, the Attorney-General of Northern Rhodesia, from a judgment of the High Court of Northern Rhodesia (April

19, 1958) awarding the present appellant, Edward Liso Mungoni, £25 as damages for wrongful imprisonment.

This was the first appeal to the Board from the Federal Supreme Court of Rhodesia and Nyasaland.

The following facts are taken from the judgment of the Judicial Committee: The appellant was an African resident in Northern Rhodesia. He claimed damages for wrongful arrest and detention. The High Court of Northern Rhodesia (Mosdell Ag.J.) found in his favour and awarded him £25 damages. That decision was reversed by the Federal Supreme Court of Rhodesia and Nyasaland (Tredgold C.J., Lewey F.J., Paterson C.J.N.R.) who held that he had not been wrongfully arrested or detained. He now appealed to Her Majesty in Council asking not only that the judgment in his favour should be restored but also that the damages should be increased, because the sum of £25 was, he said, inadequate.

On September 11, 1956, the Acting Governor of Northern Rhodesia made a proclamation in which he said he was satisfied that a public emergency existed and he proclaimed that the provisions of the Orders in Council (those dealing with emergencies) should have effect in the Western Province of Northern Rhodesia. On the very same day he issued emergency regulations which gave the authorities wide powers, and in particular gave the Governor power to make detention orders. He also issued an instrument delegating many of his powers to the Provincial Commissioner of the Western Province.

At the time when the emergency was declared the appellant was living in the Twapia African Township, Ndola, which was in the Western Province of Northern Rhodesia. He was an official of the African National Congress. At 6 a.m. on September 16, 1956, police officers came to his house and arrested him. He was arrested for breaking the Emergency Regulations by attending a meeting which had been prohibited. He was not tried on that charge because at 7.30 p.m. that day the Provincial Commissioner for the Western Province made a detention order against him. It was in these words:

"NORTHERN RHODESIA
"THE EMERGENCY POWERS REGULATIONS, 1956.

"DETENTION ORDER

"WHEREAS it is provided by regulation 16 of the Emergency "Powers Regulations, 1956, that whenever the Governor is "satisfied that for the purpose of maintaining public order it is "necessary to exercise control over any person, he may make "an order against such person directing that such person be "detained.

"AND WHEREAS it is further provided by the said regulation

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"that any person detained in pursuance of the said regula-
"tion shall be detained in such place as may be authorised by
"the Governor;

"AND WHEREAS the powers conferred upon the Governor by
"the said regulation have been delegated under the provisions
"of regulation 47 of the said Regulations to the officer for the
"time being carrying out the duties of the Provincial Commis-
"sioner, Western Province;

"AND WHEREAS I am satisfied that for the purpose of main-
"taining public order it is necessary to exercise control over one
EDWARD MUNGONI LISO.

"NOW, THEREFORE, I, GLYN SMALLWOOD JONES, Member of the
"Most Excellent Order of the British Empire, Provincial Commis-
"sioner, Western Province, do hereby order that the said EDWARD
"MUNGONI LISO be detained and do hereby authorise the Local
"Prison, MUMBWA, as the place where the said EDWARD MUNGONI
"LISO shall be detained.

"Given under my hand at NDOLA this 16th day of September,
"1956.

"(Signed) G. S. JONES,
"Provincial Commissioner."

In pursuance of the detention order, the appellant was taken to the detention camp at Mumbwa. Fifty-three others were taken as well. On November 2, 1956, Mr. Stewart, on behalf of the 54 detained persons, applied to the Chief Justice of Northern Rhodesia (Bell C.J.) for a writ of habeas corpus ad subjiciendum. On November 28, 1956, the Chief Justice held that the 54 orders of detention were invalid and ordered that the 54 detainees should be discharged forthwith (see *Stewart* v. *Chief Secretary of Northern Rhodesia* [1]). They were so discharged, but the Governor of Northern Rhodesia himself immediately made restriction orders against them. The restriction order against the appellant was dated November 28, 1956, and prohibited him from being in the Western Province except under written permit. It was signed by the Governor himself. That order was subsequently continued by further orders, all signed by the Governor himself. Then, in 1959, one of the restricted persons named Mwenya applied to the High Court in London for leave to issue a writ of habeas corpus ad subjiciendum. The High Court (Lord Parker C.J., Slade and Winn JJ.) held that the courts of England had no jurisdiction to issue the writ (see *Ex parte Mwenya* [2]), but the Court of Appeal (Lord Evershed M.R., Romer and Sellers L.JJ.) on October 13, 1959, held that the courts had jurisdiction, though they did not determine whether it was proper to exercise it.[3] A week later, on October 20, 1959, the Governor of Northern

[1] [1956] R. & N. 617.
[2] [1959] 3 W.L.R. 509; [1959] 3 All E.R. 525.
[3] [1959] 3 W.L.R. 767; [1959] 3 All E.R. 525.

Rhodesia revoked the restrictive orders. The appellant thereupon became free.

This appeal only concerned the period during which the appellant was detained under the detention order made by the Provincial Commissioner, that is to say, from 7.30 p.m. on September 16, 1956, to the time of his discharge on November 29, 1956. The appellant contended that his detention during that period was unlawful and claimed damages for false imprisonment. He had in his favour the ruling of Bell C.J. in the habeas corpus proceedings, holding that the detention order was invalid. But he, through his counsel, admitted that that ruling was not conclusive in his favour. The validity of the detention order could be investigated afresh in this civil action; see *Budd* v. *Anderson*.[4] And, indeed, it had been investigated afresh by each of the courts. Mosdell Ag.J., who tried the case at the first instance, thought that the decision of Bell C.J. was a proper one and held that the detention order was invalid. Accordingly, he awarded damages for wrongful detention. But the Federal Supreme Court thought the decision of Bell C.J. was wrong and likewise the decision of Mosdell Ag.J. was also. They held that the detention order was valid and reversed the award of damages.

The difference of opinion between the judges arose upon this: Bell C.J. (and Mosdell Ag.J. following him) held that, in order for the detention order to be valid, it was the duty of the *Governor* of Northern Rhodesia *himself* to be satisfied it was necessary to exercise control over the appellant. It was his personal duty to be satisfied. He could not delegate it. The Governor had not himself performed that duty and the detention order was therefore invalid. But the Federal Supreme Court held that it was not necessary for the Governor himself to be satisfied. He could delegate that task to the Provincial Commissioner of the Western Province. He had so delegated it and, inasmuch as the Provincial Commissioner was satisfied, that was enough, and the detention order was valid.

1959. Dec. 3, 7. *E. L. Mallalieu Q.C.*, *A. Ivan Kaufman* and *John Haines* for the appellant.

B. C. Roberts and *Mervyn Heald* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Ross-Clunis* v. *Papadopoullos* [5]; *Musson* v. *Rodriguez* [6]; *Hook* v. *Cunard Steamship Co. Ltd.*[7]; *Julius* v. *Bishop of Oxford* [8]; *Rex* v. *Ludlow* [9];

[4] [1943] K.B. 642; [1943] 2 All E.R. 452.
[5] [1958] 1 W.L.R. 546; [1958] 2 All E.R. 23.
[6] [1953] A.C. 530; [1953] 3 W.L.R. 212.
[7] [1953] 1 W.L.R. 682; [1953] 1 All E.R. 1021.
[8] (1880) 5 App.Cas. 214, 222.
[9] [1947] K.B. 634; [1947] 1 All E.R. 880.

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Carlish v. *East Ham Corporation* [10]; *Blackpool Corporation* v. *Locker*.[11]

1960. January 25. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships draw particular attention to the fact that it was the Provincial Commissioner who made the detention order—it was he who said he was satisfied that it was necessary to exercise control over the appellant—and not the Governor himself.

The point at issue is to what extent, if any, the Governor of Northern Rhodesia can delegate his functions in respect of detention orders to the Provincial Commissioner. In order to enable him to delegate, it is necessary to find some express authority in that behalf. Their Lordships recall that in England the powers of the Secretary of State under regulation 18B were personal and could not be delegated. As Lord Wright said in *Liversidge* v. *Anderson* [1]: "The regulation places on the Secretary a public "duty and trust of the gravest national importance. As I under- "stand the regulation, it is a duty which he must discharge on "his own responsibility to the utmost of his ability, weighing on "the one hand, the suspect's right to personal liberty, and, on the "other hand, the safety of the State in the dire national peril in "which during this war it has stood and stands."

But in Northern Rhodesia, the Emergency Regulations contain an express provision enabling the Governor to delegate his powers. And the question is how far that enables him to delegate his power to make detention orders. The authority to make detention orders is given by Emergency Regulation 16 (1) which is in these terms: "16. (1) Whenever the Governor is satisfied that "for the purpose of maintaining public order it is necessary to "exercise control over any person, he may make an order (herein- "after called a detention order) against such person directing that "such person be detained, and thereupon that person shall be "arrested and detained." Their Lordships would pause for a moment to notice that, under the regulation, the Governor cannot make a detention order unless he is first "satisfied" of what is there stated. In a sense that puts a *duty* on him to be "satisfied" before he makes an order. Can this duty be delegated by the Governor to someone else? Mr. Mallalieu argues that it cannot. The authority of the Governor to delegate applies, he said, only to *powers* and not to *duties*. He bases this on the words of Emergency Regulation 47, which defines the Governor's authority to delegate: "47. The Governor may, by writing under "his hand, and either generally or specially, depute any person "or persons, either by name or by office, to exercise all or any of

[10] [1948] 2 K.B. 380; 64 T.L.R. 419; [1948] 2 All E.R. 550.

[11] [1948] 1 K.B. 349; [1948] 1 All E.R. 85.

[1] [1942] A.C. 206, 265; 58 T.L.R. 35; [1941] 3 All E.R. 338.

" the powers conferred upon the Governor by these Regulations, " subject to such conditions, if any, as he may specify, and there- " upon any person so deputed shall have and exercise such powers " accordingly, but no such delegation shall affect or impair the " power of the Governor to act himself under these Regulations."

Turning back now to regulation 16 (1), Mr. Mallalieu said that it contained a duty and also a power. The *duty* laid upon the Governor was to be " satisfied " that it was necessary to exercise control over any person. The *power* was to make an order directing that such person be detained. The effect of regulation 47, said Mr. Mallalieu, was to authorise the Governor to delegate his *power* to make an order, but it did not authorise him to delegate his *duty* to be satisfied. He was bound to fulfil this duty himself personally. This would not give rise to any practical difficulty, said Mr. Mallalieu, because regulation 16 (6) enables a police inspector to detain a suspect for 28 days pending a decision whether a detention order should be made against him.

Mr. Mallalieu said that this restriction of the Governor's authority to delegate (limiting it to powers and not extending it to duties) must have been deliberate. He said that regulation 47 was in striking contrast to section 28 of the Interpretation Ordinance (c. 1 of the Northern Rhodesian Ordinances, 1959 ed.) which empowers the Governor (in the cases to which it applies) to depute both powers and duties. It reads as follows: " 28. Where " by any law the Governor is empowered to exercise any *powers* " or perform any *duties*, he may, unless by law expressly pro- " hibited from so doing, depute any person or persons by name, " or the person or persons for the time being holding the office or " offices designated by him, to exercise such powers or perform " such duties on his behalf, subject to such conditions, exceptions " and qualifications as the Governor may prescribe, and there- " upon, or from the date specified by the Governor, the person " or persons so deputed shall have and exercise such powers and " perform such duties, subject as aforesaid: Provided that " nothing herein contained shall authorise the Governor to depute " any person to make rules under the power in that behalf con- " ferred upon him by any law." Their Lordships appreciate the significance of this point so made by Mr. Mallalieu. It is clear that section 28 does not apply to the Emergency Regulations. Regulation 47 was inserted instead. And regulation 47—in contrast to section 28—only authorises the Governor to delegate powers, not duties. This was the determining factor which influenced Bell C.J. in the habeas corpus proceedings. He said [2]: " The wording of regulation 47 follows so closely the wording of " section 28 that, when the two stand side by side, the omission " from regulation 47 of the delegation of the performance of *duties* " imposed by law is very apparent."

Their Lordships can now turn to the instrument of delegation

[2] [1956] R. & N. 617, 629.

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itself. It followed the words of regulation 47 very closely. It spoke of powers and not of duties. It was in these terms:

" Government Notice No. 221 of 1956.

" The Emergency Powers Orders in Council, 1939 and 1956.

" The Emergency Powers Regulations 1956.

" Delegation of Powers

" In exercise of the powers conferred by regulation 47 of the " Emergency Powers Regulations, 1956, all the *powers* conferred " upon the Governor by the provisions of the said Regulations, " other than the powers conferred by regulations 10, 16 (7), 16 " (9) and 20, are hereby delegated to the officer for the time being " carrying out the duties of the Provincial Commissioner, Western " Province.

" Given under by hand at Lusaka this eleventh day of September, 1956.

" A. T. WILLIAMS,
" Acting Governor."

Bell C.J. regarded that instrument as a valid delegation to the Provincial Commissioner of the *power* to make a detention order but no delegation at all of the *duty* of the Governor to be satisfied. That duty remained with the Governor himself and was, he thought, a " very proper limitation ": and, as the Governor had never fulfilled this duty in regard to the 54 detained persons, they must be released. In the key passage of his judgment he said [3]: " The delegation set out in Government Notice 221/56 is good as " far as it goes. The Provincial Commissioner can make a " detention order—but only when the Governor is satisfied that " it is necessary in terms of regulation 16 (1): and no delegation " of the duty of *satisfying* himself has been made by the " Governor. Without the step of ' satisfying ' being taken, a " detention order is ultra vires. In the result, the 54 orders " of detention, the subject-matter of this application, are, in my " opinion, invalid, and I have no option but to order the release " of the detained persons, which I accordingly do."

While their Lordships share with the Chief Justice his concern for the liberty of the subject, they cannot agree with this line of reasoning. The power and the duty under regulation 16 (1) are so interwoven that it is not possible to split the one from the other—so as to put the duty on one person and the power in another.

[3] [1956] R. & N. 617, 629.

Whosoever exercises the power, he it must be who has to carry out the duty. It seems clear to their Lordships that, if the Governor has any authority at all to delegate his functions under regulation 16 (1), he must be able to delegate both the power and duty together to one and the same person. He cannot delegate the power to another and keep the duty to himself. Even this did not daunt Mr. Mallalieu. He said that if the power cannot be split from the duty, then it means that the Governor cannot delegate his functions under regulation 16 (1) at all: for he cannot delegate his duty under it to anyone.

It seems to their Lordships that the arguments for the appellant proceed on this fallacy: they assume that the duty under regulation 16 (1) is something separate and distinct from the power therein contained. Their Lordships cannot accept this view. In their opinion regulation 16 (1) contains not so much a duty, but rather a power coupled with a duty. The power of the Governor to make a detention order can only be exercised when he is " satisfied " that it is necessary. The requirement that he is to be satisfied—though in one sense a duty—is nevertheless also a condition or limitation on the exercise of the power. And when regulation 47 authorises the Governor to delegate the power to any person, it authorises him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they be also duties. There are many powers in the Emergency Regulations to which the like applies. They start off " Whenever the Governor is satisfied " or " If it appears " to the Governor," or the like. Mr. Mallalieu was forced to say that, whenever such a condition or limitation was expressed, the Governor had to fulfil it himself and could not delegate it. Their Lordships cannot accept this view. A detailed study of the regulations convinces them that it was intended that in all these cases the Governor should be able to delegate the power together with the fulfilment of the condition precedent to its exercise.

The reason why regulation 47 refers only to " powers " and not to " duties " became apparent in the course of the argument. The Emergency Regulations impose no duties on the Governor simpliciter—nothing, for instance, which a mandamus would issue to command him to perform. The only duties on him are those which are appurtenant to powers conferred on him and are in the nature of conditions or limitations on the exercise of the powers. All these can be delegated under regulation 47, and there was no reason to apply section 28 of the Interpretation Ordinance.

For these reasons, which are substantially the same as those given by Tredgold C.J. in the Federal Supreme Court, their Lordships are of opinion that the detention order was valid. No question arises therefore about damages.

Their Lordships will humbly advise Her Majesty that the

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appeal should be dismissed. The appellant being in forma pauperis, there will be no order as to costs.

Solicitors: *Parke, Tattersall & Co.; Charles Russell & Co.*

C. C.

[QUEEN'S BENCH DIVISION.]

1960
Jan. 22.

Lord Parker C.J., Cassels and Ashworth JJ.

REGINA *v.* BURT. *Ex parte* PRESBURG.

Costs—Justices—Penalty in guise of costs—Attendance of salaried person necessary for prosecution—Prosecution not legally represented——Evidence by police officer—Whether prosecution incurred costs—"Costs"—Whether order just and reasonable—Costs in Criminal Cases Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 48), *s.* 6 (1).

The applicant appeared before a stipendiary magistrate to answer an information charging him with an offence under section 49 of the Road Traffic Act, 1930, and pleaded not guilty. The police were not represented at the hearing, but a police officer attended and gave evidence and the prosecution case consisted solely of his evidence. The magistrate convicted the appellant, and, having fined him 20s., ordered him to pay £2 2s. costs. On an application for an order of certiorari to bring up and quash that part of the magistrate's order relating to costs, on the grounds, inter alia, that under section 6 of the Costs in Criminal Cases Act, 1952,[1] the magistrate might only order such costs as he thought just and reasonable and that, since costs could not include any sum of money as compensation for the salary paid to a police officer, the prosecution had in fact incurred no costs, so that the costs awarded were neither just nor reasonable, alternatively, that the sum was plainly excessive, and therefore the award was made without jurisdiction:—

Held, that "costs" in section 6 (1) was not confined to disbursements and expenses properly so-called, but included the expenses to which a prosecutor was put when the activities of a person, such as a police officer, to whom he paid a salary were necessary in or about the prosecution, so that it was wrong to say that the prosecution had incurred no costs; that, in considering the costs which the prosecution had so incurred, regard should be had to the whole structure of police organisation and not to the amount of pay which the police officer would receive in respect of the time he had spent in attendance at court; and that, in the circumstances, it had not been shown that £2 2s. was such a sum as could not represent the costs incurred by the prosecution.

Attorney-General v. *Shillibeer* (1849) 19 L.J.(N.S.)Ex. 115; 4 Ex. 606 applied.

[1] Costs in Criminal Cases Act, 1952, s. 6: "(1) On the summary "trial of an information a magistrates' court shall have power to "make such order as to costs—(*a*) on "conviction, to be paid by the accused "to the prosecutor; . . . as it thinks "just and reasonable."

S. 17: "(1) In this Act . . . "'Prosecutor' includes any person "who appears to the court to be a "person at whose instance the prosecution has been instituted, or under "whose conduct the prosecution is at "any time carried on."

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APPLICATION for an order of certiorari.

The following facts appeared from the affidavits filed in support of the application: The applicant, David Presburg, was summoned to appear at Bow Street Magistrates' Court on March 11, 1959, at 2.15 p.m. to answer an information alleging that he failed to conform to the indication given by a traffic sign, contrary to section 49 of the Road Traffic Act, 1930 (as amended). The applicant duly appeared in answer to the summons and pleaded not guilty. He was represented by a solicitor. The police were not represented but a police officer attended and gave evidence, and the prosecution case consisted solely of his evidence. At the conclusion of the hearing the magistrate (Clive Burt Q.C.) said that he found the case proved, and he convicted the applicant and fined him 20s., and ordered him to pay £2 2s. costs. The applicant's solicitor thereupon asked the magistrate why he had ordered costs and the magistrate said: "Because I say so." The solicitor pointed out that the police had not been represented and the magistrate replied: "That is my order." At no time did the magistrate ask either the police or the clerk of the court whether in fact or to what extent the prosecution had incurred costs.

The applicant sought an order of certiorari to bring up and quash that part of the magistrate's order whereby he was ordered to pay £2 2s. costs on the grounds that the magistrate's only jurisdiction to make him pay costs was to make him pay such costs as the magistrate thought to be just and reasonable, and that (a) the prosecution had in fact incurred no costs and the costs awarded were neither just nor reasonable; (b) the costs ordered and awarded were not awarded as costs, but as a fine or penalty; (c) the magistrate had no power to inflict a fine or penalty; (d) the magistrate never thought that the costs he so awarded were just or reasonable; and (e) in the premises, the magistrate exceeded his jurisdiction and acted improperly.

According to the magistrate's affidavit bringing to the attention of the court certain facts which he considered to have a material bearing on the question at issue: "After deciding to "convict the applicant and to impose a fine upon him I "considered what costs had been incurred by the prosecution as "I thought that it was a case in which it would be just to make "a reasonable contribution to the prosecution for the costs which "had been incurred. I appreciated that the prosecution had not "been legally represented, and that the Metropolitan Police had "been involved in the trouble and loss of time inevitably incurred "in carrying on the prosecution. In particular I had regard to "the fact that for that purpose it had been necessary for Police "Constable Skinner to attend at court and give evidence on the "day of the hearing. I estimated that the Metropolitan Police "had thus been prevented from employing Police Constable "Skinner upon other police duties for half a day. I took the view "that it was reasonable in these circumstances to order the "applicant to pay the sum of £2 2s. as a fair contribution to the

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" costs that had been incurred by the prosecution by appropriation " to the case of the time of the police force." As to the grounds on which the applicant sought relief, the magistrate deposed that he had taken the view that the prosecution had in fact incurred costs as described above, that he did not make the order for costs as a fine or a penalty but as a contribution to the costs which he considered had in fact been incurred, and that he had thought that the costs which he awarded were just and reasonable having regard to the matters set out above.

James Miskin for the applicant.
J. R. Cumming-Bruce as amicus curiae.

The following cases were referred to in argument: *Attorney-General* v. *Clark* [2]; *Attorney-General* v. *Shillibeer* [3]; *Reg.* v. *Highgate Justices, Ex parte Petrou* [4]; *Lord Advocate* v. *Stewart (No. 2)*.[5]

LORD PARKER C.J. In these proceedings Mr. Miskin moves on behalf of David Presburg for an order of certiorari to bring up and quash a decision of a stipendiary magistrate, Clive Burt, given on March 11, 1959, whereby he convicted the applicant of an offence under the Road Traffic Act, 1930, fined him 20s. and ordered him to pay £2 2s. costs. The application is in fact, if I understand it aright, to bring up the order and to quash merely that part of it which orders the payment of £2 2s. costs.

This was a very simple case in which an information was laid by a police officer against the applicant for, in effect, crossing a traffic light when the lights were against him. The case was ordered to come on in the afternoon of Wednesday, March 11, when a police officer alone attended, the police not being represented, and gave evidence, and he may or may not have cross-examined the applicant. The note says that the applicant was cross-examined, but it may be that that was cross-examination by the court.

In the affidavit sworn by the applicant and his solicitor, it appears that at the end of the case, after the magistrate had found the case proved and fined the applicant 20s., he ordered him to pay £2 2s. The solicitor asked: " Might I ask why you have " ordered costs? " The magistrate replied: " Because I say so." The solicitor then said: " But the police are not represented," and the magistrate replied: " That is my order."

It is urged in this court that that order for the payment of £2 2s. costs was in excess of the magistrate's jurisdiction. The argument can be summarised in this way: It is said that costs are no more and can be no more than an indemnity; that before the magistrate exercises his jurisdiction to award costs he must find

[2] [1909] 2 K.B. 7; 25 T.L.R. 318.
[3] (1849) 19 L.J.(N.S.)Ex. 115; 4 Ex. 606.
[4] [1954] 1 W.L.R. 485; [1954] 1 All E.R. 406.
[5] (1899) 63 J.P. 473.

as a fact that costs have been incurred, and that that is a collateral fact upon which his jurisdiction is founded, and by the wrong finding of a collateral fact he cannot give himself jurisdiction. So far, I think the argument is absolutely sound. It is then said that costs cannot include any sum of money as compensation for the salary paid to a police witness. Quite shortly, it is said that this police officer was employed; he was getting his salary whether he was there or whether he was not, and no expense had been incurred.

Before considering the matter more closely, it is necessary to look at the Costs in Criminal Cases Act, 1952, under which the magistrate's jurisdiction arose. The relevant section is section 6, and it is in the widest possible terms: "(1) On the summary "trial of an information a magistrates' court shall have power "to make such order as to costs—(*a*) on conviction, to be paid "by the accused to the prosecutor; (*b*) on dismissal of the "information, to be paid by the prosecutor to the accused, as it "thinks just and reasonable." What, then, is included in the word "costs"? One argument addressed to us by Mr. Miskin, to whom, incidentally, the court is indebted for his careful argument, is a reference to other sections of the Act where reference is made to costs, and it is stated what costs are there being dealt with. Thus, in section 1 (2), which is concerned with costs awarded by assizes and quarter sessions out of local funds, it is provided: "The costs payable out of local funds under the "preceding subsection shall be such sums as appear to the court "reasonably sufficient to compensate the prosecutor, or as the "case may be the accused, for the expenses properly incurred by "him in carrying on the prosecution or the defence"—that is to the prosecutor—"and to compensate any witness for the "prosecution, or as the case may be for the defence, for the "expense, trouble or loss of time properly incurred in or inci-"dental to his attendance and giving evidence." Pausing there, it is said that that subsection draws a distinction in regard to costs paid to the prosecution and costs paid to a witness. Costs paid to a witness are to include not merely expense but something for his trouble and loss, whereas, it is said, in the case of the prosecutor there is no compensation for trouble or loss but only for expenses, which means the actual expenses which he incurs. A similar provision is contained in section 5 (3) in regard to costs to be awarded out of local funds. It is said, accordingly, that when one comes to section 6 (1), "costs" there in relation to the prosecutor's costs, mean no more than the costs which could be paid to the prosecution under the earlier provisions dealing with payment out of local funds and, properly construed, cover only actual expenses incurred. It is, I think, sufficient to say in answer to that argument that section 1 (2) and section 5 (3) have their origin in a completely different set of legislation to that from which section 6 (1) is derived.

Mr. Cumming-Bruce, who has appeared here as amicus curiae,

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and has assisted the court very considerably, has traced the history of these sections, and whereas the provisions for payment out of local funds can be traced to a series of Acts beginning in 1752 and culminating in the Costs in Criminal Cases Act, 1908, section 6 derives directly from the Summary Jurisdiction Act, 1848, s. 18. It is quite clear, in my judgment, that those are two completely separate codes and, therefore, the Costs in Criminal Cases Act, 1952, the present Act, being an Act made under the Consolidation of Enactments (Procedure) Act, 1949, there is no reason whatsoever for reading "costs" in one part of the Act as meaning the same as "costs" in another part of the Act. Again, reference was made to the fact that in regard to the costs that may be awarded out of local funds, the Home Secretary has power to make regulations. That is derived from section 12 of the Act, and those regulations, the Witnesses' Allowances Regulations, 1955 [S.I. 1955, No. 1655 (L.13)] expressly provide in regulation 11: "(1) Notwithstanding anything contained in the preceding regulations no sum shall be allowed under these regulations in respect of (*a*) a member of a police force attending court in his capacity as such." Mr. Miskin concedes, of course, as he must, that those are regulations made under the provisions dealing with the award of costs out of local funds; but he can, at any rate, say this, that police officers are looked upon as being in a peculiar position, and that so far as those provisions are concerned, nothing will be awarded to a police officer attending court as a witness on behalf of the prosecution. As I have said, I do not think that any help is to be derived from those other sections and regulations in construing section 6 of this Act.

What, then, is included in the word "costs"? Must it be confined and confined only to disbursements and expenses properly so called? I confess that I should be surprised if it was necessary to confine the word "costs" in that limited way. An illustration was given in the course of the argument of some of these big stores today who employ private detectives and others to keep an eye on shoplifters. If such an employer uses one of his salaried staff in and about the prosecution of an offender, is it to be said that the employer has been put to no expense? It seems to me that he has been put to expense in that he has employed a member of his salaried staff to do that and thereby lost that man's labour for the time being, and is put to the expense of having to find another person to perform the work which the first employee would otherwise be doing.

The matter, to my mind, is put beyond argument by an old case—which is none the worse for that—to which we have been referred, *Attorney-General* v. *Shillibeer*.[1] In that case there was an excise information in which the Crown had the services of the Crown Solicitor. The Crown Solicitor was a salaried employee of

[1] (1849) 19 L.J.(N.S.)Ex. 115.

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the Crown. The Crown succeeded and was awarded costs, and it was said that the Crown by making a special bargain with its solicitor, not employing a solicitor ad hoc, but paying the Crown Solicitor a salary, could not recover the solicitor's costs which otherwise would have been recovered if an outside solicitor had been employed. The judgment of the court was delivered by Parke B., and I must read some of his judgment. He said [2]: "There was "an objection made that the plaintiff was bound under the statute "2 & 3 Will. 4, c. 120, s. 121, which gives costs, and could not "charge the ordinary costs against the subject, because the "Crown employed the solicitor of the excise at an annual salary, "and did not incur any expenditure in matters depending in the "particular suit. We took time to consider the case, and we are "clearly of opinion that that argument ought not to prevail, "and that the Crown is entitled to full costs in the suit." He went on to say [3]: "Then it was said that it is the fault of the "Crown, because they have made such a bargain with the solici-"tor that they cannot tell how much salary is paid for the "costs of a particular suit since they made such a bargain with "the solicitor. We think that objection really has no weight. "The Crown has a solicitor, and makes a perfectly fair bargain "with him, very much to the benefit of the public, and we think "that ought to make no difference in the case." To much the same effect was a Scottish case, *Lord Advocate* v. *Stewart*.[4]

In my judgment, there is no distinction between that case and the case of the salary paid to a police officer, or any other salary which a prosecutor has to pay to a person whose activities are necessary in and about a prosecution. It matters not that, unlike the case of *Shillibeer*,[5] the person to whom the salary is paid is not a solicitor or a professional man.

Mr. Miskin, however, goes further, and he says that even if it is right to say that some costs can be said to have been properly incurred by the prosecution here, yet the sum of £2 2s. which was awarded is so plainly excessive that it appears on its face to be a fine and, therefore, to have been imposed without jurisdiction. The onus, of course, in a case such as this of showing that the collateral facts are such that the magistrate had no jurisdiction, is on those that assert it, namely, the applicant. The applicant, accordingly, must show that the costs properly incurred could not equal or exceed £2 2s. For my part, the applicant has totally failed to satisfy me on that point. I think it is quite wrong to make a rough calculation of what the pay of a policeman would amount to for four hours one afternoon. It seems to me that you have to look at the whole structure of the police administration and to consider the matter in that light. Quite apart from that, a magistrate with very considerable experience has stated in his affidavit that he formed the view that £2 2s. was a reasonable contribution to the costs. Further,

[2] (1849) 18 L.J.(N.S.)Ex. 115, 117.
[3] 19 L.J.(N.S.)Ex. 115, 118.
[4] (1899) 63 J.P. 473.
[5] 19 L.J.(N.S.)Ex. 115.

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although he does not say so in his affidavit, he must in his position and with his experience have known that at any rate there were certain disbursements which must have been paid, fees paid on the laying of the information, fees for service, and matters of that sort. In my judgment, it has not been shown that £2 2s. in these circumstances is such a sum as could not represent costs properly incurred.

That is really an end of this case, but I would like to say this, and I should have said it earlier: It has been conceded that, although the information was laid by a particular police constable, he must be taken in laying that information to be acting on behalf of the Metropolitan Police; it would be quite artificial to treat him as a private individual and to say that as a private individual he had been put to no expense or loss or trouble because he himself was being paid all the time. Not only would that be an artificial approach, but if one looks at section 17 (1) of the Act of 1952, it is expressly provided: "'Prosecutor' includes any person who appears to the court to be a person at whose instance "the prosecution has been instituted, or under whose conduct the "prosecution is at any time carried on." Accordingly, Mr. Miskin, quite rightly, has conceded that the prosecutor here and the person entitled to costs, if costs be payable, is the Commissioner of Metropolitan Police or the Metropolitan Police Force. Accordingly, in my judgment, this application fails.

CASSELS J. I agree.

ASHWORTH J. I also agree.

Application dismissed.

Solicitors: *Amery-Parkes & Co.; Treasury Solicitor.*

J. F. L.

[HOUSE OF LORDS.]

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SOCIETY OF MEDICAL OFFICERS OF HEALTH . . . . . APPELLANTS;

AND

HOPE (VALUATION OFFICER) . . . RESPONDENT.

1959 *Nov.* 9, 10.

1960 *Jan.* 21.

Estoppel—Per rem judicatam—Rates and rating—Local valuation court—Decision in 1951 *that society be entered on current valuation list as exempt from rates under Scientific Societies Act,* 1843*—Same question arising in* 1956*—Scientific Societies Act,* 1843 (6 & 7 *Vict. c.* 36), *s.* 1*—Local Government Act,* 1948 (11 & 12 *Geo.* 6, *c.* 26), *ss.* 40, 41, 44, 48.

* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD COHEN, LORD KEITH OF AVONHOLM and LORD JENKINS.

Rates and Rating—Science or fine art—Exemption—Whether decision of local valuation court on requisite entry in one valuation list res judicata in relation to new valuation list—Whether local valuation court a court of competent jurisdiction—Whether dispute before local valuation court a lis inter partes—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 40, 41, 44, 48.

Section 48 (4) of the Local Government Act, 1948, provides that, on appeal to a local valuation court, the court "shall give such "directions with respect to the manner in which the hereditament in "question is to be treated in the valuation list as appear to them "to be necessary to give effect to the contention of the appellant if "and so far as that contention appears to the court to be well "founded. . . ."

In 1951 a society made a proposal to delete from the current valuation list a hereditament occupied by it on the ground that it was exempt from payment of rates under section 1 of the Scientific Societies Act, 1843. The valuation officer objected. On appeal to the local valuation court for the area, the court decided that the hereditament was exempt under the Act of 1843, and directed that the list be amended to accord with that decision.

On April 1, 1956, a new valuation list came into force by virtue of statutory directions, and the society's hereditament was entered on that list with gross and rateable values. The society again made a proposal that it be exempt under the Act of 1843. The valuation officer objected. On appeal to the local valuation court for the same area, the court stated that they had in 1951 decided that the society was exempt, and in the absence of evidence adduced by the valuation officer of any variation in the society's constitution and activities since 1951, the court decided that the hereditament be exempt from rates under the Act of 1843.

On the valuation officer's appeal to the Lands Tribunal, the society entered a plea of res judicata:—

Held, that a decision of a local valuation court does not create an estoppel per rem judicatam when the valuation list which was the subject of the decision has come to the end of its statutory life and a new quinquennial valuation list has to be brought into existence, even when it is shown or agreed that there has been no change of circumstances.

The jurisdiction of the tribunal is limited, in that its function begins and ends with deciding the assessment or liability of a person for a terminable period.

Further, the position of a valuation officer is that of a neutral official charged with the recurring duty of bringing into existence a valuation list, and cannot properly be described as a party so as to make the proceedings a lis inter partes.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155; 42 T.L.R. 207 distinguished.

Leith Harbour and Docks Commissioner v. *Inspector of the Poor* (1866) L.R. 1 Sc. & Div. 17, H.L. applied.

Reg. v. *Hutchings* (1881) 6 Q.B.D. 300; *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council* [1926] A.C. 94; and *Inland Revenue Commissioners* v. *Sneath* [1932] 2 K.B. 362; 48 T.L.R. 241 considered.

Decision of the Court of Appeal [1959] 1 Q.B. 462; [1959] 2 W.L.R. 377; [1959] 1 All E.R. 509 affirmed.

APPEAL from the Court of Appeal (Morris L.J. and Wynn-Parry J., Sellers L.J. dissenting).

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This was an appeal from an order of the Court of Appeal dated February 9, 1959, whereby an appeal by the appellants, the Society of Medical Officers of Health on a case stated by the Lands Tribunal (Erskine Simes, Q.C.), pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, was dismissed, and the decision of the Lands Tribunal was affirmed. By its decision (given on a preliminary point of law) the Lands Tribunal had refused to give effect to a plea of res judicata by the now appellants in answer to an appeal by the now respondent, S. G. Hope (Valuation Officer) from a decision of a local valuation court for North East London.

The facts are fully stated in the opinion of Lord Radcliffe.

D. Tolstoy Q.C. and *H. S. A. Hart* for the appellants.
Maurice Lyell Q.C. and *Patrick Browne* for the respondent.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Shannon Realties Ltd.* v. *Ville de St. Michel* [1]; *Badar Bee* v. *Habib Merican Noordin* [2]; *Lamont* v. *Dumfriesshire Assessor* [3]; *Smith* v. *Argyleshire Assessor* [4]; *M'Gilvray* v. *Oban Assessor* [5]; *Reg.* v. *Hartington Middle Quarter* [6]; *Vernon* v. *Inland Revenue Commissioners* [7]; *Long* v. *Gowlett* [8]; *Whittaker* v. *Jackson* [9]; *Humphries* v. *Humphries* [10]; *Tarr* v. *Cory Brothers & Co. Ltd.* [11]; and *Edwards* v. *" Old Bushmills " Distillery Co. Ltd.* [12]

Their Lordships took time for consideration.

Jan. 21, 1960. VISCOUNT SIMONDS. My Lords, I have had the privilege of reading the opinion which my noble and learned friend, Lord Radcliffe, is about to deliver. I agree so fully, both in his reasoning and conclusions, that I do not think it necessary to add anything further. I shall content myself with moving in due course that the appeal be dismissed.

LORD RADCLIFFE. My Lords, the only question raised by this appeal concerns the application of the principle of estoppel per rem judicatam to the making of a new valuation list for the St. Pancras, London, rating area in accordance with the provisions of the Local Government Act, 1948. The appellants occupy a hereditament at Tavistock House, Tavistock Square, situated in that area, and their objection is to the entry of their hereditament in the new valuation list which came into force on April 1, 1956, at a gross value of £300 and a rateable value of £247. Their objection, which takes the form of a proposal to alter the list, calls for

[1] [1924] A.C. 185.
[2] [1909] A.C. 615.
[3] (1900) 2 F. 610.
[4] (1885) 12 R. 905.
[5] 1916 S.C. 665.
[6] (1855) 4 E. & B. 780.
[7] [1956] 3 All E.R. 14.
[8] [1923] 2 Ch. 177.
[9] (1864) 2 H. & C. 926.
[10] [1910] 2 K.B. 531.
[11] [1917] 2 K.B. 774.
[12] (1926) 10 T.C. 285.

the exclusion of the hereditament on the ground of "exemption "from payment of rates under the Scientific Societies Act, 1843." They may, indeed, be entitled to such exemption if they bring themselves within the conditions required by section 1 of that Act: but hitherto they have been maintaining in their successive appeals to the local valuation court, the Lands Tribunal, the Court of Appeal and now to this House that they are entitled to this exemption as a conclusion of law founded on the facts (1) that in 1951 they obtained a decision from the then local valuation court that the preceding valuation list, now expired, should be altered so as to give effect to their exemption from rating by virtue of the Scientific Societies Act, and (2) that neither their circumstances nor their purposes have altered since that date.

This particular plea was argued as a preliminary point when the appeal was before the Lands Tribunal and so it remains. It became possible to deal with it in this way, and thus to postpone any inquiry into the actual current situation of the appellants, because the respondent had formally intimated to the local valuation court, before they decided upon the appellants' proposal, that he did not contend that any alteration had been made in the constitution of the society since the earlier decision of the local valuation court in 1951, and did not suggest that the society now carried on activities which it did not then carry on. What he wished to rely on were the present constitution of the society and its present activities. The setting up of a preliminary point in this way seems a somewhat elaborate procedure: but the result is that, if the plea of estoppel does not commend itself to your Lordships' House, as it has not to the Lands Tribunal or to the majority of the Court of Appeal, the case will have to go back to the Lands Tribunal for adjudication on its merits, whatever they may be.

It is necessary now to state a few matters of fact to show the context in which this alleged estoppel arises. The Scientific Societies Act, 1843, as is well known, gives exemption from rates in respect of any hereditament, if (1) it belongs to a society instituted for purposes of science, literature or the fine arts exclusively; (2) it is occupied by the society for (a) transacting its business, and (b) carrying into effect its purposes, and if the society (3) is supported, at any rate in part, by voluntary contributions, and (4) does not make distributions of money among its members, and (5) obtains a certificate, as prescribed, from a barrister-at-law or the Lord Advocate. Exemption, therefore, depends upon the combination of a set of facts, most of which are capable of variation from year to year, and the absence of any one of which destroys the privilege of immunity from rates. I note this because the foundation of the appellants' argument for an estoppel lay in the proposition that the decision of the local valuation court in 1951 was a decision as to the society's "status." To my mind, that would be an inappropriate description of the nature of such a decision, and it would not become any

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the more appropriate because, on a particular subsequent occasion, the valuation officer agreed or did not oppose a claim that the relevant purposes and circumstances had not altered.

In 1951 the valuation list in force in the St. Pancras rating area was the last valuation list made under the Valuation (Metropolis) Act, 1869. The procedure followed when the appellants made their proposal to delete their hereditament from the list was that laid down by the Local Government Act, 1948. The valuation officer objected to their proposal and the resulting appeal came before a local valuation court for North East London, whose function is (section 44 (1)) the "hearing and determining "appeals . . . against objections to proposals for the alteration "of valuation lists." The valuation officer appeared as a party on the hearing of the appeal, as he was entitled to do (section 48 (3)) and the court, after hearing the parties, then gave its decision in favour of the exemption claimed. In doing so, it acted under the authority conferred on it by section 48 (4), which runs as follows: "After hearing the persons mentioned in the last pre-"ceding subsection, or such of them as desire to be heard, the "local valuation court shall give such directions with respect to "the manner in which the hereditament in question is to be "treated in the valuation list as appear to them to be necessary "to give effect to the contention of the appellant if and so far "as that contention appears to the court to be well founded, and "the valuation officer shall incorporate in the list as settled, or, "as the case may be, cause to be made in the list, such altera-"tions as are necessary to give effect to those directions." No appeal against the decision was made by the valuation officer.

Now, does that decision create an estoppel per rem judicatam when the valuation list that was the subject of the decision has come to the end of its statutory life, and a new quinquennial valuation list has to be brought into existence to fulfil the requirements of the relevant Act of Parliament? Obviously not, both parties agree, if there has been any material change of circumstances in the meantime: but "Yes," the appellants say, if it is shown or agreed that there has been no change of circumstance.

The principles of law governing estoppel per rem judicatam inter partes are generally repeated in the form derived from the words of de Grey C.J. in the *Duchess of Kingston's Case* [1] and quoted by Lord Selborne L.C. in *Reg.* v. *Hutchings* [2]: "... the "judgment of a court of concurrent" (or of exclusive) "jurisdic-"tion, directly upon the point, is conclusive ... between the same "parties coming incidentally in question in another court for a "different purpose. But neither the judgment of a concurrent or "exclusive jurisdiction is evidence of any matter which came col-"laterally in question, though within their jurisdiction; nor of "any matter incidentally cognisable, nor of any matter to be "inferred by argument from the judgment." Other authorities

[1] (1776) 20 St.Tr. 355, 538n. [2] (1881) 6 Q.B.D. 300, 304.

have added the requirement that there must be a lis inter partes for the judgment to proceed upon, and that the court must be "a "court of competent jurisdiction that has seisin of the case for the "purpose of reaching a final decision inter partes." (See *Inland Revenue Commissioners* v. *Sneath*.[3])

My Lords, the words themselves may be plain but they involve several distinctions that are far from clear. What is direct and what collateral or incidental? By what test is the matter the same or different? When are the parties the same and what are the determining marks of a party or a lis for this purpose? To take only the instance of the present case. Certainly the local valuation court is a court of competent jurisdiction able to give a final decision of some sort between those who appear before it: but then the question arises, for what decisions is it a court of competent jurisdiction, and do they or can they extend beyond the range of the form and contents of the current valuation list? Again, the valuation officer is no doubt a party to a controversy between himself and the complainant: but, having regard to his statutory function and duties, including that of preparing the new valuation list, and to the interests of the whole body of ratepayers from time to time in the contents of the list, is this controversy a lis or is he a party for the purpose of the principles of estoppel per rem judicatam?

I do not think that it is possible to discuss the point raised by the present appeal simply in terms of these general phrases, or without giving full weight to the fact that what is in question is the conclusiveness for liability to one rate of a decision given with regard to another. The system of rating involves certain considerations that are special to itself. Its nearest analogy is with the system of annual personal taxation. With regard to both one has to begin by recognising that there is high and frequent authority for the proposition that it is not in the nature of a decision given on one rate or tax that it should settle anything more than the bare issue of that one liability and that, consequently, it cannot constitute an estoppel when a new issue of liability to a succeeding year's rate or tax comes up for adjudication. The question of this liability is a "new question." It is not "eadem quaestio." The "cause of action is different." "The subject-matter is a different year's tax and a different "year's assessment and is not the same as the subject-matter "of the previous ruling." All these things have been said with reference to rates or taxes, and the list of decisions that recognise or enforce the principle is a long one: see *Leith Harbour and Docks Commissioners* v. *Inspector of the Poor*[4]; *North Eastern Railway Co.* v. *Dalton Overseers*[5] *per* Wills J.; *Scott* v. *Lowe*[6];

[3] [1932] 2 K.B. 362; 48 T.L.R. 241.

[4] (1866) L.R. 1 Sc. & Div. 17, H.L.

[5] [1898] 2 Q.B. 66, 73–74; 14 T.L.R. 421; (C.A.) [1899] 1 Q.B. 1026; 15 T.L.R. 346; (H.L.) [1900] A.C. 345; 16 T.L.R. 419.

[6] (1902) 86 L.T. 421.

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It would not be at all easy for us to depart from this long line of authoritative opinion, even if we wanted to. Personally, I do not want to, because I think that, on the whole, it is more in the public interest that tax and rate assessments should not be artificially encumbered with estoppels (I am not speaking, of course, of the effect of legal decisions establishing the law, which is quite a different matter), even though in the result some expectations may be frustrated and some time wasted.

To say that the issue of liability to one year's rate is not the same subject-matter as the issue of liability to another year's, or that the one cause of action is different from the other is, perhaps, rather an arbitrary way of disposing of the appellants' case. There are legal contexts, in trespass or recurring claims for rent, for example, in which much the same might be said and yet it is not impossible for an estoppel to arise. The reason why, when you are dealing with rates and taxes, the difference of subject-matter is treated as being so important seems to lie in two considerations which, as I read the authorities, are peculiar to their particular field.

One consideration is that the jurisdiction of the tribunal to which the decision belongs by the administrative scheme is a limited one. It is limited in the sense that its function begins and ends with that of deciding what is to be the assessment or liability of a person for a defined and terminable period. "The "assessment seems inherently to be of a passing nature." For the purpose of arriving at its decision the tribunal may well have to take account of, and form its own opinion on, questions of general law; it may even have necessarily to consider one or more of such questions: but in either case the view adopted with regard to them is incidental to its only direct function, that of fixing the assessment. For that limited purpose it is a court with a jurisdiction competent to produce a final decision between the parties before it: but it is not a court of competent jurisdiction to decide general questions of law with that finality which is needed to set up the estoppel per rem judicatam that arises in certain contexts from legal judgments. It seems to me to be entirely congruous with this conception of the functions of a local valuation court and their inherent limitation that the Local Government Act, 1948, should express its power to make decisions in the words that I have already quoted from section 48 (4): ". . . the "local valuation court shall give such directions with respect to "the manner in which the hereditament in question is to be "treated in the valuation list as appear to them to be necessary

[7] [1926] A.C. 94, 100.
[8] [1932] 2 K.B. 362.
[9] (1944) 171 L.T. 340, 341.

" to give effect to the contention of the appellant if and so far as " that contention appears to the court to be well founded."

I take it that the point of view which I have been expressing forms the real significance of the judgment of Lord Selborne L.C. in *Reg.* v. *Hutchings*,[10] to which reference is so often made. In that case a local board under the Public Health Act, 1875, had applied to justices in petty sessions for an order against a frontager for payment of a share of the expenses of sewering a street. The application was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. Some years later another application was made by the same board for an order for payment of a share of paving expenses. It was decided by the Court of Appeal that the frontager could not rely upon a plea of estoppel against the board, precluding it from asserting that the street was not repairable by the inhabitants at large. " I am of opinion that there was in " law no estoppel," said Lord Selborne,[11] " . . . I think so, " because of the nature of the liability in question, and the nature " and limits of the summary jurisdiction which the justices " exercised . . . " Then, later on, he said[12]: " The justices, " before whom the complaint of the urban authority came . . . " had no jurisdiction to adjudicate directly or immediately " between these parties (or between any parties whatever) on " the question whether Mill Street was or was not repairable " by the inhabitants of Bradford at large. That was, at the most, " a matter ' incidentally cognisable ' by them. No conclusion " which they might form upon it could establish (in the one case) " or disprove (in the other) any such liability, as against or in " favour of the inhabitants. Their only jurisdiction was to make " or refuse the order for payment of a certain sum of money, " then claimed as the defendant's statutable quota of certain " expenses, at that time incurred by the urban authority."

When the respondent in this appeal advances the reason: " Because the local valuation court which decided in 1951 how " the said hereditament was to be treated in the valuation list " then in force had no jurisdiction to decide how it should be " treated in the new valuation list," this is, of course, a truism. But then I do not think that anyone is contending that it had just that jurisdiction. What is said is that in 1951 it had sufficient jurisdiction to be able to settle, permanently, questions of law as between the parties themselves: and that jurisdiction, in my opinion, it did not possess.

The other main consideration which has influenced the courts in their treatment of these questions is the special position of the valuation officer, surveyor or equivalent official or committee. This reflects upon the propriety of using the words " *party* " or " *lis inter partes* " in this connection. It will be shorter to limit attention to the case of rating, though a study of the judgments

[10] 6 Q.B.D. 300.
[11] Ibid. 303.
[12] Ibid. 305.

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of the Court of Appeal in *Sneath's* case [13] will show how closely parallel are the arguments that develop with regard to a surveyor or inspector of taxes. However that may be, the position of the valuation officer in rating is that he is a neutral official charged with the statutory and recurring duty of bringing into existence a valuation list and maintaining its contents in correct and legal form. He has, of course, no personal interest when he appears before the local valuation court: nor would it be correct to say that he represents the rest of the ratepayers other than the complainants. It is in the nature of the rating scheme that all those other ratepayers, a body of persons varying from year to year, are interested in the valuation or exemption allotted to any single hereditament on the list. Indeed, we were reminded by counsel that at the time of the 1951 decision there was no bar to any ratepayer, as a person aggrieved, raising an objection to the alteration of the list consequent upon that decision and asking for his objection to be heard. Some statutory limitation has since been placed upon this right of objection, the details of which I have not checked, because its existence is only significant as illustrating how inappropriate are the general circumstances of rating procedure to the importation of the legal doctrine of estoppel per rem judicatam into its ordinary administration. It is no reflection upon the responsible work carried out by the local valuation courts if I say that they are not the natural repositories of the right to decide for good such legal issues as the interpretation of statutes or general legal questions affecting ratepayers: and to hold that, subject to appeal, such decisions are to be treated as conclusive for all time would be, in my opinion, to impose a needlessly heavy burden upon the administration of rating.

There is only one further point. In the course of their argument the appellants relied upon the decision of the Judicial Committee of the Privy Council in *Hoystead* v. *Commissioner of Taxation*.[14] They pointed out, as is quite true, that that was a case in which estoppel per rem judicatam was successfuly asserted against the taxing authority in respect of an assessment for the year 1920–21 because of a judgment on a case stated for the High Court in Australia relating to the assessment for the year 1918–19. The estoppel related to a question as to the nature of legal rights in property and the interpretation of the taxing statute with regard to them. But *Hoystead's* case [14] is useless to illuminate the only point which is now before this House, the effect on a succeeding valuation list of a decision given with regard to an earlier. At no stage of the proceedings, so far as appears, was the argument put forward on behalf of the commissioner of taxation that the assessment for 1920–21 was a new subject-matter in relation to the assessment for 1918–19: nor is the point noticed in the opinion of the Judicial Committee

[13] [1932] 2 K.B. 362. [14] [1926] A.C. 155; 42 T.L.R. 207.

delivered by Lord Shaw. That opinion is devoted to considering with weight and learning, and ultimately to rejecting, the proposition advanced by Sir John Simon on behalf of the commissioner that there could be no estoppel because the legal point which had been the subject of the High Court's decision had been conceded by admission and did not therefore embody the court's own direct judgment. The case stands as an authoritative contribution to the rule that in matters of estoppel what might have been said may be as important as what was actually said, and that, as between the parties themselves, law may indeed be formed sub silentio. To apply the same conception to the elucidation of the law itself, and to suppose that decisions can be persuasive on propositions that were never considered, for good reasons or bad, would be an altogether unconvincing way of arriving at a judgment.

We do not know for what reason the point of "new subject-matter" was not raised in *Hoystead's* case.[14] It is to be noted, however, that the decision that was set up as an estoppel was a decision of the highest legal tribunal in Australia, the High Court, arrived at by the full court upon a case stated for their opinion by a single judge of the High Court to whom there lay an appeal from the decision of the commissioner of taxation. Any objection, therefore, which was based on difference of subject-matter between the taxes for the respective years, would have to meet the puzzling question whether for the purposes of estoppel the jurisdiction of the High Court in adjudicating upon points of law arising in tax proceedings is not wider and more comprehensive than the jurisdiction of the original assessing tribunal. It is true that that aspect does not seem to have had any weight attached to it in the other decision of the Judicial Committee of the same year, the *Broken Hill* case.[15] But there the point did not call for, or receive, any full attention. I say nothing more about this. It is not the point before us and, if it ever arises, it will need separate consideration.

I would dismiss the appeal.

LORD COHEN. My Lords, I concur.

LORD KEITH OF AVONHOLM. My Lords, I do not repeat the facts of this case, which have already been fully set out by my noble and learned friend, Lord Radcliffe. The proposition submitted by Mr. Tolstoy for the appellants was that where a question has been decided by a court of competent jurisdiction in a lis inter partes, these parties are estopped from reopening the same question in a subsequent suit between themselves. This submission necessarily proceeded upon the assumption, which has not been challenged by the respondent, that the facts and circumstances relevant to the appellants' exemption from rating under

[14] [1926] A.C. 155; 42 T.L.R. 207. [15] [1926] A.C. 94.

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section 1 of the Scientific Societies Act, 1943, remained unchanged from what they were when the local valuation court on October 24, 1951, decided that the appellants' hereditament was exempted from rating under the Act of 1843. Otherwise it would not be the same question that comes up for reconsideration.

The proposition advanced, which is impeccable in circumstances in which it is permitted to operate, is, in my opinion, inapplicable to the circumstances of this case. I find it difficult to equate the procedure followed out under the statute with a proper lis inter partes, though that, of itself, might not be conclusive. Nor do I find it easy to distinguish the functions performed by assessment committees before the coming into operation of the Act of 1948 from those now performed by a local valuation court, or to think, because the new body is differently constituted and called a court, that a greater importance and effect should be attached to its decisions. The introduction of a court into the proceedings instead of a committee played some importance, if I understood aright, in the submission for the appellants.

What we are faced with here is an administrative act of a public official, the valuation officer, against which the party affected has a right of appeal to the local valuation court, with further appeals to higher courts. The valuation officer has a public duty to perform by making periodically every five years a valuation list of all hereditaments, with certain exceptions, in his rating area. He must necessarily reconsider and revise the previous valuation list. He has no personal interest in any appeals taken against his valuations, and has a duty to hold the scales as fairly as he can among the ratepayers affected, the occupiers of the various hereditaments. The general body of ratepayers is constantly changing. With each quinquennium the revaluations will affect a new body of ratepayers. I doubt if the valuation officer owing such a duty to an ever-changing body of ratepayers can be regarded as always the same party in the sense in which that expression is used for the application of the rule of res judicata. What if the appellant society changes its habitat and moves into another rating area with a different valuation officer?

I emphasise these aspects of the functions of a valuation officer under the statute, for they lead to what I regard as the true answer to the submission for the appellants, which is that a public officer in the position of the respondent cannot be estopped from carrying out his duties under the statute. The case is, I think, a fortiori of the judgment of a Board of the Privy Council in *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.*,[16] where it was held, in the circumstances of that case, that a public utility company could not be estopped from carrying out its duty under a statute. It has been said on other occasions that there is no

[16] [1937] A.C. 610; 53 T.L.R. 391; [1937] 1 All E.R. 748.

estoppel against a statute. Lord Parker of Waddington applied this ratio in *Inland Revenue Commissioners* v. *Brooks* [17] with reference to an assessment to income tax which was claimed to be final against the Commissioners for the Special Purposes of Income Tax in an assessment for super-tax. "I do not dispute," he said, "these general principles [of law governing estoppels], "but it seems to me that where there is a statutory provision "requiring an estimate to be made for a statutory purpose and "by a statutory authority, the principle of estoppel cannot be "invoked to render the provision nugatory in cases where such "principle might otherwise have applied."

If an entry in the valuation list has become final, that is a procedural matter and may be conclusive for the period for which the list endures. I say *may* be conclusive, for I observe that the Act (section 40) provides with reference to current valuation lists that a person aggrieved or a valuation officer may make a proposal for alteration of the list at any time. Whatever the effect of this may be I have reached the conclusion, for the reasons I have given, that when a new list is in preparation the valuation officer is not estopped by anything that he has done, or omitted to do, or by any decision given against him, in the past. He may, in my opinion, seek to rectify the result of mistakes in fact or errors of law. A previous judgment will have only the weight that falls to be attributed to it, according to the authority of the court that gave it, on the doctrine of stare decisis.

Much reliance was placed by counsel for the appellants on the judgment of the Privy Council in *Hoystead* v. *Commissioner of Taxation*.[18] That authority is not binding on this House, and the point was never taken in the case that a decision on liability to assessment to tax for one year is not conclusive of liability to assessment in a later year. The judgment would seem to conflict with what was said a month earlier in *Broken Hill Proprietary Co. Ltd.* v. *Broken Hill Municipal Council* [19] by a Board differently constituted, rejecting a plea of res judicata: "The "decision of the High Court," it was said, "related to a valua- "tion and a liability to tax in a previous year, and no doubt as "regards that year the decision could not be disputed. The "present case relates to a new question—namely, the valuation "for a different year and the liability for that year. It is not "eadem questio, and therefore the principle of res judicata cannot "apply." In my opinion that is the position here, and I do not find it necessary to examine *Hoystead's* case [20] further, beyond observing that some of the things that were said in that case are not, I think, entirely consistent with what was said in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[21] or with what I regard as essential to a successful plea of res judicata, a common medium concludendi in the two actions.

[17] [1915] A.C. 478; 31 T.L.R. 89.
[18] [1926] A.C. 155.
[19] [1926] A.C. 94, 100.
[20] [1926] A.C. 155.
[21] [1939] A.C. 1, 41–42; 55 T.L.R. 260; [1938] 4 All E.R. 747.

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It was suggested by appellants' counsel that the previous decision of the local valuation court was a judgment in rem fixing the status of the appellant society. But I cannot accept that the local valuation court has jurisdiction to pronounce judgments in rem. It is concerned with the entry of hereditaments in the valuation list, and under section 48 (4) " shall give such directions " with respect to the manner in which the hereditament in " question is to be treated in the valuation list as appear to them " to be necessary to give effect to the contention of the appellant " if and so far as that contention appears to the court to be well " founded." That is a general power with reference to the treatment of hereditaments in a particular valuation list and cannot, in my opinion, be taken to confer a power to make a declaration on the status of the occupier which would have all the binding effect of a judgment in rem. So to hold would indeed, I think, be against the provisions of the statute, if only because it would stultify the right given to a person aggrieved to make a proposal for alteration of the current list under section 40. The general considerations to which I have earlier referred are, in my opinion, equally strong reasons for rejecting this submission for the appellants. Reliance was placed on *Wakefield Corporation* v. *Cooke*.[22] The judgment there held to be a judgment in rem had reference to the status of a street as a public street. This was quite a different category of case decided under a statutory code which was held to give justices a power to determine once and for all the character of a street for the purposes of a local Act and cannot, in my opinion, be applied to the circumstances of this case.

Reference was made in the course of the argument to certain Scottish land valuation decisions thought to be unfavourable to the appellants' contentions. These may be put aside. At best they provide but illustrations of the practice in the matter of valuation under a co-ordinate jurisdiction which operates independently of and without appeal to the courts exercising civil jurisdiction in Scotland. The Lands Valuation Appeal Court in Scotland is, within limits, master of its own system of practice and procedure, and a final court of law within its own sphere. The question, moreover, which arises on this appeal could not come before the Lands Valuation Appeal Court. It would be a question between the rating authority and the occupier which, in the event of dispute, would be matter of ordinary litigation in the civil courts. Such was the case in *Leith Harbour and Docks Commissioners* v. *Inspector of the Poor*,[23] the speeches in which in this House, especially that of Lord Chelmsford, contain dicta on the rule of res judicata which are not helpful to the appellants. There were specialties, however, in that case which may make the dicta obiter, rather than the ratio of the decision. I do not therefore treat these observations as determinative of the point raised

[22] [1904] A.C. 31; 20 T.L.R. 115. [23] L.R. 1 H.L.(Sc. & Div.) 17.

by this appeal. For the reasons, however, which I have already given, I think the appeal must fail.

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LORD JENKINS. My Lords, I agree.

Appeal dismissed.

Solicitors: *Hillearys; Solicitor of Inland Revenue.*

F. C.

[CHANCERY DIVISION.]

GOULD *v.* NATIONAL PROVINCIAL BANK LTD. AND ANOTHER.

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Russell J.

[1956 G. No. 1722.]

Practice and Procedure—Discovery—Default of appearance—Whether order for discovery should be made—Party improperly joined.
Practice—Parties—Joinder—Debtor to bank—Whether proper party to summons by guarantor for declaration that legal charge and guarantees were invalid.

The plaintiff executed a legal charge on his house and entered into three guarantees for the purpose of guaranteeing the repayment to a bank of certain sums owed to the bank by his son-in-law. The plaintiff subsequently brought an action against the bank and his son-in-law for a declaration that the legal charge and the guarantees were invalid and ought to be set aside. The bank entered an appearance and delivered a defence; but the son-in-law did neither. The plaintiff applied for an order for discovery against the son-in-law:—

Held, that the son-in-law was not a proper party to the action because he was not legally or equitably interested in the relief claimed; and that, therefore, discovery should not be ordered against him, for if it was, it would mean that he was being retained as a party for the purpose of discovery.

Heatley v. *Newton* (1881) 19 Ch.D. 326 and *Codd* v. *Delap* [1906] W.N. 57 considered.

Per curiam: An order for discovery should not be made against a defendant in default of appearance because there is no issue, at that stage, between the plaintiff and that defendant and, therefore, there is nothing in relation to which discovery can be ordered.

PROCEDURE SUMMONS.

On October 20, 1950, the plaintiff, Herbert Gould, executed a guarantee of the payment to the first defendant, National Provincial Bank Ltd., of all sums of money then or thereafter due to it from the second defendant, the plaintiff's son-in-law, up to the amount of £1,500, and a legal charge upon his house to secure all sums of money then or thereafter due to the bank from the

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

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plaintiff. On May 11, 1951, the plaintiff executed a similar guarantee limited to an additional amount of £750; and on September 1, 1952, he executed a third similar guarantee limited to an additional amount of £900. On November 6, 1952, the bank called upon the second defendant to pay all moneys due from him to it; and by notice in writing dated February 16, 1953, the bank required the plaintiff to pay to it the sum of £3,150 alleged to be due to it on the security of the legal charge. On February 3, 1956, the bank issued an originating summons against the plaintiff for possession of the plaintiff's house. On October 1, 1956, the plaintiff issued a writ against the bank and his son-in-law claiming a declaration that the legal charge and the three guarantees were invalid and ought to be set aside; alternatively, rescission of the documents or the transactions affected thereby, and delivery up of the documents for cancellation. The bank's originating summons was adjourned pending the determination of these proceedings. The bank entered an appearance to the writ and delivered a defence. The second defendant neither entered an appearance nor delivered a defence. On the summons for directions in the action, the plaintiff asked for an order for discovery of documents against the second defendant; the master adjourned that point to the judge.

A. C. Sparrow for the plaintiff.
Robin Dunn for the bank.
The second defendant did not appear and was not represented.

The cases cited in argument are referred to in the judgment.

RUSSELL J. This is an application by the plaintiff in the action for discovery of documents against the second defendant who is in default of appearance.

[His Lordship referred to the facts and continued:] Without going into great detail, the plaintiff says that he was misled into executing these documents by fraudulent misrepresentation on the part of a representative of the National Provincial Bank. There is also an allegation of undue influence and abuse of a relationship which involved a duty on the part of the bank to the plaintiff.

The plaintiff wants discovery from the second defendant of documents relating to the second defendant's business on the ground that such documents would be relevant to an issue on the pleadings of this nature; that it is alleged that the bank's representatives in effect said that the second defendant's business was a nice profitable business, and that that was not the fact because the business was at all material times in serious difficulties. The plaintiff says that the documents in the possession, power or control of the second defendant will assist the court in determining whether that allegation is or is not correct. It is the first essential step in the allegation of fraudulent misrepresentation by or on behalf of the bank.

I was referred to R.S.C., Ord. 31, r. 12, which says: "Any "party may . . . apply to the court or a judge for an order direct- "ing any other party to any cause or matter to make discovery "on oath of the documents which are or have been in his "possession or power, relating to any matter in question therein." Mr. Sparrow, for the plaintiff, says that the second defendant is a party, and so is the plaintiff, and there is nothing in that rule which provides that it does not cover a case where one of the parties is in default of appearance and defence. He also points out that R.S.C., Ord. 13, r. 12, is in these terms: "In all "actions not by the rules of this Order otherwise specially "provided for,"—which would be, for example, an action of this character—"in case the party served with the writ does not "appear within the time limited for appearance, upon the filing "by the plaintiff of a proper affidavit of service, and if the writ "is not specially indorsed under Order III, Rule 6, of a statement "of claim, the action may proceed as if such party had "appeared." Mr. Sparrow says that means that the action, in all respects, may proceed as if the party had appeared and, therefore, equally in that order there is nothing to suggest that discovery cannot be obtained against the party who is in default of appearance.

In my view, there is, in this case, what I may describe as a special and earlier point. If the second defendant be not a proper party to the proceedings, the question is should discovery be ordered against him because in fact he has remained a party. If he is not a proper party, I am clearly of opinion that discovery should not be ordered since it would mean this, that he would be being retained as a party for no purpose other than discovery. I consider that the second defendant in this case is not a proper party.

The relief claimed is, first, "a declaration that the legal "charge . . . and the three guarantees . . . are invalid and ought "to be set aside." The second defendant is not a party to either the legal charge which is between the plaintiff and the bank, or to any of the three guarantees which are guarantees of the second defendant's overdraft with the bank. The second claim is: "Further or in the alternative rescission of the said documents "or the respective transactions effected thereby." The third is: "Delivery up of the said documents for cancellation." The second defendant, in my view, has no legal or equitable interest in either the legal charge or any of the three guarantees. I think that that can be tested by inquiring whether, should the plaintiff and the bank choose, as a matter of agreement between them, to tear up the guarantees or the charge by way of legal mortgage, the second defendant would have any say in the matter at all, either in law or in equity. If, as I think, he would have no say, I cannot see how he can be concerned in an action whose only purpose, in effect, is to seek on the one hand the tearing up or

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destruction of these documents, or on the other hand, their preservation and the establishment of their validity.

It is suggested by Mr. Sparrow that the second defendant is interested in this way, that it is his banking account which is being guaranteed and the legal charge is in support of those guarantees. Of course, in a sense, he is interested; but it seems to me that, for a person to be a proper party to an action of this nature, it is essential that he should be legally or equitably interested in some part of the relief claimed. That view of this particular case seems to represent the justice of the matter and satisfies me that an order for discovery should not be made against the second defendant.

There is another aspect of the matter which is more general. Mr. Dunn, for the bank, says that no discovery should be ordered against a defendant who is in default of appearance since ex hypothesi there is no issue between the plaintiff and such a defendant because no part of the statement of claim has been put in issue by the defendant; and that that must apply to any such case as this. He says if there is no issue between the plaintiff and the second defendant in these proceedings there can be no discovery ordered as between the plaintiff and the second defendant. Mr. Sparrow, for the plaintiff, says that is not so unless there has been in some shape or form a submission to the claim or an admission of the facts. In this connection reference was made to two cases. The first is *Heatley* v. *Newton*,[1] in which "The plaintiff, who had bought property at an auction and paid "a deposit to the auctioneers, brought an action against the "vendors and the auctioneers to have the contract rescinded, "the deposit repaid with interest, the costs of the action paid, "and for damages. The statement of claim alleged that all, or "nearly all, of the biddings previous to that of the plaintiff were "fictitious, and were either biddings by the vendors or their "agents, or were announced by the auctioneer without any "bidding having in fact been made. The auctioneers applied for "liberty to pay the deposit into court, and to have the action "dismissed against them on such payment being made. The "Master of the Rolls made an order that, the vendors under-"taking to pay the auctioneers their costs of the action without "prejudice to how they should ultimately be borne, and to pay "any interest and damages to which the plaintiff might be held "entitled, and the auctioneers undertaking, in the event of the "vendors not carrying out their undertaking, to pay to the plain-"tiff interest on the deposit up to the time of payment into "court, and the costs of the action up to and including that "application in the event of the court holding the plaintiff "entitled to such interest and costs, the auctioneers should be "at liberty to pay the deposit into court, and that all further "proceedings against them should be stayed: *Held*, on appeal,

[1] (1881) 19 Ch.D. 326.

" that the order must be discharged, the auctioneers not having " submitted to give the plaintiff all the relief which he could in " any event be entitled to against them, for that if the allega- " tions in the statement of claim were established the plaintiff " would be entitled to have judgment against them for the deposit " with interest, and to have an order for costs of the action " against all the defendants." Pausing there, it is to be observed that case was not one in which there was no defence delivered. The defendant auctioneers were simply saying that the proceedings should be stayed against them on terms which would be less than the plaintiff would be fully entitled to if he succeeded in the action. Two passages in the judgments were referred to in argument. The first is where Baggallay L.J. said [2]: " Another point, upon which I do not feel so clear, was " strongly pressed by Mr. Crossley, that the plaintiffs were " entitled to keep Fox & Bousfield before the court, apart from any " question of personal pecuniary responsibility, upon the ground " alone of being able to obtain discovery from them which would " enable them to establish their case as against the other defen- " dants. I am not prepared to admit, as a general principle, that " a plaintiff is entitled to have persons kept before the court as " defendants, that they may aid him in obtaining discovery from " the other defendants, but here the two things are so mixed up " together that, as it appears to me, enough has not been done on " the part of Messrs. Fox & Bousfield, as regards the plaintiff's " interest, to entitle them to be dismissed from the suit, or to " entitle them to have the proceedings stayed against them." That passage seems to be rather neutral, but Lush L.J. said [3]: " Now, the order in question exonerates Messrs. Fox & Bousfield " from the time they made the payment into court from all " liability except interest and costs up to that time, and it " compels the plaintiff to take the undertaking of the vendors that " they will be answerable for all damages to which the plaintiffs " may be held entitled. I do not think that the court has a " right to do this, seeing that the auctioneers were originally " properly joined as defendants in the action. I quite agree that " you cannot claim to retain parties as defendants in a suit merely " because you want to interrogate them; but it appears to me " that where they are properly made defendants it is a ground " for not letting them off summarily, that there is a very great " advantage accruing to the plaintiffs from being at liberty to " interrogate them instead of simply calling them as witnesses at " the trial." Then he continued to deal with the matter in relation to the form of discovery which is involved in interrogatories rather than that which is involved in the ordinary discovery of documents.

The other case, referred to by Mr. Dunn, was *Codd* v. *Delap*.[4] In that case the plaintiff sued Delap and others for

[2] 19 Ch.D. 326, 336.
[3] Ibid. 337.
[4] [1906] W.N. 57.

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a declaration "that the plaintiff was beneficially entitled to "50 fully-paid-up shares in a certain railway company. The "statement of claim (amongst other things) set out the plaintiff's "title to the shares, and alleged that the shares were at the "commencement of the action registered in the books of the com- "pany in the name of the defendant Stevens as mortgagee, and "that the defendant Delap claimed to be beneficially entitled "to them as against the plaintiff. The defendant Stevens (who "was the solicitor of the defendant Delap, and was made a "defendant only with respect to these shares) by his defence "admitted the allegations in the statement of claim in relation to "these shares, and disclaimed all interest whatever in them. An "application by the plaintiff, by summons in chambers, for leave "to administer interrogatories to the defendant Stevens with "respect to these shares and other matters having been dismissed "by the judge, the plaintiff now moved to discharge the order." It was argued: "Stevens was properly made a defendant, and "could not avoid giving discovery by saying that he now claimed "no interest in the shares. It was impossible for the plaintiff to "get on unless he could obtain answers from Stevens as to what "he said and did on certain occasions." Farwell J. refused in his discretion to grant the application, saying[5]: "There was now "no issue between the plaintiff and Stevens, but the plaintiff "desired to interrogate Stevens to see if his answers would help "him. If the interrogatories were answered, the plaintiff could "not read the answers at the trial against any of the other "defendants. The plaintiff, in fact, was seeking to obtain from "Stevens a statement on oath of what his evidence would be at "the trial of the action. It was a novel application, and must "be dismissed with costs." This is also a case involving interrogatories rather than discovery of documents; but I find support for my decision to decline to order discovery of documents having regard to the fact that the second defendant, in my view, is not a proper party and, therefore, cannot be retained as a party for the purpose only of discovery, in the judgment of Lush L.J. in *Heatley* v. *Newton*,[6] where he said[7]: "I quite agree that you "cannot claim to retain parties as defendants in a suit merely "because you want to interrogate them."

On the other hand, it does not seem to me that either of those cases are quite in point on the question here, whether discovery can be ordered against a defendant who is in default of appearance and so long as he is in default of appearance. As suggested by Mr. Dunn, there cannot be said to be any issue between the parties on which discovery against the second defendant should be granted and, therefore, there should not be any discovery. Mr. Sparrow points out that there is nothing in Bray on Discovery as to whether discovery can be ordered

[5] [1906] W.N. 57, 58.
[6] 19 Ch.D. 326.
[7] Ibid. 337.

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against a defendant who is in default of appearance. He has also argued that since the court in such circumstances would have power to make the full order claimed in default of defence, then that power to make the greater order must include the power of making a lesser order, such as the order for discovery. For my part, I do not follow that at all. It seems to me that an order for discovery is to be considered like any other order of this type. On the supposition that the court in such circumstances is in a position to make a full order and to grant the full relief claimed against the particular defendant, it seems to me that, as between the plaintiff and that particular defendant, no relief by way of discovery is required. It is not actually necessary for my decision in this case, but I think that it would be right, if a defendant is in default of appearance, to say that there is no issue at that stage between the plaintiff and that defendant, and that, therefore, there is nothing in relation to which discovery is or should be ordered. It is perfectly clear that at a later stage the defendant might get leave to enter an appearance and deliver a defence on terms; but, if he were to do so, then at that stage there would be an issue, and at that stage discovery could be ordered.

In my view, the application for discovery against the second defendant should be refused.

Application refused. First defendant's costs in any event.

Solicitors: *Hewitt, Woollacott & Chown for Southall & Co., Birmingham; Wilde Sapte & Co.*

[QUEEN'S BENCH DIVISION.]

OLDFIELD *v.* NATIONAL ASSISTANCE BOARD.

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Feb. 4.

Lord Parker C.J., Cassels and Ashworth JJ.

Bastardy—Affiliation order—National assistance—Order by consent on payment of lump sum by defendant without weekly payments—Subsequent application by National Assistance Board against defendant—Whether previous adjudication "affiliation order"—Whether "in force"—National Assistance Act, 1948 (11 & 12 *Geo.* 6, *c.* 29), *s.* 44 (2).

Meaning of "affiliation order"—Affiliation Orders Act, 1914 (4 & 5 *Geo.* 5, *c.* 6), *s.* 7—*Affiliation Proceedings Act,* 1957 (5 & 6 *Eliz.* 2, *c.* 55), *s.* 4 (2).

On November 12, 1956, on the hearing of a complaint under section 3 of the Bastardy Laws Amendment Act, 1872, by a mother alleging that the defendant was the father of her illegitimate child, the justices were informed that the parties had consented to an order being made in favour of the mother on terms that the defendant should pay her £100, and that an order should be made without

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weekly payments. The justices accordingly adjudged the defendant to be the father of the child and made an order stating "No weekly "payment." The defendant duly paid the £100 to the mother with the intention that that payment should release him from all further liability to maintain the child. On January 19, 1959, and other days, assistance was given under Part II of the National Assistance Act, 1948, by reference to the requirements of the child, and on February 7, 1959, the National Assistance Board applied, pursuant to section 44 (2) [1] of that Act, for a summons to be served on the defendant under section 3 of the Bastardy Laws Amendment Act, 1872. The defendant contended, inter alia, that the order made on November 12, 1956, in the proceedings between the mother and himself was an "affiliation order" within section 44 (2) which barred the subsequent proceedings by the board. The justices considered that they had jurisdiction to hear the board's complaint, and they adjudged the defendant to be the father of the child and ordered him to pay 25s. weekly. On appeal:—

Held, that on the true construction of section 44 (2) of the National Assistance Act, 1948, the words "affiliation order" meant an order which provided for the payment of money and did not include an order such as that made by the justices on November 12, 1956, which was a mere adjudication of the defendant as the putative father; accordingly, there was no affiliation order within the meaning of section 44 (2) in force, and the justices had jurisdiction to hear the complaint of the board.

CASE STATED by Lancashire justices sitting at Lytham.

On February 7, 1959, a complaint was preferred by the National Assistance Board against the defendant, James Terence Oldfield, stating that he was the father of an illegitimate child born on May 11, 1956, to a certain woman, and that, assistance having been given under Part II of the National Assistance Act, 1948, on January 19 and other days by reference to the requirements of the child, pursuant to section 44 (2) of the Act they applied for a summons to be served upon him under section 3 of the Bastardy Laws Amendment Act, 1872.

In accordance with section 12 (3) of the Affiliation Proceedings Act, 1957, the justices treated the application as an application for a summons under section 1 of that Act, and found the following facts. On May 11, 1956, the mother gave birth to the female child in question. On November 13 justices sitting at Lytham heard a complaint by the mother under section 3 of the Bastardy Laws Amendment Act, 1872, at which hearing counsel for the defendant stated that the parties had consented to an order being made in favour of the mother in terms that the defendant should

[1] National Assistance Act, 1948, s. 44: "(1) . . . where (*a*) assist- "ance is given under Part II of this "Act by reference to the requirements "of an illegitimate child . . . (2) If "no affiliation order is in force, the "Board . . . may . . . make applica- "tion to a court of summary jurisdic- "tion . . . for a summons to be served "under section 3 of the Bastardy "Laws Amendment Act, 1872."

Note. The Bastardy Laws Amendment Act, 1872, was repealed by the Affiliation Proceedings Act, 1957, s. 12 (1) and Sched., and by s. 12 (3): "So much of any enactment or docu- "ment as refers . . . to any enactment "repealed by this Act shall . . . be "construed as referring to this Act or "the corresponding enactment there- "in. . . ."

pay to her £100, and that an order should be made without weekly payment. As a consequence of that statement, the justices adjudged the defendant to be the putative father of the child, and their decision was shown in the minute of adjudication in the certified extract from the court registrar, exhibited to the case, as "Order made. No weekly payment. 10s. 6d. court costs." The notes of evidence taken by the clerk to the justices at the time read: ". . . Child born 11.5.56 single woman . . . defendant "father. Ask for order without payment for £100. Counsel agrees "no corroboration required. Order by consent. Order that "defendant is father of the child. No money payment to be "made." The defendant paid £100 to the mother on November 12, 1956, with the intention that that payment should release him from all further liability to maintain the child. The justices found, further, that assistance was paid by the board by reference to the requirements of the child on January 19, 1959, and other days, and that the defendant was the putative father of the child (the evidence of the mother having been corroborated in a material particular by other evidence to the satisfaction of the justices).

It was contended by the defendant that the previous proceedings pursuant to section 3 of the Bastardy Laws Amendment Act, 1872, between the mother and him, and the order made thereon by the justices on November 12, 1956, barred the subsequent proceedings, there being an affiliation order in force within the intent of section 44 (2) of the National Assistance Act, 1948; that that order was an order made on a complaint pursuant to the Act of 1872, and the justices' jurisdiction in such proceedings to make an order (as opposed to a finding of paternity) was a jurisdiction to make an affiliation order within that Act, and whether or not the order that they in fact made was such an affiliation order, they did not thereafter have jurisdiction to deny that it was such an order or to vary, interpret or otherwise reconsider its effect as being other than an affiliation order within the intent of section 44 of the Act of 1948; that, by virtue of the decision in *Williams* v. *Davies*,[2] the justices might not adjudicate a second time as to the paternity of the child at the suit of the board, having previously done so at the suit of the mother; and that, therefore, the justices should not make the order sought by the board.

It was contended by the board that the words "affiliation "order" in section 44 (2) of the National Assistance Act, 1948, referred to an order made under the Affiliation Proceedings Act, 1957 (or the Bastardy Laws Amendment Act, 1872), requiring the person against whom an adjudication of paternity had been made to pay (i) a sum of money weekly for the maintenance and education of the child; or (ii) a sum in respect of the expenses incidental to the birth of the child; or (iii) the child's funeral expenses in the case where the child had died before the making of the order; that the justices had jurisdiction to hear and

[2] (1883) 11 Q.B.D. 74.

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determine the complaint and, in particular, to make an adjudication of paternity followed by such order referred to in section 4 (2) of the Affiliation Proceedings Act, 1957, as they might think fit in all the circumstances of the case; that the order made on November 12, 1956, did not exhaust the jurisdiction of a justices' court under section 44 (2) of the National Assistance Act, 1948, as regards the board, who were not a party to the previous proceedings and whose right to apply for an order under the Affiliation Proceedings Act, 1957, was separate and distinct and not co-extensive with any right enabling the mother to institute affiliation proceedings; that the fact that a justices' court had made a previous adjudication of paternity against the defendant in respect of the child upon complaint made by the mother did not preclude the justices from making a second adjudication against him in respect of the child in proceedings by the board under section 44 (2) of the National Assistance Act, 1948; that the effect of the previous adjudication of paternity made on the mother's complaint irrevocably determined the status of the defendant in relation to the child so that the justices must on hearing evidence in accordance with the provisions of section 4 of the Affiliation Proceedings Act, 1957, adjudge him to be the putative father of the child; that the defendant was estopped by reason of the prior adjudication from denying that he was the putative father of the child; and that, even if the justices disregarded altogether the evidence tendered by the board as to the proceedings of November 12, 1956, and the adjudication made thereon, there was other evidence in support of the complaint which was sufficient in law to justify an adjudication of paternity against the defendant.

The justices were of the opinion that no affiliation order was in force within the meaning of those words in section 44 (2) of the National Assistance Act, 1948, by reason of the wording of section 4 of the Bastardy Laws Amendment Act, 1872 (the relevant statute in force on November 12, 1956), which conferred jurisdiction on them to adjudicate on the paternity and, if they saw fit, to make an order for payment of a weekly sum and certain expenses; that the award of costs on November 12, 1956, was made under section 55 of the Magistrates' Courts Act, 1952, the Sixth Schedule of which repealed that part of section 4 of the Bastardy Laws Amendment Act, 1872, which, prior to June 1, 1953, had contained the power to award such costs, and this, in their opinion, did not affect the question of whether an affiliation order was in force; that the board was not bound by *Williams* v. *Davies*[3] because in that case the facts were that an order for weekly payments had been made in the first instance by the justices and it was only on the making of a second order for weekly payments that the justices were held to be wrong, whereas in this case they were of opinion that no affiliation order was in force so that the decision in *Williams* v. *Davies*[3] did not apply;

[3] 11 Q.B.D. 74.

and that the defendant was the father of the child. They accordingly ordered that he should pay the weekly sum of 25s. to the board until she should attain the age of 16.

The defendant appealed.

David Wild for the defendant.
J. R. Cumming-Bruce for the board.

The following case was cited in argument: *Colchester* v. *Peck*.[4]

LORD PARKER C.J. This is an appeal by way of case stated by justices for the county of Lancaster sitting at Lytham, before whom a complaint was preferred by the National Assistance Board against the defendant, alleging that he was the father of a certain illegitimate child.

The justices heard the complaint. They heard evidence on the part of the mother, and they heard the evidence of the defendant, who contested the issue. They found, and the finding as such is not challenged, that the defendant was the father of the child, and they ordered that he should pay the weekly sum of 25s. to the board direct until the child should attain the age of 16 years. It is said that the justices were wrong, for reasons to which I will refer in a moment.

The powers of the National Assistance Board in this regard are to be found in section 44 of the National Assistance Act, 1948. Speaking quite generally for the moment, where assistance has been given under the Act by reference to the requirements of an illegitimate child, the board have power to make the putative father pay towards the requirements of that child. If I may go in reverse order and refer to subsection (6) of that section first, power is there given to apply to the court for an order which has already been made to be varied so that, instead of the money being paid by the putative father to the mother, it shall be paid direct to the board. Under subsection (5) power is given to intervene in any proceedings brought by the mother in order to provide that any payments she would otherwise receive are paid direct to the board, and under the group of subsections (2), (3) and (4) power is given to the board themselves to take proceedings against a man, alleging that he is the putative father, and to obtain the order which the mother might have obtained. Subsection (2), which is the important subsection for the purposes of this case, reads as follows: "If no affiliation order is in force, the board or local "authority may within three years from the time when the "assistance was given or accommodation provided make applica-"tion to a court of summary jurisdiction having jurisdiction in "the place where the mother of the child resides for a summons "to be served under section 3 of the Bastardy Laws Amend-"ment Act, 1872." The opening words are "If no affiliation

[4] [1926] 2 K.B. 366; 42 T.L.R. 535.

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" order is in force," and the sole issue with which the court is now concerned is as to the meaning of the two words " affiliation " order " in that subsection.

That issue arises for this reason: On November 12, 1956, a long time before the present complaint, an application was made by the mother under section 3 of the Bastardy Laws Amendment Act, 1872, and the justices adjudged that the defendant was the father of her child. In fact the defendant was prepared to pay £100, and the mother was prepared to accept it, and it appears that the justices, having been told that, merely adjudged that the defendant was the father of the child, and made no order for any money payment other than the court costs of 10s. 6d. In fact the defendant thereafter paid the mother the £100, and the question is whether the order the justices so made on November 12, 1956, was an affiliation order. If it was, then the National Assistance Board have no power under section 44 to obtain the order which the justices made on March 16, 1959, with which the court is now concerned.

It is convenient to look first at section 4 of the Bastardy Laws Amendment Act, 1872. I will not read it all, but it is enough to say that, upon certain evidence being given and the justices being satisfied, they may adjudge the defendant to be the putative father of the bastard child. That is the first step, and then the section goes on: " and they may also, if they see fit, having " regard to all the circumstances of the case, proceed to make an " order on the putative father for the payment to the mother. . . ." Pausing there, two steps are envisaged, the first the adjudication that the man is the putative father, and secondly, if the justices think fit, an order for the payment of money.

By section 7 of the Affiliation Orders Act, 1914, there was a definition of " affiliation order "—true, for the purposes of that Act. It provides: " In this Act, unless the context otherwise " requires the expression ' affiliation order ' means an order made " under the Bastardy Laws Amendment Act, 1872, or any Act " amending the same, adjudging a man to be the putative father " of a bastard child and ordering him to pay a sum of money " weekly or otherwise to the mother . . ." Finally, the Affiliation Proceedings Act, 1957, which is a consolidating Act made under the Consolidation of Enactments (Procedure) Act, 1949, provided by section 4 (2): " If the evidence of the mother is corroborated " in some material particular by other evidence to the court's " satisfaction, the court may adjudge the defendant to be the " putative father of the child and may also, if it thinks fit in all " the circumstances of the case, proceed to make against him an " order (referred to in this Act as ' an affiliation order ') for the " payment by him " of money and expenses and the like.

In all those three Acts the words used are a little different. There was no definition in the Act of 1872, but it was contemplated that there should be, as it were, two stages, an adjudication and then what is called an order for the payment of money. In

the Act of 1914, the adjudication and the order for the payment of money are together treated as the affiliation order, and in the Affiliation Proceedings Act, 1957, the order for the payment of money alone is treated as the affiliation order. However, it is significant that under all three statutes, adjudication alone is not an order. That being so, the next step is to look at the context in which these words are used. Section 44 of the National Assistance Act, 1948, is a financial section providing, as I have said, for the collecting of money by the National Assistance Board. One would think that "affiliation order" in such a section must mean an order which was more than a mere adjudication of a man as the putative father, but one which provided for the payment of money. The words "is in force," in my judgment, assist that contention. Otherwise, it would be easy to say that the board might make an application for a summons to be served under section 3 of the Act of 1872 against any man who had not been adjudged to be the putative father. That is not, however, the scheme; the scheme is that an application can be made if no affiliation order is in force, and by that I think is meant no order for the payment of money. The structure of section 44 would seem to bear that out, and for that reason, coupled with the significance which I attach to the fact that in each of the three Acts to which I have referred adjudication alone is nowhere treated as an order, I think that "affiliation order" in subsection (2) of section 44 is confined to an order for the payment of money. In the present case there was no order for the payment of money made in 1956. Accordingly, an application did lie under section 44 (2). That application was heard by the justices; they dealt with all the evidence, as they had to pursuant to section 44 (3), and they adjudged that the defendant was the father of the child and ordered him to pay 25s. a week to the board. In my judgment, the justices were right, and this appeal should be dismissed.

CASSELS J. I agree.

ASHWORTH J. I also agree.

Appeal dismissed.

Solicitors: *Bower, Cotton & Bower for George Davies & Co., Manchester; Solicitor, National Assistance Board.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1959
Dec. 2, 3, 4, 7, 8, 9, 10.

Pearson J.

DINGLE *v.* ASSOCIATED NEWSPAPERS LTD. AND OTHERS.

[1958 D. No. 1084.]

Parliament—Privilege—Right to control own proceedings—Report of select committee of House of Commons—Attack on validity of report—Whether comment on report permissible—Bill of Rights, 1688 (1 *Will. & Mary, sess.* 2, *c.* 2), *s.* 1, *art.* 9.

Libel—Privilege—Qualified privilege—Parliamentary papers—Report of select committee of House of Commons—Comment at the trial on proceedings and report of committee—Whether comment relevant—Parliamentary Papers Act, 1840 (3 *&* 4 *Vict. c.* 9), *s.* 3.

To impugn the validity of the report of a select committee of the House of Commons, especially one which has been accepted as such by the House by being printed in the House of Commons Journal, is contrary to section 1, article 9[1] of the Bill of Rights, 1688. No such attempts can properly be made outside Parliament.

Bradlaugh v. *Gossett* (1884) 12 Q.B.D. 271 applied.

Where defendants bona fide and without malice published an extract from a report of a select committee of the House of Commons defamatory of the plaintiff, who sued them for libel:—

Held, that they were entitled to the statutory defence under section 3 of the Parliamentary Papers Act, 1840,[2] and it was not relevant at the trial for the plaintiff to comment on the report or on the proceedings leading to the publication of the report.

ACTION.

The plaintiff, Philip Burrington Dingle, the town clerk of Manchester, sued for damages for libels appearing in the issues of the *Daily Mail* newspaper for June 16 and June 26, 1958. The first defendant, Associated Newspapers Ltd., were the proprietors of the *Daily Mail;* Arthur George Wareham, the second defendant, was the editor of the *Daily Mail*, and Michael Kelly, the third defendant, was a journalist employed by the first defendant. The plaintiff alleged that in the issue of the *Daily Mail* for June 16, 1958, the defendants falsely and maliciously printed and published an article concerning the circumstances in which the shares in Ardwick Cemetery Ltd. were acquired by the Manchester Corporation. The article, which stated that it was written

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

[1] Bill of Rights, 1688, s. 1, art. 9: "That the freedom of speech and "debates or proceedings in Parliament "ought not to be impeached or questioned in any court or place out of "Parliament."

[2] Parliamentary Papers Act, 1840, s. 3: "It shall be lawful in any civil "or criminal proceeding to be commenced or prosecuted for printing "any extract from or abstract of such "report, paper, votes, or proceedings, "to give in evidence under the "general issue such report, paper, "votes, or proceedings, and to show "that such extract or abstract was "published bona fide and without "malice; and if such shall be the "opinion of the jury a verdict of not "guilty shall be entered for the defendant or defendants."

by the third defendant, purported to be the report of an interview with the chairman of Ardwick Cemetery Ltd., and set out allegations by the chairman that while negotiations for the sale of shares in Ardwick Cemetery Ltd. were in progress between its board of directors and the Manchester Corporation, the plaintiff went behind the backs of the board and sent out a letter to the shareholders offering them £1 for each share, a price which was less than the offer for which the board were then negotiating; and that the shares in Ardwick Cemetery Ltd. were worth more than double the £1 each that, as a result of the plaintiff's letter to the shareholders, the corporation paid for them. The article then contained the following paragraph:

"Objections"

"Twice there have been formal objections in the House of "Commons to a bill dealing with the cemetery. A debate has "been arranged for Thursday, but this may be shelved. Sir John "Barlow, M.P. for Middleton and Prestwich, has put down a "motion that there should be an independent valuation of the "shares. If it proved more than £1 the balance would be paid "by the corporation for all shares bought after December 2 last. "If not, the original £1 deal would stand. Last month, a com-"mittee of the House of Commons, examining the Bill—it was "intended to enable Manchester to take over the cemetery for "conversion to playing fields or an open space—reported—'It "'was clear to the committee that the corporation obtained the "'shares by presenting a one-sided view, which failed to disclose "'the true position of the company on a break-up.'" The article ended with a report of the views of the chairman of Ardwick Cemetery Ltd. on the acquisition of the company by Manchester Corporation. The plaintiff alleged that the whole of this article meant, and was understood to mean, that he had by a statement which he knew to be misleading, false or deceptive, or by dishonest concealment of material facts, induced the shareholders of Ardwick Cemetery Ltd. to enter into or offer to enter into an agreement to sell their shares, and that the plaintiff was guilty of an offence under section 12 (1) of the Prevention of Fraud (Investments) Act, 1939.

The defendants pleaded various defences, and in relation to the paragraph in the article headed "Objections," which is set out above, they contended, inter alia, that in so far as the words in that paragraph consisted of statements of fact, they were a fair and accurate report of parliamentary proceedings published by the defendants bona fide and without malice. The defendants further contended in relation to this paragraph that the words "it was clear to the committee that the corporation obtained the "shares by presenting a one-sided view, which failed to disclose "the true position of the company on a break-up" were extracted from the report of a select committee of the House of Commons, and were an extract from a parliamentary paper within the

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meaning of the Parliamentary Papers Act, 1840, namely, from the report of the select committee on the Manchester Corporation Bill, and were published bona fide and without malice. This report was laid on the table of the House of Commons and made public; and by a standing order the committee were required to report to the House any circumstances relating to the Bill of which they thought the House should be informed.

In his reply, the plaintiff denied, inter alia, that publication of the extract from the report of the select committee was privileged, and contended that the extract was not a report of parliamentary proceedings but was an extract of what purported to be a report from the committee.

In the course of the trial certain questions arose on matters of parliamentary privilege in respect of the proceedings and report of the select committee, and on the defence raised under the Parliamentary Papers Act, 1840. It was indicated, or appeared to be indicated, in the opening speech for the plaintiff, that an attack was to be made on the report of the select committee, and that the attack was perhaps to be carried to the extent of impugning the validity of the report, on the ground of some defect of procedure.

Questions also arose on the effect of the publication of extracts from the report of the select committee on the assessment of damages. The case is reported solely on the question of parliamentary privilege and on these matters.

Geoffrey Lawrence Q.C. and *W. D. T. Hodgson* for the plaintiff.

Neville Faulks Q.C. and *David Hirst* for the defendants.

Sir Jocelyn Simon Q.C., S.-G., J. R. Cumming-Bruce and *R. A. Barr* appeared as amici curiae.

No cases, other than that cited in the judgment, were referred to in argument.

Pearson J., after stating the matters set out above, continued: There is one other introductory matter which I think it is convenient to mention here before coming to the facts, and that is the subject of parliamentary privilege as it affected this action. In the opening speech something was said which indicated, or seemed to indicate, that there was going to be an attack on the report of the select committee of the House of Commons, and that the attack was, perhaps, to be carried to the extent of impugning the validity of the report, on the ground of some defect of procedure. In consequence of that, the Solicitor-General and Mr. Cumming-Bruce attended in this court on the second day of the trial as amici curiae and pointed out the difficulties arising in the sphere of parliamentary privilege.

Reference was made to the Bill of Rights, 1688, s. 1, art. 9, on freedom of speech, which provides: "That the freedom of

" speech and debates or proceedings in Parliament ought not to " be impeached or questioned in any court or place out of " Parliament."

Reference was also made to *Bradlaugh* v. *Gossett*,[1] and it is sufficient to read a short portion of the headnote: " The House of " Commons is not subject to the control of Her Majesty's Courts " in its administration of that part of the statute law which has " relation to its internal procedure only. What is said or done " within its walls cannot be inquired into in a court of law. A " resolution of the House of Commons cannot change the law of " the land. But a court of law has no right to inquire into the " propriety of a resolution of the House restraining a member " from doing within the walls of the House itself something which " by the general law of the land he had a right to do." There is a clear affirmation of the exclusive right of Parliament to regulate its own internal proceedings.

That was one of the points put forward and, in my view, it is quite clear that to impugn the validity of the report of a select committee of the House of Commons, especially one which has been accepted as such by the House of Commons by being printed in the House of Commons Journal, would be contrary to section 1 of the Bill of Rights. No such attempts can properly be made outside Parliament.

The next point was that the Solicitor-General and Mr. Cumming-Bruce made a submission or a request that no comment on the report should be permitted in the course of the trial. That, as a matter of construction of the relevant provision in the Bill of Rights might have raised a more debatable question, but it seemed quite clear at the time, and still is clear, to my mind, that it was easy to give effect to that request because, once the question of the validity of the report had been excluded as outside the scope of the court's inquiries, any comment on the report, or how it was obtained, and the proceedings leading up to it, would have little or no materiality: indeed, to a large extent, any such comment would not be relevant at all.

Accordingly, for two reasons, because of the desire which the courts have to co-operate as far as possible with the parliamentary authorities in matters where there may be some debatable ground on which a conflict might arise, and because of the lack of materiality or even of relevancy, any comment has, throughout the proceedings, been ruled out.

I had better explain briefly why I say that any comment of that kind is of no materiality, and possibly of no relevancy, to the issues in the action. As to the basic facts of the case, clearly, in my view, this court should make its own findings based on the evidence adduced and on the arguments presented in this court, and that should be done without regard to any decisions reached or opinions expressed or findings made by a different tribunal

[1] (1884) 12 Q.B.D. 271.

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having a different function, and, probably, different issues before it, and having received different evidence and a different presentation of the case.

Then, secondly, in so far as there is an issue under the Parliamentary Papers Act, 1840, s. 3, the fact that a report of the select committee was made is simply an event which happened, and it is not relevant to inquire how it came to be made or what led up to it, and, if the defendants can show that they printed and published extracts from that report, and did so in good faith and without malice, they are entitled to the statutory defence, and no amount of comment on the report or on the proceedings leading up to it would deprive them of that defence or make it any worse or any better.

Finally, on the issue as to the assessment of damages, here again the report of the select committee is an event which happened, and, in so far as the making of the report and the printing of extracts from it in various newspapers caused damage to the plaintiff's reputation, the defendants are not responsible for that damage and, again, any amount of comment would have very little, if any, materiality and perhaps not even relevancy.

So on those two main points no difficulty arises at all. There were other matters, and also minor details of evidence, and I should mention that the Solicitor-General and Mr. Cumming-Bruce supplied further information and explanations with regard to the production of certain documents and other matters of evidence in which parliamentary privilege might be involved, but those are points of detail.[2] I would say only this, that manifestly

[2] The Solicitor-General, referring to the question of parliamentary privilege, said that there were two species of evidence in question—the minutes of proceedings of the select committee, which were laid on the table of the House and were not published, and what were officially called the minutes of evidence. A request for the production of the minutes of proceedings had been made to the Speaker of the House of Commons on behalf of the plaintiff in the action, but the Speaker had refused it on the ground that the proper course was for the plaintiff to proceed by petition to the House for production of the minutes. No such petition had been made; and any evidence relating to these minutes of proceedings would, in his submission, clearly be a breach of parliamentary privilege.

The minutes of evidence were taken down and transcribed by an official shorthand writer, who was an officer of the House, and by a standing resolution he could not be called to produce the transcript or give evidence without leave; in this case leave had not been requested. Any member of the public, however, could buy a copy of the transcript; so that if the minutes of evidence could be proved aliunde, for example by being an agreed document as in this case, it was unlikely that the House would treat its production as a breach of privilege.

It was important to remember that the House had never formally waived its privilege to prevent publication of its proceedings. There was, however, little doubt that if a petition had been made for the production of the minutes of evidence, as it had been for the copies of official reports of debates, it would have been granted. It therefore seemed that the court could safely consider a transcript of the evidence without any practical risk of collision with the House; but, in his submission, the proper procedure in future cases would be to present a petition. Reports by government departments to the select committee fell into the same class as the minutes of evidence, and all that he had already said applied to them also.

His Lordship asked whether the position still was that it would not be

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the parliamentary authorities have given the fullest co-operation to facilitate the administration of justice without detriment to parliamentary privilege. This court is indebted to the Solicitor-General and to Mr. Cumming-Bruce for their intervention as amici curiae, and for the friendly help which they afforded in that capacity.

[The remainder of the case does not call for report. There were findings that the defendants had acted in good faith and without malice, so that the publication of the extracts from the select committee's report was privileged, and that the offer made by the plaintiff on behalf of the Manchester Corporation to buy the shares of the Ardwick Cemetery Ltd. for £1 each was a suitably generous offer, as the shares were worth considerably less than £1 each.]

Judgment for the plaintiff for £1,100.

Solicitors: *Stephenson, Harwood & Tatham for Grundy, Kershaw, Farrar & Co., Manchester; Swepstone, Walsh & Son; Treasury Solicitor.*

right to comment upon the conduct of the select committee.

The Solicitor-General said that if any comments were made or its validity impugned or any reflection made on its conduct, that would be very much in the danger area. The plaintiff's proposal to call evidence which was the same as that given before the select committee would not, however, be a breach of privilege.

[HOUSE OF LORDS.]

ARBUCKLE SMITH & CO. LTD. . . . APPELLANTS;

AND

GREENOCK CORPORATION . . . . RESPONDENTS.

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Jan. 18, 19; *Feb.* 18.

Rating—Rateable occupation—Repairs to vacant property—Warehouse—Work on alterations—"Actual occupation"—Meaning—Local Government (Scotland) Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 43), *ss.* 222, 241 (1), 379 (1)—*Valuation and Rating (Scotland) Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 60), *s.* 16 (1).

By section 222 of the Local Government (Scotland) Act, 1947 (as amended by section 16 (1) of the Valuation and Rating (Scotland) Act, 1956), the occupier of premises is responsible for paying rates. By section 243 (1) he is not liable for rates on premises which are "unlet, unoccupied or unfurnished throughout the whole "year from Whitsunday to Whitsunday corresponding to or as "nearly as may be to the period for which the rate is levied." In section 379 (1) "occupier" is defined as "any person in actual "occupation of any land."

On March 1, 1957, a company bought a warehouse with a view to using it as a bonded store. Approval of such use by the Customs

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* *Present*: VISCOUNT KILMUIR L.C., LORD REID, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

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and Excise was necessary and was applied for, but before it could be granted considerable alterations in the premises were required, and from March 3, 1958, till June 16, 1958, the work was carried out. The company had not previously used the premises as a warehouse. The local authority claimed rates in respect of the premises for the year from Whitsunday, 1957, to Whitsunday, 1958:—

Held, on the footing that there was no difference between the laws of Scotland and England in the principles affecting rateable occupation, that during the material period the company was not in rateable occupation. The making of alterations with the intention of carrying on a business when they were completed did not constitute rateable occupation or "actual occupation" within the meaning of the Act. There being no use of the premises according to their nature, there was no occupation attracting liability to rates (post, pp. 438, 441 and 445).

Mersey Docks and Harbour Board Trustees v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees* (1865) 11 H.L.C. 443; and *Clyde Navigation Trustees* v. *Adamson* (1865) 4 Macq.H.L. 931 distinguished.

Hackney Borough Council v. *Metropolitan Asylums Board* (1924) 40 T.L.R. 645 questioned.

Decision of the Second Division of the Court of Session, 1959 S.L.T.(Notes) 56 reversed.

Appeal from the Second Division of the Court of Session.

This was an action for payment in which the respondents, the Greenock Corporation, as rating authority for the burgh of Greenock, sued the appellants, Arbuckle Smith & Co. Ltd., for payment of £2,141 13s. 4d. with interest in respect of rates claimed to be due by the appellants in respect of the year from Whitsunday, 1957, to Whitsunday, 1958. The appellants denied that the rates in question were due by them and tabled a plea to the relevancy of the respondents' averments, and also a plea to the effect that since the subjects in respect of which the rates were levied were unlet, unoccupied and unfurnished, within the meaning of section 243 of the Local Government (Scotland) Act, 1947, throughout the year in question, there was no liability on them for rates. The respondents tabled pleas to the effect that the sum sued for was due and resting owing and that, as the defences were irrelevant, decree should be pronounced de plano in terms of the conclusions of the summons. There were also certain other pleas tabled for the parties, but these were not insisted on and this appeal is not concerned with them. By interlocutor dated March 25, 1959, the Lord Ordinary (Lord Guest), after a debate, sustained the respondents' plea to the relevancy of the defences and granted decree de plano in terms of the conclusions of the summons. The appellants reclaimed and by interlocutor dated June 18, 1959, their Lordships of the Second Division refused the appellants' motion for review and adhered to the Lord Ordinary's interlocutor. The appellants now submitted their Lordships' interlocutors for review and the respondents submitted that those interlocutors were well founded and should be affirmed by the House of Lords.

The facts are set out in the opinion of Viscount Kilmuir L.C.

Alexander Thompson Q.C. (of the Scottish Bar) and *Henry Keith* (of the English and Scottish Bars) for the appelant company.

W. Grieve Q.C. and *Peter Maxwell* (both of the Scottish Bar) and *W. B. Harris* (of the English Bar) for the respondent corporation.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *East London Railway Co.* v. *Whitechurch* [1]; *Reg.* v. *St. Pancras Assessment Committee* [2]; *Hall* v. *North British Railway Co.* [3]; *London County Council* v. *Hackney Borough Council* [4]; *London County Council* v. *Wilkins* [5]; *Mid-Northamptonshire Water Board* v. *Lee* [6]; *Newcastle City Council* v. *Royal Newcastle Hospital.* [7]

Their Lordships took time for consideration.

February 18. VISCOUNT KILMUIR L.C. My Lords, this is an appeal against an interlocutor of the Second Division of the Court of Session by which the court adhered to an interlocutor of the Lord Ordinary (Lord Guest) decerning against the appellants in terms of the first conclusion of the summons for payment to the respondents of £2,141 13s. 4d.

There is no dispute about the facts. The appellants purchased certain warehouse premises situated in Greenock with entry as at March 1, 1957, with a view to using them as a bonded store for spirits. It was not permissible for the appellants so to use the premises until provisional approval of such use had been granted by H.M. Customs and Excise. The appellants applied for provisional approval on January 28, 1958. It was an essential preliminary to the grant of provisional approval that certain alterations to the premises should be carried out in order to make them secure in accordance with Customs regulations. The appellants commenced to carry out such alterations on March 3, 1958, and completed them on June 16, 1958. Provisional approval was granted by H.M. Customs and Excise on June 13, 1958, and thereafter the appellants commenced to use the premises as a bonded store. The appellants had never prior thereto—that is at any time during the relevant period of Whitsunday, 1957, to Whitsunday, 1958, used the premises as a bonded store or for any purpose of their business as warehousemen. They intended to occupy the premises when the alterations were complete and when

[1] (1874) L.R. 7 H.L. 81.
[2] (1877) 2 Q.B.D. 581.
[3] 1883, 10 R. 857.
[4] [1928] 2 K.B. 588; 44 T.L.R. 592.
[5] [1957] A.C. 362; [1956] 3 W.L.R. 505; [1956] 3 All E.R. 38.
[6] [1958] A.C. 68; [1957] 2 W.L.R. 881; [1957] 2 All E.R. 143.
[7] [1959] A.C. 248; [1959] 2 W.L.R. 476; [1959] 1 All E.R. 734.

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H.M. Customs and Excise were satisfied with the security measures.

Liability for rates in Greenock depends upon section 222 of the Local Government (Scotland) Act, 1947, which enacts: "Save "as otherwise provided with respect to any rate in this Act or "any other enactment, every rate levied shall be payable by "owners and occupiers in equal proportions," and upon section 16 (1) of the Valuation and Rating (Scotland) Act, 1956, which enacts: "In the year first commencing after the passing of this "Act, and in every subsequent year every rate levied by a rating "authority shall be payable by occupiers only . . ." By section 379 (1) of the Act of 1947 "occupier" is defined as meaning "the tenant or sub-tenant or any person in the actual occupation "of land." Section 243 (1) of the Act of 1947 (as amended by the Act of 1956) enacts that save as otherwise provided in a local Act, "any rate levied by the rating authority shall not be "payable in respect of lands and heritages if the lands and "heritages are unlet, unoccupied and unfurnished throughout the "whole of the year from Whitsunday to Whitsunday correspond-"ing to or as nearly as may be to the period for which the rate "is levied." We were assured that there is no relevant local Act.

The premises in question were admittedly unlet and unfurnished and the question is whether they were unoccupied in the sense used in the context of rating.

Lord Patrick thought that the word "actual" in section 379 (1) of the Act of 1947 had been used to make plain that the occupation which is necessary to make the occupier liable to pay rates is de facto occupation as opposed to de jure occupation, the kind of constructive occupation which might be held to flow from mere ownership of land. I am disposed to agree with him on this, and also when he says that for the purposes of the Act of 1947 an owner of land must have made some actual use of the premises in the relevant year before he can be called on to pay rates. The crucial question, however, is what kind of use is contemplated or, in other words, whether it is sufficient to make alterations with the intention of carrying on a business when the alterations are completed.

I do not think it is. I accept broadly the argument for the appellants which can be put in this way. The sole purpose of the appellants in acquiring the premises was to use them as a bonded store in connection with their business as warehousemen. The alterations were necessary in order that this purpose might, if the alterations were approved by the Customs and Excise, receive effect. Yet activity carried on in relation to premises, the sole object of which is to make the premises fit for the only use which is contemplated, does not amount to the kind of actual user as is essential to rateable occupation. So long as the activities were confined to making the premises fit for a contemplated purpose, the premises were not serving the appellants' purposes as

warehousemen. The premises were not being applied to the purpose for which they existed but were in an antecedent stage. It must be remembered that under rating law it is open to the owner to sterilise a property—whether by leaving a house without furniture or otherwise—which is perfectly capable of being let for a valuable rent. If, therefore, there is no use of premises according to their nature I find it difficult to see how there is occupation attracting liability for rates.

The learned judges who considered this case in the Court of Session were obviously much impressed by the advantage which, in their view, the appellants would receive from altering the premises. I cannot, however, take their next step of saying that because it was an advantage to the appellants to alter the premises, therefore the appellants were making beneficial use of the premises. It is an undoubted advantage to the owner of an empty house to put on some slates and keep it weathertight, but the fact that he does so could not create rateable occupation where none existed. I cannot myself accept the view that when a person is repairing or altering something designed for a particular purpose, he is by that action making use of it. The learned Lords of Session were able to find support for their view in the decisions of this House in *Mersey Docks and Harbour Board Trustees* v. *Cameron; Jones* v. *Mersey Docks and Harbour Board Trustees* [1] and *Clyde Navigation Trustees* v. *Adamson.*[2] With the greatest respect, I cannot find any. When I consider the use made of its premises by a docks and harbour board, I have no difficulty in recognising it as a full as well as a beneficial occupation, although the board is precluded from making a profit. In these cases the dock estates were clearly being used according to their actions and the decisions do not, in my view, help in the problem raised by the instant case.

As, however, reliance has been placed on certain English cases and everyone has treated the law of Scotland and the law of England as being the same on this point, I want to say that I do not think that they place any real difficulty in the way of the view which I have formed. It will be noted that in *Hackney Borough Council* v. *Metropolitan Asylums Board* [3] Lord Hewart indicated that the carrying out of alterations without more might not amount to rateable occupation. My difficulty is to perceive the relevance of the accumulation of small facts on which the decision that there was rateable occupation was reached. I do not think that the cases where the ratio decidendi was that the premises were in effect "stand-by" premises, such as *Borwick* v. *Southwark Corporation* [4] and *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council*,[5] help in the decision of this case. It follows that, in my view, the two cases in sheriff courts,

[1] (1865) 11 H.L.C. 443.
[2] (1865) 4 Macq.H.L. 931.
[3] (1924) 131 L.T. 136; 40 T.L.R. 645.
[4] [1909] 1 K.B. 78.
[5] [1944] K.B. 412; 60 T.L.R. 275; [1944] 1 All E.R. 436.

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Commercial Bank of Scotland v. *Glasgow Corporation*,[6] and *Co-operative Permanent Building Society* v. *Pinkerton*,[7] were not rightly decided.

For all these reasons I would allow the appeal.

Lord Reid. My Lords, in this action the respondents sue for £2,141 13s. 4d., being rates due for the year from Whitsunday, 1957, to Whitsunday, 1958, in respect of warehouse premises at Ker Street, Greenock. The appellants acquired these premises in March, 1957, with a view to using them as a bonded warehouse. Before premises can be used for that purpose the requirements of H.M. Customs and Excise as to security must be satisfied. Preliminary approval of the premises was given in September, 1957, and alterations with a view to improving the security of the premises were made by the appellants between March 3 and June 16, 1958, whereupon provisional approval was given and the appellants were free to use the premises for their intended purpose.

The appellants' defence is that throughout the year in question the premises were "unlet, unoccupied and unfurnished" within the meaning of section 243 of the Local Government (Scotland) Act, 1947. If that is established, then occupiers' rates are not payable. Owners' rates having been abolished in 1956, the whole sum now sued for represents occupiers' rates, and if the appellants' contention is correct it is a complete defence to this action.

The premises were unlet and it is now admitted that they were unfurnished throughout the year. The case turns on whether they were "unoccupied" throughout the year. The facts are not in dispute. The premises remained empty and the only operations carried out in them by the appellants during the year were some slight repairs to the roof in January and the alterations begun on March 3 and not completed by Whitsunday. These alterations comprised bricking up some windows and doors and fitting iron bars to some other windows.

The respondents do not attach importance to the repairs but they maintain that by making these alterations the appellants occupied the premises. What then is the meaning of "unoccupied" in the Act of 1947? There is no definition of the word and the only assistance to be got from the Act is in the definition of "occupier" in section 379 (1) which includes "any person in actual occupation of land." Premises are therefore unoccupied unless there is "actual" occupation by somebody. But that does not throw much light on what is meant by "occupation": it only excludes occupation which is not actual but only notional—if there can be such a thing as notional occupation.

There is singularly little authority in Scotland on the meaning of occupation and, apart from two sheriff court cases, there is

[6] 1925 S.L.T.(Sh.Ct.) 142.

[7] (1958) June 18, Glasgow Sheriff Court (unreported).

none in point in this case. In England there is a wealth of authority, not always consistent, but again, with one possible exception, there is none exactly in point here. I therefore think it proper to begin by taking the word "unoccupied" as an ordinary word of the English language and considering its possible meanings. It could, I suppose, mean that no one ever set foot in the premises during the relevant period, but I reject that meaning at once, both because it has never even been suggested so far as I know in any authority or textbook, and because, very properly, it was not argued in this case. So if the owner can himself enter or send in others without thereby "occupying" the premises, the criterion of occupation must be either how frequently he or his representatives go in or what they do when they are here. No one has contended that entry for inspection or cleaning or ordinary maintenance such as heating in cold weather or carrying out ordinary repairs to make the premises wind- and water-tight constitutes occupation, and it appears to me that occupation must involve something more than that. But if that be so, I have difficulty in seeing on what reasonable principle the making of the alterations in this case can be held to constitute occupation. It might easily be necessary to do work not dissimilar in character and extent from that done here to make good doors and windows broken by natural or human agency. And, moreover, where fairly extensive repairs are necessary the old position is not always exactly restored: the opportunity is taken to carry them out in such a way as to make improvements. It would seem to me very odd if in such a case the criterion were whether or not the work done has improved the premises or made them more valuable to the owner.

But I can see a clear distinction between maintaining, repairing or improving a fabric, on the one hand, and enjoying the accommodation which it provides, on the other. And I think that it would accord with the ordinary use of language to say that the owner who in some way enjoys the accommodation is occupying the premises, but that the owner who merely maintains, repairs or improves his premises is not thereby occupying them: he is preparing for future occupation by himself, his tenant or his disponee.

It appears to me that the difficulty in this case arises from a misapplication of the requirement that, to be rateable, occupation must be beneficial. The argument is that if you find the owner making use of his property, and if that use is beneficial, then there must be occupation: the kind of use does not matter. But if the word "use" is used in that wide sense that argument must, I think, be wrong or at least too widely stated. If bricking up doors and windows is beneficial use, I do not see how it can be said that replacing or repairing broken doors and windows is not also beneficial use: the premises might be unusable until the repairs had been done. The real question in this case, to my mind, is not whether that kind of use was beneficial. It is

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whether that kind of use, beneficial or not, can amount to occupation.

A good deal was said in argument about the decisions of this House in *Mersey Docks and Harbour Board Trustees* v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees* [8] and *Clyde Navigation Trustees* v. *Adamson*.[9] There statutory boards had made full use of their premises; they did all the things that a normal occupier would do, and the quality of their use was not in issue. Their case was that they did not have to pay rates because they were precluded from making profit. Their occupation was nevertheless held to be beneficial and rateable: it was beneficial because it was of property capable of yielding a net annual value. Since that time occupation of such property has been held rateable whether or not the occupier derives profit from it. But those cases throw no light on the question what kind of use amounts to occupation, and do not in the least support the fallacious argument: occupation to be rateable must be beneficial; these owners made beneficial use of their property; therefore they were in rateable occupation.

I do not propose to examine subsequent English authorities. They show that it may be difficult in particular cases to show whether there was such enjoyment of the property as to amount to occupation. But with one exception they do not involve the present question. The exception is *Hackney Borough Council* v. *Metropolitan Asylums Board*.[10] I find it somewhat difficult to determine the ratio decidendi, but it would seem to be that although individual acts of maintenance and improvement do not constitute occupation, an accumulation of such acts may do so. I would doubt that. But I think it unnecessary to decide that such an accumulation could never amount to occupation: it is sufficient to say that that could only be so in exceptional circumstances, and that there is nothing exceptional in the present case. It follows that, in my opinion, the two sheriff court cases—*Commercial Bank of Scotland* v. *Glasgow Corporation* [11] and *Co-operative Permanent Building Society* v. *Pinkerton*,[12] in Glasgow Sheriff Court on June 18, 1958—were wrongly decided. For the above reasons, I agree that this appeal should be allowed.

Lord Radcliffe. My Lords, we have here to consider the rateability of a warehouse owned by the appellants but not put to any use by them during the relevant year except so far as entry upon the premises by workmen, and the carrying out by them of alterations to the fabric, may constitute " use " for this purpose. The alterations were required in order to render the warehouse properly secure for service as a bonded store in accordance with Customs regulations. The specific items of work mentioned were the bricking up of certain windows and doors.

[8] 11 H.L.C. 443.
[9] 4 Macq.H.L. 931.
[10] 131 L.T. 136.
[11] 1925 S.L.T.(Sh.Ct.) 142.
[12] (1958) unreported.

I take it, therefore, that this is not a case of an existing building being reduced for the time being to an incomplete state by far-reaching structural alterations, but is a case of an existing building being subjected to certain modifications of its structure which, until completed, left it unfit for the intended business use.

It has been common ground that the appellants' claim not to be rated in respect of the premises depends upon section 243 (1) of the Local Government (Scotland) Act, 1947, the effect of which is to provide exemption from rates in respect of any hereditament which has been " unlet, unoccupied, and unfurnished " throughout the whole of the year from Whitsunday to Whitsunday corresponding to, or as nearly as may be to, the period for which the rate is levied. Certainly the warehouse was neither let nor furnished during the relevant period; but was it unoccupied? That rests upon the meaning which is to be attributed to the words " occupier " or " occupied " or " occupation " where they appear in the context of a rating enactment. In section 379 (1) of the same Act " occupier " is defined as meaning the tenant or sub-tenant or " any person in the actual occupation of land." In my opinion, the word " actual " has no particular significance here. The question is still, What is meant by " occupation " ? And that, I think, can only be answered by considering what acts, intentions or situations are requisite to constitute occupation for the purposes of rating.

Both the learned Lord Ordinary and the learned judges of the Second Division of the Court of Session treated the law of Scotland and the law of England as being the same on this point, though I have no doubt that differences between the two systems may lead to divergences in other respects. Consequently, English decisions were referred to so far as they threw any light upon the principles of law to be applied, though no English decision has dealt with a case precisely similar to that which is now before us. Having regard to the general link between the conceptions of rateability ruling in the two countries, which was confirmed by the successive decisions of this House in *Mersey Docks and Harbour Board Trustees* v. *Cameron*; *Jones* v. *Mersey Docks and Harbour Board Trustees* [13] and *Clyde Navigation Trustees* v. *Adamson*,[14] I should have been disposed in any event to consider the case on the same basis: but I am confirmed in this approach by my understanding that both of your Lordships who are trained in Scottish law take the same view as the Second Division upon this matter.

My Lords, I think that consideration of this case must begin by recognising that an empty dwelling-house is not rateable, and the owner of it is not regarded by the law as an occupier for rating purposes. It is no doubt something of a curiosity that the owner can by his own decision and for his own purposes withdraw from rateability a hereditament which may be of substantial annual

[13] 11 H.L.C. 443. [14] 4 Macq.H.L. 931.

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value, and for which a tenant would readily give a profitable rent. But so it is, even though the principle of it puzzled so great an authority as Lord Blackburn (see *Harter* v. *Salford Overseers* [15]). Whether the rule is " in truth an exception from the general law " of rating " (*per* Lord Russell of Killowen in *Townley Mill Co. (1919) Ltd.* v. *Oldham Assessment Committee*,[16] it is nonetheless an established part of that law. It accords with the principle that, to be a rateable occupier, a person must enjoy some benefit from the land: his occupation must be " a thing of value." The explanation has been said to be that the owner of an empty house does not use it " as a house " within the meaning of the original Poor Relief Act of 1601 (see *per* Lord Atkinson in *Liverpool Corporation* v. *Chorley Union Assessment Committee* [17]); and it has been decided at various times that, while putting the owner's furniture in the house does set up rateability, presumably because some use of it as a house is being obtained, keeping a caretaker in the house merely as a custodian does not constitute occupation by the owner.

It is evident, therefore, that there will not be occupation in the context of rating unless some use is made of the hereditament in the course of the relevant year. " Use " is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed. When rating law turns its attention from dwelling-houses to industrial or commercial premises the same conceptions are, in my opinion, applicable to determine whether or not occupancy ceases or begins, though they must be adapted to the particular circumstances of such premises, factory or warehouse, and the business for the purpose of which they are created. Nevertheless, I think that the words of Farwell L.J. in *Rex* v. *Melladew* [18] provide a satisfactory indication of the correct test: " Rateable property has " many varieties; of some the normal use is by personal occupa- " tion, e.g., a dwelling-house, of others by occupation by live or " dead stock, e.g. a linhay used as a shelter for cattle, or a barn; " and the nature of the property and its mode of use must be " considered in each case. The test, in a case like the present, of " business premises, appears to me to be, Has the person to be " rated such use of the tenement as the nature of the tenement and " of the business connected with it renders it reasonable to infer " was fairly within his contemplation in taking or retaining it? "

Now, the appellants never used the warehouse in question here as a warehouse during 1957–58. That, I think, is the determining point. They did not buy it for any purpose of use except as a bonded store, and that only when their adaptations were complete and their licence permitted. This is not a case of a warehouse being kept empty in one year by its owner after it

[15] (1865) 6 B. & S. 591, 595.
[16] [1937] A.C. 419, 433; 53 T.L.R. 205; [1937] 1 All E.R. 11.
[17] [1913] A.C. 197, 211; 29 T.L.R. 246.
[18] [1907] 1 K.B. 192, 203–204; 23 T.L.R. 207.

had been used as such by him in the previous year: nor is it one of those cases of " stand-by " premises such as were the subject of decision in *Borwick* v. *Southwark Corporation*[19] and *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council.*[20] Nor, again, is it a case of premises bought for one business purpose being, in fact, put to some other use. Here, if nothing more had been done than was done up to the date when the work of adaptation began, there would have been no question of rateable occupation. The whole issue is whether the acts that were done in carrying out these works amounted to such a use of the hereditament as set up an occupation within the year.

In my opinion, they did not. Since language is not a precise instrument, it is possible to say that there was use of the premises in the circumstance that they were entered and subjected to the work of adaptation. I do not think, however, that it is this sort of user that is relevant when the court is considering whether a warehouse was in rateable occupation. There was no enjoyment of the value of the building as a warehouse. Indeed, I do not see how adaptation work differs in its significance from current repair or maintenance work carried out for the purpose of keeping the building safe against wind and weather. If all that was done to or in an empty building was that workmen went in to effect such current repairs, I should have thought it rather extravagant to suggest that it thereby became occupied in the rating sense.

Again, it is not, in my opinion, a correct, or, at any rate, a conclusive, test to determine whether an occupation was beneficial to inquire whether it suited the owner to have the work in question done or whether such work was to his advantage. Except in very special circumstances, it is to be assumed that it would be. But you could say as much about maintenance work. It prevents a loss of value to the owner just as adaptation or improvement should lead to an increment of value. These considerations, however, do not suffice to show that the occupation, assuming the acts to have amounted to such, was itself " a thing of value " during the year. Where there was no act of user of the warehouse for the business purpose for which it existed this requirement was not fulfilled.

It will appear from what I have said why I take the view that the judgments of the Lord Ordinary and of the Second Division of the Court of Session do not proceed on what is altogether the correct principle. For the same reasons I do not think that the two sheriff court cases to which we were referred, *Commercial Bank of Scotland* v. *Glasgow Corporation*[21] and *Co-operative Permanent Buliding Society* v. *Pinkerton*,[22] were rightly decided. The principle applied is entirely intelligible, but it is not, in my opinion, in accord with the proper conception of occupation in rating law.

The English decision which is closest to this case on its facts

[19] [1909] 1 K.B. 78.
[20] [1944] 1 K.B. 412.
[21] 1925 S.L.T.(Sh.Ct.) 142.
[22] (1958) unreported.

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is *Hackney* v. *Metropolitan Asylums Board.*[23] It is, however, impossible to refer to that case as an authority on any matter of principle, owing to the extreme ambiguity of the judgment of the Divisional Court delivered by Lord Hewart C.J. The most that can perhaps be inferred, for what it is worth, is that the court seems to have inclined to the view that there would not be occupation of an empty building during the period when nothing more was done in it than execute works of adaptation and reconstruction. What makes the decision unsatisfactory is that it is impossible to see upon what principle the comparatively trivial other acts upon the premises were held by the court to turn what would or might not otherwise have been rateable occupation into such an occupation. I cannot see what their significance was and I should be surprised if anyone else can.

I would allow the appeal.

Lord Cohen. My Lords, I agree.

Lord Keith of Avonholm. My Lords, I agree and have little further to add. I have some difficulty in following the approach made by their Lordships of the Second Division to the question in this case, and in particular, to understand why those of their Lordships who gave opinions thought it necessary to consider whether the alterations that were made were beneficial, or of value, to the appellants. These premises could not be entered in the valuation roll unless they were capable of beneficial occupation. The annual value which was put upon them in the roll was the measure of the value of that occupation; in other words, it was, under section 6 of the Lands Valuation (Scotland) Act, 1854, the rent which a hypothetical tenant might be expected to give for them in their actual state, taking one year with another. But for assessment to rates there must be occupation. If, therefore, there were rateable occupation of the premises that annual value supplied the basis of assessment for occupiers' rates. The assessment in the present instance must have been on that footing. If the appellants were in occupation they were in beneficial enjoyment of the premises and it does not really matter what use they were making of the premises. In *Clyde Navigation Trustees* v. *Adamson*[24] the Clyde Navigation Trustees claimed that they were not in rateable occupation so as to be liable to be assessed to poor rates. This House and the Court of Session held that they were liable, and in the Court of Session[25] it was pointed out that it was only the assessor under the Lands Valuation Acts who could fix the value of that occupation. The question as I see it must always be: Was there such occupancy as would amount to enjoyment of the beneficial value of the subjects?

The question in this case is whether the appellants were in rateable occupation during any part of the rating year 1957–58.

[23] 131 L.T. 136.
[24] 1863 1 M. 974; 4 Macq.H.L. 931.
[25] 1 M. 974, 986.

If their Lordships of the Second Division entertained the view that the appellants were in actual occupation, then there was no need to go on and consider whether that occupation was beneficial. That had already been fixed by the value in the valuation roll. But I think they may have meant that mere entry on the premises to make the alterations in question—which they called use or possession of the premises—was not enough unless that use was of value. Beneficial use, in other words, was necessary for actual occupation. I do not know that I would cavil at that proposition in this case, but I do not think that what was done here was beneficial use of the premises. The alterations were the same kind of alterations that might have been done in other circumstances by a tenant of premises, or by an owner-occupier in undoubted occupation of premises, but these would not add to his beneficial use or enjoyment, unless they were of such a character as added to the value of the premises, in which case they would, no doubt, be reflected in an increased valuation in the valuation roll. In that case, his beneficial use would be in the enjoyment of the increased value, not in the mere making of the alterations. In the premises here in question there could be no possible benefit, or enjoyment, from the alterations until the next rating year.

I can detect no difference between the law of Scotland and the law of England in the principles that affect rateable occupation, though the system by which rateable values are fixed may be somewhat different. The statute defines occupier as including any person " in the actual occupation " of land. It is difficult to know what significance was intended by the word " actual." The definition in the Act of 1947 is not new. It will be found in the Burgh Police (Scotland) Act, 1892. It may be intended to exclude the nominal occupation which may attach to an owner-occupier being entered, as I think is usual, in both the owner's and occupier's column of the valuation roll, irrespective of whether he is in actual occupation or not. But the point here is immaterial. The word " actual " cannot certainly weaken the criteria to be looked to in deciding whether there is rateable occupation. I cannot add to the views expressed in the speeches already delivered that nothing points here to actual occupation of the premises in question.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Rees & Freres for Fraser, Stodart & Ballingall, W.S., Edinburgh; John Kennedy & Co. for the Town Clerk, Greenock.*

[HOUSE OF LORDS.]

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INLAND REVENUE COMMISSIONERS . . Appellants;

AND

HINCHY . . . . . Respondent.

Revenue—Income tax—Penalty—"Treble the tax which he ought to be "charged"—Bank interest misstated in income tax return—Additional assessment made—Claim for penalties—Power of remission—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 25 (3).

Judicial Precedent—Statute—Construction—Assumed construction for decision on different point—Whether binding.

Statute—Construction—Absurdity—Unreasonable or oppressive result—Lack of ambiguity—Tax penalty.

Statute—Construction—Consolidating Act—To be construed against background of previous sociology—Savage tax penalty—Relevance of provisions consolidated.

Statute — Construction — Same words used in other provisions — Tax penalty.

Statute — Construction — Punctuation — Acts before 1850 *— Irrelevance Modern Acts* (*see* post, p. 455).

Statute — Construction — Different language of different provisions — Relevance—Incongruous provisions lumped together (*see* post, p. 456).

The respondent, in making a return of income for the year ending April, 1952, stated that interest from his Savings Bank deposits amounted to £18 6s., and was assessed to tax accordingly. In fact the interest was £51 5s. 9d., and when that was discovered an additional first assessment was made on him for the amount understated, the tax on which was £14 5s. Subsequently, the Inland Revenue Commissioners, by writ dated June 15, 1956, claimed £438 13s. 6d. for penalties, being triple the total amount of tax payable by the respondent in respect of the tax year 1952–53, plus £20, under section 25 (3) of the Income Tax Act, 1952, which provides: "A "person who neglects or refuses to deliver . . . a true and correct . . . "return which he is required under the preceding provisions of this "Chapter to deliver shall—(*a*) if proceeded against by action in any "court, forfeit the sum of £20 and treble the tax which he ought "to be charged under this Act. . . ."

The Crown contended that "the tax which he ought to be charged "under this Act" meant the whole tax chargeable for the relevant year without deduction of P.A.Y.E. payments but excluding tax deducted at source by those who paid dividends etc. and surtax:—

Held, (1) that the liability to the penalty must arise when the offence was committed, i.e., either, where no return has been made, when the time for making a return has expired, or, where an incorrect return has been made, when such a return has been received by the commissioners (post, pp. 451, 461, 464).

(2) That the words of section 25 (3) are not ambiguous and cannot mean anything but treble the whole tax which ought to be charged for the relevant year (post, pp. 454, 459, 464, 470).

Attorney-General v. *Till* [1910] A.C. 50; 26 T.L.R. 134 applied.

Quaere, whether surtax should be excluded from the computation of that whole tax (post, pp. 456, 464, 466, 470).

* *Present*: Viscount Kilmuir L.C., Lord Reid, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm.

Decision of the Court of Appeal [1959] 2 Q.B. 357; [1959] 3 W.L.R. 66; [1959] 2 All E.R. 512 reversed.

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APPEAL from the Court of Appeal (Lord Evershed M.R., Ormerod and Harman L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 11, 1959, allowing in part an appeal by the appellants, the Commissioners of Inland Revenue, from a judgment of Diplock J. given on December 2, 1958, on the trial of an action for penalties under the Income Tax Act, 1952, brought by the appellants against the respondent, Albert Edwin Hinchy, in the Queen's Bench Division of the High Court. By the judgment of Diplock J. it was adjudged that judgment should be entered for the appellants for the sum of £20 without costs, and by the order of the Court of Appeal the judgment was varied by substituting a judgment in favour of the appellants for £62 13s. in lieu of the judgment for £20.

The facts are stated in the opinion of Viscount Kilmuir L.C.

Sir Reginald Manningham-Buller Q.C., A.-G., John Pennycuick Q.C. and *Alan Orr* for the appellants.

The respondent did not appear and was not represented.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Income Tax Special Commissioners* v. *Pemsel*[1]; *Vickers, Sons & Maxim Ltd.* v. *Evans*[2]; *Lochgelly Iron and Coal Co. Ltd.* v. *M'Mullan*.[3]

February 18. VISCOUNT KILMUIR L.C. My Lords, this is an appeal from an order of the Court of Appeal (Lord Evershed M.R., Ormerod and Harman L.JJ.) in England, allowing in part an appeal by the appellants from a judgment of Diplock J. on the trial of an action for penalties under the Income Tax Act, 1952. Diplock J. held that judgment should be entered for the appellants for the sum of £20 without costs, while the Court of Appeal substituted a judgment in favour of the appellants for £62 15s. The Court of Appeal thus added to the sum of £20 treble the tax on the amount which would have escaped taxation had a return made by the respondent formed the basis of assessment.

The facts are that on April 19, 1952, the respondent filled up the prescribed form containing a return of income and claim for allowances for the income tax year 1952–53. In that return he set out the figures of £18 6s. as the bank interest. In fact the correct amount of his income from that source in the year ending April 5, 1952, was £51 5s. 9d.

In order to appreciate the basis of the judgments of the courts below it is material to observe that no assessment was ever made on Mr. Hinchy on the basis of his incorrect return, that the only

[1] [1891] A.C. 531; 7 T.L.R. 657.
[2] [1910] A.C. 444; 26 T.L.R. 548.
[3] [1934] A.C. 1; 49 T.L.R. 566.

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assessment made on him for the relevant year was made after the correct amount had been discovered, and that this assessment in respect of all the tax for which he was liable for that year was made before the issue of the writ on June 13, 1956.

These facts raise the question of the construction of subsection (3) of section 25 of the Income Tax Act, 1952, which provides: "A person who neglects or refuses to deliver, within "the time limited in any notice served on him, or wilfully makes "delay in delivering, a true and correct list, declaration, state- "ment or return which he is required under the preceding "provisions of this Chapter to deliver shall—(*a*) if proceeded "against by action in any court, forfeit the sum of £20 "and treble the tax which he ought to be charged under this "Act; or (*b*) if proceeded against before the General Commis- "sioners, forfeit a sum not exceeding £20 and treble the "tax which he ought to be charged under this Act, and where "he is proceeded against before the General Commissioners, the "penalty shall be recovered in the same manner as any other "penalty under this Act, and the increased tax shall be added "to the assessment."

The argument for the Crown which was developed before Diplock J. and later before the Court of Appeal may be summarised as follows: The penalty imposed by the said section 25 (3), in the case of proceedings by action in a court, is a fixed penalty which the court (unlike the General Commissioners, in proceedings brought before those commissioners) has been given by the legislature no power to mitigate but which the Commissioners of Inland Revenue or the Treasury may mitigate under section 500 of the Act. The said penalty has been applied by the legislature to a very wide variety of defaults. It embraces cases in which no return has been delivered at all, cases in which an incorrect return has been delivered, and cases (as under section 27, requiring the delivery by employers of lists of their employees) where a duty is cast upon one person to deliver a document relating to the tax liability of another, and where default in performing such duty can have no bearing on the ascertainment of the defaulter's own liability to tax. It applies irrespective of whether there has been fraud on the part of the defaulter and to cases in which there has been a serious, trivial, or even no direct, loss of tax to the Revenue. But the penalty applied to all these cases is a single penalty, and on the true construction of the relevant words in section 25 (3) (which must, it was submitted, be given the same construction as the corresponding words applied to proceedings before General Commissioners in section 55 of the Income Tax Act, 1842) such penalty is a penalty of £20 and treble the total tax to which the defaulter is chargeable by direct assessment for the year of assessment in question; the words "ought "to be charged" limiting the ambit of the penalty to such tax as could be directly assessed on the defaulter, and there being in this respect a material difference in the wording of section 25 (3)

and the wording " treble the tax chargeable in respect of all the " sources of his income " of paragraph 4 of Schedule VI of the Income Tax Act, 1952. It was further contended that the penalty could not be made to work in all the cases to which it is made applicable if it were construed as limited to treble the tax avoided by the default; and that if the legislature had intended the subsection to bear this meaning it would have used the phraseology to be found in section 48 of the Act. The Crown's construction of the words had not, so far as was known, ever been challenged in the period of over a century which had elapsed since the enactment of the Income Tax Act, 1842.

Diplock J. took the view that the consequence of the construction of section 25 (3) contended for by the Crown seemed to him to be absurd and unjust, and if there was some other possible construction, consistent with the words, which led to results less absurd and unjust, he would be inclined to adopt it. In his view, there was such an alternative construction, for it seemed to him that a reasonable meaning of the words " the tax which he ought " to be charged under this Act " was the tax to which the taxpayer ought to be duly assessed, but to which he had not been duly assessed by reason of the default; that is to say, the increased tax which, when one looked at the latter part of the subsection, was to be added to the assessment. In this respect he thought that section 48 of the Income Tax Act, 1952 (dealing with penalties for fraud), expressed in clearer and lengthier language what was intended to be conveyed by the elliptical expression in section 25 (3).

This construction raised the question of determining at what point of time one must ascertain the amount of tax which the taxpayer ought to be charged, and Diplock J. gave the answer of the date at which the proceedings, whether before the court or the General Commissioners, are brought. As, therefore, in the present case the proceedings had been commenced after the respondent had been charged with all the tax for which he was liable, there was at the date of the commencement of the action no tax with which he ought to be charged under the Act, and the only amount recoverable was the fixed penalty of £20.

Like the Court of Appeal, I regret that I am unable to accept this view as to the point of time. Its result would be that if the error were discovered before the assessment was made, the making of the correct assessment would eradicate that portion of the penalty arrived at by multiplying the tax. I cannot accept this. The liability to the penalty must, in my view, arise when the offence is committed, that is, when no return is made, when the time for making a return has expired, or, where an incorrect return has been made, when such a return has been received by the commissioner.

The Court of Appeal did, however, approve of the antecedent reasoning of Diplock J. and the gist of their view is expressed in

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the following quotation [1]: "So, as a matter of English, it seems "to us at least a legitimate interpretation of the phrase 'tax "'which he ought to be charged' to limit its significance to that "amount of tax with which, at the relevant point of time, the "taxpayer ought to be charged but with which he has not been "charged by reason of his defective return: in other words, the "tax appropriate to the undisclosed income."

The difficulty of the view of the Court of Appeal is that this expression appears to predicate that there has been an assessment by which the taxpayer has been charged with the lesser amount by reason of his defective return, and that this forms the basis of the penalty under section 25. It is unfortunate that the Court of Appeal do not seem to have appreciated that there had been no assessment on the respondent on the basis of the incorrect return which could play its part in the quantification of the penalty. In this case, as in many others, there is not, to use the language of the Court of Appeal,[1] "tax . . . with which he [the taxpayer] "has not been charged by reason of the defective return." He has not been charged because the time for charging him has not yet arrived. When that time does come, non constat that the return will have any causative effect on his assessment. The latter may be based on other information, and in the case of income under Schedule E must be based on his income in the current and not the past year. It is an essential constituent of this problem that at the time of the commission of an offence under section 25, assessment may be in the future whereas, under section 48 (the fraud section), assessment must be in the past.

Nevertheless, although the concluding reasoning of the Court of Appeal does not, in my opinion, fit the facts of this case or the general procedure of taxation, it would be wrong to ignore what the Attorney-General termed the "underlying thought of that "judgment." They considered that the penalty provisions produced minimum penalties wholly unrelated to the extent of the default, so extravagant as to be shocking in a final provision, and at least one anomaly which might well be thought to run quite contrary to ordinary justice. They considered that the penalties were so unfair and unjust and contained variations so numerous and illogical as to produce, in their view, the result that no safe view could be got, from other sections of the Act, in the attempt to construe section 25. Although they did not use the words of Lord Loreburn in *Attorney-General* v. *Till*,[2] that the penalties were "unreasonable or oppressive," yet they clearly considered them to be of that nature. I asked Mr. Pennycuick what was his submission as to the law which should guide the court in construing provisions which appeared to be oppressive and unreasonable. His answer was that if there were any ambiguity the court would prefer that construction which did not lead to an oppressive and unreasonable conclusion, but if the

[1] [1959] 2 Q.B. 357, 378; [1959] 3 W.L.R. 60; [1959] 2 All E.R. 512.

[2] [1910] A.C. 50, 52; 26 T.L.R. 134.

words were clear, then they had to be given full effect whether or not that effect was unreasonable or oppressive. He submitted that there was no ambiguity in this case.

Bearing this in mind and also the fact that the respondent was not represented, I have tried to formulate an argument implicit in the words of the section. I remind myself that the effect of the decision of this House in *Attorney-General* v. *Till* [3] was to rewrite this section in the sense: " A person who neglects to " deliver any return or who delivers a return which is not correct " is liable to the penalty." As the section can look to the future, can the words creating the penalty be extended distributively and respectively so that the penalty becomes the sum of £20 and treble the whole tax which he ought to be charged under this Act where he neglects to deliver a return, and in the case of an incorrect return, the sum of £20 and treble the tax on the amount which would have escaped taxation if the incorrect return made by the respondent had formed the basis of assessment? I cannot give this meaning to the words. So to do would entail the making of an artificial assessment on the basis of the return, the making of the true assessment and the subtracting of the one from the other. I do not pause to speculate on the hypothetical difficulties of policy and procedure which might arise. I am content to say that to add the necessary words would, in my opinion, be legislation and not construction.

I also tried to consider whether, on the assumption of an ambiguity, I could gain assistance from the fact that the element of treble tax was attached to penalties after proceedings in court, by section 23 (2) of the Finance Act, 1923, which also changed the penalty for abettors of fraud in what is now section 48 of the Income Tax Act, 1952. Again I could find nothing to drive me to a recondite secondary meaning. I cannot ignore the fact that a multiplier of the tax with which he ought to be charged was made a constituent of the penalty for the equivalent of this offence by section 118 of the Act of 1805. I cannot believe that, in the year of Trafalgar and Austerlitz, Parliament was considering such a refinement as the present argument entails. The more, however, I consider the piecemeal additions of the last 150 years, the more glad I am of the assurance of the Attorney-General that the penalties are being reconsidered.

Moreover, although the present point was not argued, it was assumed that " treble the tax to be charged under the Act " meant treble the whole tax for the relevant year by two members of the Court of Appeal [4] and by Lord Atkinson in *Attorney-General* v. *Till*,[5] by Rowlatt J. in *Attorney-General* v. *Johnstone*,[6] inferentially by the Court of Session in *Lord Advocate* v. *M'Laren* [7] and by the High Court and Supreme Court of what was

[3] [1910] A.C. 50.
[4] [1909] 1 K.B. 694; 25 T.L.R. 342.
[5] [1910] A.C. 52.
[6] (1926) 136 L.T. 31, 32.
[7] (1905) 7 F. 984; 5 T.C. 110.

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then the Soarstat Eireann in the unreported case of *Attorney-General* v. *White*.[8] It is impossible, in my view, to give the words a different meaning in that part of the subsection which applies to proceedings before the commissioners from that which applies to proceedings in court, although in the case of the commissioners it is a maximum and not a fixed penalty.

I have, therefore, come to the conclusion that the words must bear their ordinary meaning and that this appeal must be allowed.

At the request of the Revenue there will be no order for costs.

Lord Reid. My Lords, if the appellants, the Commissioners of Inland Revenue, are right in their main contention, any taxpayer who makes a mistake in his annual income tax return and has not discovered and rectified it must, if he is sued, be subjected by the court to a penalty of £20 and treble the whole tax which he ought to be charged for the year; that penalty is in addition to the tax which he normally has to pay. It does not matter how innocent the mistake may have been or how large the penalty may be, the court has no power to modify or reduce the penalty, although such a penalty, with the modern rates of income tax, would be ruinous to most taxpayers with moderate or large incomes. The commissioners maintain that the only remedy lies with them, and that it is for them in their sole and unfettered discretion (unless the Treasury choose to interfere) to determine what they think would be a proper penalty in each case and to reduce the penalty imposed by the court accordingly.

The commissioners have, in fact, exercised this power for a long time, and it is no doubt a tribute to the way in which they have exercised their discretion that this appears to be the first time that the extent of their power has been challenged in court, and that it has been possible to delay for so long the revision of the penalty provisions in the Income Tax Acts, although the need for such revision had long been evident.

The incongruities and anomalies in these penalty provisions have a very long history. Some had their origins in the Income Tax Acts of 1799, 1803 and 1806, and even in the Act of 1842 there were already serious anomalies. But in those days the rate of tax was low and penalties based on the total amount of tax payable were probably not oppressive. And this is not the only chapter of the law in which ill-conceived provisions introduced by temporary Acts with limited application have long survived without any radical revision and have to be applied in circumstances very different from those which existed at their origin.

This case turns on the proper construction of section 25 (3) of the Income Tax Act, 1952. [His Lordship read the subsection and continued:]

In a somewhat similar provision in the Act of 1799 the penalty was simply £20. Then, after some amendments, the Act of 1842,

[8] (1930) Oct. 5, Hanna J.; (1931) March 8, Supreme Court (unrep.).

section 55, provided: "And be it enacted that if any person who "ought by this Act to deliver any list, declaration or statement "as aforesaid shall refuse to neglect so to do within the time "limited in such notice, or shall under any pretence wilfully delay "the delivery thereof, and if information thereof shall be given, "and the proceedings thereupon shall be had, before the commis- "sioners acting in the execution of this Act, every such person "shall forfeit any sum not exceeding £20, and treble the "duty at which such person ought to be charged by virtue "of this Act, such penalty to be recovered as any penalty con- "tained in this Act is by law recoverable, and the increased duty "to be added to the assessment, . . . ; and every person who "shall be prosecuted for any such offence by action or informa- "tion in any of Her Majesty's courts, and who shall not have "been assessed in treble the duty as aforesaid, shall forfeit the "sum of £50."

In the Act, as printed by the Queen's Printer, there is a comma after £20 in the passage "shall forfeit any sum not exceeding "twenty pounds, and treble the duty. . . ." An argument was submitted that this comma showed that "not exceeding" only governed "£20" and did not apply to "and treble the "duty," so that the General Commissioners only had power to reduce the £20 and had no power to reduce that part of the penalty which consisted of treble duty. But before 1850 there was no punctuation in the manuscript copy of an Act which received the Royal Assent, and it does not appear that the printers had any statutory authority to insert punctuation thereafter. So even if punctuation in more modern Acts can be looked at (which is very doubtful), I do not think that one can have any regard to punctuation in older Acts. And omitting the comma I would hold that the whole of the penalty was subject to modification under the Act of 1842. There is now no comma in section 25 (3) (*b*) and, in my view, if proceedings are now taken before the General Commissioners they are entitled to reduce the penalty of treble tax.

In 1842, if the matter was taken before a court there was a fixed penalty of £50: with the low rates of tax then in force £50 was presumably thought at least comparable with £20 plus treble tax. Under the Act of 1918, section 107, the penalty which a court could impose was still only £50, but the rise in the rates of income tax made that an inadequate penalty in many cases, and the provision which now appears in section 25 (3) (*a*) was introduced by the Finance Act, 1923, s. 23 (2).

Before dealing with the crucial question in this case, the proper construction of section 25 (3) (*a*), there are several matters which it may be convenient to deal with at this stage. The appellants submitted that this subsection is governed by section 25 (2), so that it only applies if the return or other statement was not true and correct to the best of the judgment and belief of the person making it. We were informed that the commissioners

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never take action under this section unless they think that the declaration required by subsection (2) was not truly made, but I can find no basis in law for it being a defence to an action to prove that the return or statement was made to the best of the judgment and belief of the defendant. The offence is not delivering a true and correct return, and if, in fact, it is not true and correct, the penalty follows as a matter of course.

Then it was said that whatever be the true meaning of "the "tax which he ought to be charged under this Act," it cannot include either surtax or tax deducted at source by those who pay dividends, etc. It is not necessary to decide those matters in this case and I will only say, particularly with regard to surtax, that I am not convinced that these are excluded, and that in any revision of this and other provisions this ought to be made clear.

In determining the proper construction of section 25 (3) one must bear in mind that the subsection applies to other things as well as a return of the taxpayer's own income: it applies to any list, etc., which he is required to deliver under a number of other sections. Under section 21 he may be required in certain cases to make a return of another person's income and to submit to being charged to tax in respect of it. Under section 22 he must render a statement of money received by him on behalf of another person. Under section 23 he must deliver a list of lodgers and inmates of his dwelling-house. And section 30 applies the provisions of section 25 to lists of employees (section 27), and commissions (section 28), and interest paid to others (section 29).

I do not propose to examine the other penalty provisions in the Act of 1952. It is no doubt true that every Act should be read as a whole but that is, I think, because one assumes that in drafting one clause of a Bill the draftsman had in mind the language and substance of other clauses, and attributes to Parliament a comprehension of the whole Act. But where, as here, quite incongruous provisions are lumped together and it is impossible to suppose that anyone, draftsman or Parliament, ever considered one of these sections in light of another, I think that it would be just as misleading to base conclusions on the different language of different sections as it is to base conclusions on the different language of sections in different Acts. As an example of incongruity I need only refer to the admitted fact that the penalty in sections dealing expressly with fraud is less than the penalty under section 25 (if the appellants' construction of section 25 is right) for errors which may only be due to mistake.

I can now state what I understand to be the rival contentions as to the meaning of section 25 (3). The appellants contend that "treble the tax which he ought to be charged under this Act" means treble his whole liability to income tax for the year in question (less surtax and tax deducted at source, as I have already explained). It is not so easy to state the contrary contention briefly and accurately. Unfortunately, the respondent was not represented in this House. That was due to no fault of the

appellants, and the Attorney-General very properly drew your Lordships' attention to points on which counsel for the respondent might have relied, but that is not altogether an adequate substitute for an argument for the respondent.

Broadly, the contention is that it cannot have been intended that that which would have been chargeable in any event on the inaccurate return which was sent in should enter into the computation of the penalty, that the penalty must have been intended to have some relation to the offence, and that the tax which he ought to be charged must be the additional tax which he ought to be charged by reason of the discovery of the true state of affairs. Otherwise the penalty will often be grossly and extravagantly disproportionate to the offences. A man might be properly chargeable to £5,000 tax on his actual return and properly chargeable to £5,100 tax on the correct return. If the appellants are right the penalty would be £15,320: if the other view is right it would only be £320. And even more extravagant cases could arise when the taxpayer's omission was not in respect of his own income. If he fails to return a correct list of lodgers or employees or money collected for or interest paid to others the penalty would have no relation to that failure—it would be treble his own income tax, although he had made a correct return of his own income and paid the full tax due on it. And an even more difficult case might arise under section 21: under that section he is chargeable both in respect of his own income and in respect of income belonging to another. If one of the returns which he makes is inaccurate is the penalty treble the whole tax which he ought to be charged, i.e., the tax on both his own and the other income, or can something be read in, even if the appellants are right, so as to base the penalty on something less than the whole tax which he ought to be charged under the Act?

Difficulties and extravagant results of this kind caused Diplock J. and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellants' contention. But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.

The Court of Appeal found it possible to adopt a secondary meaning for the crucial words. Their conclusion appears to be summed up in a sentence [9]: " So, as a matter of English, it seems " to us at least a legitimate interpretation of the phrase ' tax " ' which he ought to be charged ' to limit its significance to that

[9] [1959] 2 Q.B. 357, 378.

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" amount of tax with which, at the relevant point of time, the " taxpayer ought to be charged, but with which he has not been " charged by reason of his defective return: in other words, the " tax appropriate to the undisclosed income."

I agree with the Court of Appeal that if it is possible to infer the meaning which they attach to these words that should be done. One is entitled and indeed bound to assume that Parliament intends to act reasonably, and therefore to prefer a reasonable interpretation of a statutory provision if there is any choice. But I regret that I am unable to agree that this case leaves me with any choice. When I look at the way in which the provisions of section 25 (3) (*a*) were brought into the Income Tax Acts, and at the way in which those provisions must be applied in circumstances other than those contemplated by the Court of Appeal, I find myself unable to hold that the crucial words are capable of the interpretation which they have adopted.

The Act of 1952 is a consolidating Act, and one must presume that such an Act makes no substantial change in the previous law unless forced by the words of the Act to a contrary conclusion. Therefore, in interpreting a consolidating Act, it is proper to look at the earlier provisions which it consolidated. The previous law was contained in section 107 of the Income Tax Act, 1918, and section 23 (2) of the Finance Act, 1923, to which I have already referred. Section 107 gave the court no power to impose a treble tax penalty, and it did not require the General Commissioners to impose the maximum penalty; they could modify the penalty to any extent they might think just. The Attorney-General was unable to point to any provision in force before 1923 which required the maximum penalty to be imposed even in cases where there was no fraud: there were certain provisions imposing the maximum penalty if fraud was established. Section 23 (2) of the Act of 1923 is in the same terms as section 25 (3) (*a*) of the Act of 1952. If the appellants' construction is right, then Parliament imposed for the first time in 1923 an obligation to inflict the full treble tax penalty even on innocent though negligent offenders, and did this at a time when the rate of tax (then 4s. 6d.) made such a penalty oppressive in most cases.

It is so contrary to the practice of Parliament to commit in effect unlimited discretion to a branch of the Executive as to the amount of penalties to be imposed on persons guilty of no more than negligence that I would not easily hold that this was made in 1923; but I am forced to the conclusion that this was then done, and it is idle to speculate whether Parliament, or, indeed, any member of Parliament, understood the full effect of the enactment. I refer to the appellants as a branch of the Executive because section 1 of the Inland Revenue Regulations Act, 1890 (which does not appear to have been amended or repealed), provides that they " shall in the exercise of their duty be subject " to the authority direction and control of the Treasury and shall " obey all orders and instructions which have been or may be

"issued to them in that behalf by the Treasury." It is proper to add that the present practice appears to be to confine such orders and instructions within narrow limits.

I find it impossible to hold that the words "not exceeding "£20 and treble the tax which he ought to be charged under "this Act" in section 107 (1) (*a*) of the Act of 1918 meant anything other than treble the whole tax which he ought to be charged for the relevant year. The argument for the more limited meaning adopted by the Court of Appeal is based almost entirely on the extravagant consequences which flow from giving the words in the present Act their natural meaning. But that argument loses almost all its force when applied to the Act of 1918. Under that Act the General Commissioners, an independent body, had full discretion to modify the penalty, and all that could then be said was that, owing to the increase in the rates of tax, the maximum penalty had become so high as to be extravagant in the great majority of cases. But there was no obligation under the Act of 1918 to inflict the maximum penalty in cases where it was disproportionate to the offence.

In 1923 the same words were inserted in section 107 (1) (*b*) but with the omission of the vital words "not exceeding." Why these words were omitted I do not know, but their omission creates the present difficulty. Normally, it would be impossible to hold that, when the same words as those already in one subsection are later inserted in another subsection of the same section, they can be given a meaning different from the meaning of the words which were there already. I do not find it possible in this case to hold either that the words in the original Act of 1918 had a limited meaning, or that they were given a limited meaning by the Act of 1923, or that after 1923 the same words in subsection (1) (*a*) and (*b*) had different meanings: I cannot avoid the conclusion that these words did not have a limited meaning before 1952 and that, therefore, they do not have a limited meaning now when they are reproduced in the consolidating Act of 1952.

My Lords, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend, Lord Radcliffe. I am in general agreement with it and, in particular, I agree with his account of the methods of tax administration, and of the way in which this case has been dealt with, so I need not add further to my own speech already perhaps too long.

In my judgment, this appeal must be allowed.

LORD RADCLIFFE. My Lords, in my opinion, we are bound to allow this appeal.

It has not been in dispute that in 1952 Mr. Hinchy committed a breach of the obligation imposed upon him by section 19 of the Income Tax Act, 1952. He did not, when required so to do, deliver to the inspector of taxes a true and correct return of all the sources of his income, and of the amount derived from each source for the year preceding the year of assessment, 1952–53.

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In fact, the signed return which he did deliver on April 19, 1952, stated incorrectly that his income for the year 1951–52 from interest on bank deposits, including Post Office and other savings bank deposits, had been £18 6s., whereas his true income from that source had been £51 5s. 9d.

Further, it has not been in dispute that by virtue of section 25 (3) of the same Act he thereby forfeited, if proceeded against in a court of law, the sum of £20 and treble the "tax which he ought "to be charged" under the Act. Such a forfeiture is imposed by the section upon anyone who "neglects or refuses to deliver . . . "or wifully makes delay in delivering a true and correct . . . "return." It was decided by this House in *Attorney-General* v. *Till* [10] that a person who, though not failing to make a return at all, nevertheless makes an incorrect return is within the description that I have quoted above. I am bound to say, looking back, that I think that that decision might well have been otherwise and, if it had been, the problem that we are now faced with would not have arisen. But, since it went the way it did, we must now take it that Mr. Hinchy was a person who neglected to deliver a true and correct return.

The whole question, therefore, is what penalty is attached to his default by the words "the tax which he ought to be charged "under this Act."

The Revenue say that the meaning of these words is that the defaulter incurs, apart from the £20, a penalty of three times his total income tax bill in respect of all sources of income directly assessable for the year in which the offence is committed. They say that this is the way in which the words have been understood and applied ever since they first appeared in an Income Tax Act (the first use of them in this context was in section 118 of the Income Tax Act of 1805); that whenever their import has been noticed judicially, as in *Attorney-General* v. *Till* [11] in the Court of Appeal, and in *Attorney-General* v. *Johnstone*,[12] the same meaning has been attributed to them; and that the Income Tax Codification Committee itself, which in the years before 1939 laboured with so much intelligence and devotion to no eventual result, clearly assumed this to be the correct meaning. All this, I think, is true; and these considerations are persuasive. But, having regard to the extreme severity which might attend such a penalty under present scales of taxation, and the fact that in this very case the Court of Appeal have found it possible to impute another and less onerous meaning to the words, I think it better to approach the question of construction without giving any weight to this consideration that, if the Court of Appeal are right, they have discovered in the phrase a significance that has long lain unobserved, and so lain after many persons, it is fair to suppose, have had cause to scrutinise them with somewhat anxious attention.

[10] [1910] A.C. 50.
[11] [1909] 1 K.B. 694.
[12] 136 L.T. 31.

What then are the alternative readings which have been suggested? Diplock J., before whom this action came in the High Court, took the view that (1) the point of time at which there should be ascertained the amount of tax which a defendant "ought to be charged" was the date of the initiation of the proceedings for the penalty, and (2), if at that date there had been a correct assessment on the full chargeable income, there was no tax with which it could be said that the defendant ought to be charged and nothing, therefore, recoverable except £20. In my opinion this view is wrong in its initial assumption. The date at which any penalty incurred is to be ascertained must be the date when the offence is committed: assessment or payment after that cannot affect the liability. Otherwise, every time, an error being detected, a correct assessment is made in order to determine the true tax liability for the year, the penalty by way of multiplied tax automatically disappears. I agree with the learned Master of the Rolls when he says in the judgment delivered in the Court of Appeal [13]: "We do not think that this can be right."

In the Court of Appeal itself a different interpretation prevailed. It was based on the general idea that, when there has been an incorrect return, the tax which the maker of it "ought "to be charged" in treble is something which can be called the "excess tax." This is variously described as [13] "the tax which "the taxpayer ought to be charged and was not charged because of "his failure to make a true and correct statement of his income," and as [14] "that amount of tax with which, at the relevant point "of time, the taxpayer ought to be charged but with which he "has not been charged by reason of his defective return; in other "words, the tax appropriate to the undisclosed income."

My Lords, I do not think that the words of section 25 (3) which are in question give any hint of an intention to measure the tax penalty by a computed excess of this sort. It can be done if an appropriate formula is used. Section 48, for instance, does apply such a formula, where the conditions are such that an assessment, though an inadequate one, has been made. Again, section 49 allows treble the excess tax where a false return of Schedule D income has led to under-assessment or would have led to it if undetected. But no such formula is used or indicated in the section that we have to consider. Moreover, there is another and fundamental obstacle to the introduction of this "excess tax" idea which the Court of Appeal judgment imports into the meaning of the section. Their definition depends essentially on the existence of a first incorrect assessment, such as they believed to have been made in this case, which assessment can then be compared with the corrected true assessment which emerges when the full facts are known. We were assured by the Attorney-General in the course of his argument that in this case there had been no such assessment for 1952–53, and, as this misunderstanding contributed to the Court of Appeal's view of the

[13] [1959] 2 Q.B. 357, 377. [14] Ibid. 378.

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admissible interpretation of section 25 (3), I think it necessary to set out exactly what did apparently happen, because, so far as I can see, the order of events followed here is as likely as not to be typical of the order that will be observed in any other case of untrue or inaccurate returns.

In April, 1952, Mr. Hinchy made a return purporting to set out all the sources of his income for the year 1951–52, and of the amount derived from each source. This return would afford, of course, valuable information for the purposes of the assessment to be made on him for the year 1952–53, though, in so far as the basis of assessment is the current year's income, not that of the preceding year, such a return can be informative only and there is no inherent connection between the figures it shows and the figures that should be used for the true assessment. It also affords, I suppose, a means of checking by its figures the assessments which have been made for the previous year on that year's current income.

No assessment for 1952–53 was ever made on Mr. Hinchy on the basis of his statement that his income (I include in this the income of his wife) from savings bank interest for 1951–52 had been £18 6s. The only assessment that was ever made on him for 1952–53 was made after the true figures had been established. There was then an assessment for each schedule, Schedule D and Schedule E, under which he derived assessable income, and these assessments have been put in evidence. The Schedule D assessment on "untaxed interest" is not intelligible unless the Schedule E assessment is first looked at.

The Schedule E assessment relates directly only to Mr. Hinchy's income from his employment in H.M. Customs and Excise. But, owing to the practice of "coding in" for the purpose of P.A.Y.E. deductions, two small items of income which really belonged to Schedule D were taken into account (see Part III of the assessment form) for the purpose of arriving at the code number appropriate to the operation of P.A.Y.E. By this means £21 of the savings bank interest and £19 of "excess "rents" income were taken to reduce by £40 the £396 of allowances which would otherwise have been taken into account in allotting the P.A.Y.E. code number and, ultimately, in computing the Schedule E assessment. The result was that £21 of the untaxed interest was, in effect, taxed under Schedule E and recovered through P.A.Y.E.; and the deduction of £21 from the full amount of £51 "untaxed interest" in the Schedule D assessment is merely a recognition of this arrangement, designed to prevent the £21 from being taxed twice over. It does not mean that Mr. Hinchy's assessments, when they came to be made, were on anything less than the full sum of £51 for untaxed interest. Considering the way that the matter is dealt with in more than one letter in the correspondence exhibited, I do not wonder that the Court of Appeal took the facts to be otherwise.

I still do not know why the figure of £21 was taken for the purpose of adjusting the P.A.Y.E. code number. It is quite possible that it was related to the £18 6s. shown in the inaccurate return of April, 1952: but, even so, P.A.Y.E. is no more than provisional retention of tax. It is not assessment.

It appears, therefore, that in this case there was never any failure to charge the taxpayer with the true amount of his tax for the year or any inadequate lower assessment induced by his wrong return. There never was any sum, therefore, that could be computed by comparing the tax charged by such a first assessment with the total tax liability when ascertained, nor was there any figure attributable to an additional assessment. As I see no reason to suppose that what happened here represents an unlikely sequence of events, I am afraid that I regard the successive failures of Diplock J. and the Court of Appeal to find a maintainable interpretation of "treble the tax which he ought to be "charged under this Act" that escapes the onus of trebling the whole tax bill for the year as a very strong indication that there are really no means of escape open. I do not wish, however, to accept this conclusion without giving some attention to another possible interpretation which is indicated by that phrase of the Court of Appeal "the tax appropriate to the undisclosed "income." Can one fairly regard the words of the section as enacting in some disguised way that the basis of computation is to be the difference between what would be the tax on the figures actually shown by a man in his return, whether or not there has been any assessment, and the tax on what he ought to have shown if he had made a full and correct return? This is a device applied by section 49 to certain cases, but it is noticeable that it there applies only to Schedule D income.

I find it impossible to penetrate this disguise. With all respect to those who may think otherwise, the contents of even a completely full and correct return are no measure of the proper assessment of a man's income for the year in which he makes it. The assessing authority is not under so much as a presumptive duty to make an assessment according to the return: how could it be when, except for Schedule D, the basis of assessment is the current year, which is not dealt with by the return, not the past year, which is? Assessments can be made, even where there is no return. They can be made, whatever a return shows. The contents of a return can be queried and further, more reliable information extracted. They can be cross-checked and the results amended in consequence of extraneous information available to the surveyor. In other words, the relationship of the figures of the return to the proper assessment of the year is so tenuous that I do not find it possible to suppose that the "tax which he ought "to be charged under the Act" can ever have been intended to mean the amount of tax which a person would escape if his inaccurate return were accepted as providing final figures for the

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purposes of assessment. The basic facts of the administration and collection of tax do not admit any reality to such a conception.

I come back, therefore, to the only construction which is, I believe, open to a court of law. When a man does what Mr. Hinchy did, sends in what is not a true and correct return, he commits an offence and the measure of his penalty must be ascertained as the situation is at that date. At that date he will neither have been assessed nor will he have paid any tax for the year except, it may be, some provisional deduction under P.A.Y.E. The question, what tax he ought to be charged under the Act seems to me to be, in these terms, a simple one. It is the sum of tax for which he will become liable for that year when assessment properly carried out under the Act has imposed liability upon him. It could not be anything else when the offence consists of failing or refusing to make a return at all, and I do not see how the meaning of the words can change if the offence takes the form of not making a full return.

I appreciate that the view to which the Court of Appeal felt entitled to come was largely encouraged by certain general considerations as to the result of accepting the Revenue's contention in cases of this kind. Personally, I do not find any of these considerations compulsive, in the sense that they can alter the meaning of the words that Parliament has used: but, as I am as well not altogether in agreement with the cogency of some of the things that have been said, I ought perhaps to make a brief allusion to them.

The first point made related to the way the Revenue's claim was computed, which was said to be inconsistent with its own construction of the section. It was said, for instance, that if the measure was the full tax payable by direct assessment in the year, tax levied by deduction being omitted, it was anomalous to include Schedule E tax collected under P.A.Y.E. This is not, I think, a valid criticism. Schedule E income remains liable to direct assessment at the instance either of the Revenue or of the taxpayer, though assessment can be dispensed with, and the P.A.Y.E. deductions are only provisional payments of tax in advance. In this respect income subject to P.A.Y.E. is quite different from, for instance, dividend income which is not directly assessable to income tax. Secondly, it was said that the treble tax claimed on the savings bank interest had in fact been computed only on the undisclosed portion instead of on the whole. This criticism arises from a misunderstanding of the two assessments and the way they worked out, and I have already explained what the actual circumstances were. Lastly, the comment was made that, to be consistent, surtax ought to be included in the basic computation as well as income tax. Mr. Hinchy was not a surtax payer, so the point does not arise here. All that need be said is that, if it does have to be decided at any time, there are arguments for treating the assessment and collection of surtax as carrying their own history and their own penalties, and section

25 (3) as not including surtax in the " tax " to be computed. In any event the point has no bearing on what we have now to determine.

Secondly, it is, of course, very true that the penalty provision, as interpreted by the Revenue, may not only impose fines which for some taxpayers would require payment of tens of thousands of pounds but also presents striking anomalies when its effect is contrasted with the effect of other penalty sections in the same Act. I do not think it necessary to dwell upon these or to illustrate them, because the opportunities of doing so are almost inexhaustible. What I do not perceive, however, is how these considerations can alter the interpretation of the words used by the statute. If it is said that Parliament could not have intended to impose such onerous fines for breaches which in some cases may not be blameworthy in any degree, I can only point out that Parliament has imposed just the same penalty where the default is neglect to make any return at all, and yet none of the suggested interpretations of the section achieves any penalty short of treble the whole direct assessment in those cases where there has been neither return nor assessment. Personally, I do not see any marked distinction in degrees of blame between mere carelessness which results in not making a return and that form of carelessness which leads to a return being made which misleadingly appears to be complete when it is not.

Again, whatever we managed to say about the meaning of the words in this case, there is no doubt that section 18 of the Act would still impose a penalty of treble the whole tax when a person without just excuse fails to give a notice of his liability to tax; that paragraph 4 of the Sixth Schedule would impose what may be the still more onerous burden of treble the tax on all income from all sources, if there is fraud in claiming a relief; and that section 48, section 49 and section 441 would contain provisions which in certain cases involve a charge of three times the full tax.

When it is said, therefore, that we ought to search for a more rational meaning of the words of section 25 (3) than that which is offered by the interpretation supported by the Revenue, I think that much depends upon what you regard as rational in this setting. Most of these penalty clauses have their origin in the Tax Acts of 1803–06, if not in the earlier Act of 1799. Income tax administration in those years was not the huge and efficient system to which we are now accustomed. If the purpose of Parliament at that time was, as I suspect, to impose heavy penalties for any kind of evasion, primarily as a deterrent, there is no reason for surprise that the various penalties are neither adjusted harmoniously to each other nor in themselves proportionate to degrees of blame or threatened losses of revenue. It was as " rational " to hit out blindly and heavily at anyone who was caught as to maintain savage and indiscriminate punishments under the criminal code until an effective police force had been established. What is more surprising is that, apart from the

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small changes made in the Finance Act, 1923, nothing has been done by Parliament ever since to review the whole unsatisfactory set of penalty sections and remodel them in the light of conceptions appropriate to the present day. Such a review has been called for both in the Report of the Income Tax Codification Committee (see Cmd. 5131, paras. 173–183) and in the Final Report of the most recent Royal Commission on Income Tax (see Cmd. 9474, Part VII, cap. 33), and the recommendation has no doubt reached the destination usually reserved for advice invited by governments from such committees.

Lord Cohen. My Lords, I had commenced writing a full judgment in this case but, before I had completed it, I had the privilege of reading the opinion which has just been expressed by my noble and learned friend, Lord Radcliffe. I agree so entirely with his conclusions and with the reasons he gives for thinking this appeal must be allowed that I shall only detain your Lordships long enough to say that I prefer not to express any opinion as to whether surtax enters into the calculation of treble tax until that point arises. I would allow the appeal.

Lord Keith of Avonholm. My Lords, the judgment of the Court of Appeal would seem to have proceeded on a false premise, namely, that after the false return was made by the respondent he was assessed on the return so made and that there was a balance of income undisclosed on which he had not been assessed. But that was not the position. The discovery by the Revenue of the undisclosed income was made after the return had been made and before any assessment was made. Mr. Hinchy was then assessed, after deduction of due allowances, on the full amount of income subject to assessment, including the Post Office Savings Bank interest which he had failed to disclose. Thereafter proceedings were taken for recovery of penalty in respect of the incorrect return. The Court of Appeal, in my opinion correctly, say that the offence is committed when the false return is received by the commissioners. The liability to penalty necessarily arises at the time of the offence. It is a case of a false return with which we are here concerned, and it will be convenient to set out the relevant and material dates.

The return, which was in respect of the income tax year 1952–53, was dated April 19, 1952. It disclosed as arising in the year ended April 5, 1952, untaxed interest on accounts and deposits in banks including Post Office and other savings banks of £18 6s. 0d. In fact the Post Office Savings Bank interest credited to Mr. Hinchy and his wife in that year was £51 5s. 9d. After several years' correspondence an assessment was made, on November 30, 1955, of £30 in respect of untaxed interest, tax on which at 9s. 6d. in the pound came to £14 5s. 0d. This amounted to tax on the whole £51 of Post Office Savings Bank interest, for £21, part of his personal allowance, was deducted from the £51, leaving a net

sum of £30. On March 9, 1956, a Schedule E assessment was issued, in respect of Mr. Hinchy's employment, amounting, after allowances, to £427, on which tax was computed of £125 6s. 6d. These two assessments, apart from some Schedule A assessment, otherwise settled I think by allowances, constituted Mr. Hinchy's whole tax liability for the tax year 1952–53. It may be noted that liability in respect of a Schedule E assessment was computed on income arising in the tax year and was subject of direct assessment. It is not income, as the Court of Appeal seem to have thought, from which tax is deducted at the source. The liability in respect of the savings bank interest, on the other hand, fell to be computed on the income arising in the preceding year, 1951–52. Mr. Hinchy's total liability to tax for the year 1952–53, as so assessed and charged, was thus £139 11s. 6d., the sum of £14 5s. 0d. and £125 6s. 6d. The next material date to be noted is June 13, 1956, the date of issue of the writ for penalties. The claim made by the writ is for £438 14s. 6d., being penalty, under section 25 (3) of the Income Tax Act, 1952, of £20 and treble the tax on £139 11s. 6d.

On one view of the Court of Appeal's judgment it might appear that, if the true facts and sequence of events had been appreciated, they might have decided this case in favour of the Revenue. I quote only one passage from the judgment where they say [15]: "There remains the judge's interpretation of the "relevant words (the third view above indicated), namely, that "'the tax which he ought to be charged' means what we have "called the excess tax—that is, the tax which the taxpayer ought "to be charged and was not charged because of his failure to "make a true and correct statement of his income. Where there "has been failure to make any return at all, the 'tax which he "'ought to be charged' will, of course, be the total of his tax "liability for the relevant period. But where, as in the present "case, the taxpayer's default lay in an understatement of one "of his sources of income, then the tax which he ought to be "charged will, on this interpretation, mean the tax which he "ought to be charged (but was not charged by reason of his "default) on the undisclosed income." It would seem clear from this passage that the court did not, as I have said, appreciate the true facts of the case. If the court had dealt with the true situation, I am not clear what result they would have reached. There is much in the train of thought in the judgment which suggests that they might still have held that the proper penalty was only £20 and treble tax on the amount which the taxpayer failed to disclose on his return. As the respondent was not represented on the appeal, and no case was lodged on his behalf, it is only right that any point that can be advanced on his behalf should be considered. It is partly, I understand, because of the

[15] [1959] 2 Q.B. 357, 377.

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difficulties and uncertainty which the Revenue conceive this judgment has created for them in their enforcement of the penalty provisions of the Act that they have brought this appeal.

The claim here is made under section 25 (3) of the Income Tax Act, 1952. The point in issue is a short one, namely, what is meant by the words in subsection (3), "treble the tax which "he ought to be charged under this Act." There are a number of penalty sections under the Act, all of which were referred to in the course of the argument. They do not provide any coherent or intelligent code, and in the confines sometimes of even a single section apparent anomalies can be discovered. It will be convenient to consider these sections in three groups according to the variation of language by which the penalty is imposed.

In the first group I place section 18 and section 25, omitting for the time being the sections to which section 25 applies; in the second group section 48 and section 49; and in the third group paragraph 4 of Schedule VI.

Section 18 and section 25 read as follows:

"18.—(1) It shall be the duty of every person who is charge-"able to income tax for any year of assessment to give notice to "the surveyor that he is so chargeable at or before the end of "that year: Provided that no such notice need be given by any "person as respects any year for which he has delivered a state-"ment of his profits and gains in accordance with the provisions "of this Act. (2) If any person, without reasonable excuse, fails "to give such a notice as aforesaid, he shall—(*a*) if proceeded "against by action in any court, forfeit the sum of twenty pounds "and treble the tax which he ought to be charged under this "Act; or (*b*) if proceeded against before the General Commis-"sioners, forfeit a sum not exceeding twenty pounds and treble "the tax which he ought to be charged under this Act, and where "he is proceeded against before the General Commissioners, the "penalty shall be recovered in the same manner as any other "penalty under this Act, and the increased tax shall be added "to the assessment."

"25.—(1) Any such lists, declarations, statements and returns "as are provided for by the preceding provisions of this Chapter "shall be in such form as the Commissioners of Inland Revenue "shall prescribe, and in prescribing forms under this subsection "the Commissioners shall have regard to the desirability of "securing, so far as may be possible, that no person shall be "required to make more than one return annually of the sources "of his income and the amounts derived therefrom. (2) Any "statement of annual value or profits or gains to be charged "under Schedule A, Schedule B, Schedule D or Schedule E "shall include a general declaration declaring the truth thereof "and that the same is fully stated on every description of pro-"perty, or profits or gains, included in the Act relating to the "tax, and appertaining to the person returning the statement, "estimated to the best of his judgment and belief, according to

" the provisions of this Act. (3) A person who neglects or refuses " to deliver, within the time limited in any notice served on him, " or wilfully makes delay in delivering, a true and correct list, " declaration, statement or return which he is required under " the preceding provisions of this Chapter to deliver shall—(*a*) if " proceeded against by action in any court, forfeit the sum of " twenty pounds and treble the tax which he ought to be charged " under this Act; or (*b*) if proceeded against before the General " Commissioners, forfeit a sum not exceeding twenty pounds and " treble the tax which he ought to be charged under this Act, " and where he is proceeded against before the General Commis- " sioners, the penalty shall be recovered in the same manner as " any other penalty under this Act, and the increased tax shall " be added to the assessment. (4) The commissioners shall also " proceed to assess or cause to be assessed every such person " who makes default as aforesaid. (5) If any person who is " required to deliver a list, declaration, statement or return on " behalf of any other person delivers an imperfect list, declara- " tion, statement or return and declares himself unable, within " the time limited, to deliver a more perfect list, declaration, " statement or return and states the reasons for his inability, he " shall not, if the General Commissioners are satisfied with his " explanation and grant further time for delivery, be liable to " the penalty prescribed by this section if he delivers, within the " further time granted, as perfect a list, declaration, statement " or return as the nature of the case permits. (6) If a person " delivers to any surveyor a list, declaration or statement on a " form prepared for the purpose by direction of the Commissioners " of Inland Revenue, he shall be deemed for the purposes of this " section to have been required by a notice under the preceding " provisions of this Chapter to prepare and deliver that list, " declaration or statement, and the time limited for the delivery " thereof shall be deemed for the purposes of this section to have " expired on the date of its delivery to the said surveyor. (7) Any " list, declaration, statement or return required by the preceding " provisions of this Chapter to be delivered to the surveyor shall " be made available to the General, Additional or Special Com- " missioners and their respective clerks, and, whenever necessary, " to the assessors for the preparation and making of assessments."

The provisions of subsection (2) of section 18 and subsection (3) of section 25 are in identical terms, apart from the introductory words indicating the nature of the offence struck at by the penalty provision. Section 18 deals with concealment of chargeability to tax for any year of assessment, a reference back to section 1 of the Act. The offence presumably will be committed if the potential taxpayer allows the year of assessment to run out without disclosing his chargeability. Section 25 relates to persons who are known to the surveyor of taxes and are required to make one or other of the returns in sections 19 to 23 of the Act, including persons required (section 19) to deliver true and correct returns

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of all sources of their income. I can see no ground for placing any different construction on the words "treble the tax which "he ought to be charged under the Act" in subsection (3) of section 25 from the meaning they have in section 18; or for saying that they have one meaning where the taxpayer neglects or refuses to deliver any return within the stipulated time as required by the Act, and a different meaning when he wilfully makes delay in delivering a true and correct return of his income as similarly required. The decision of this House in *Attorney-General* v. *Till* [16] is binding authority that delivery of an incorrect return is breach of this requirement. The question of the construction of these words may to some extent be resolved, I think, by asking how is it to be ascertained what tax the defaulter ought to be charged under the Act. The only way, in my opinion, is through the machinery of assessment set up by the Act. The court cannot take upon itself this task. It was so held, I think rightly, in an unreported Irish case—*Attorney-General* v. *White* [17]—under corresponding income tax provisions in Ireland, judgments in which were made available to your Lordships. Can it be said that the words have an ambulatory meaning, so that, if the taxpayer makes an incorrect return, the tax which he ought to be charged under the Act is limited to tax on the amount of the undisclosed income? This is the view, I think, taken by the Court of Appeal. I find it impossible to put such a construction on words which seem to me to be quite unambiguous. So limited the tax would be only part of the tax which he ought to be charged under the Act. It was conceded by the learned Attorney-General that the penalty is to be measured only by tax on income which is the subject of direct assessment, a concession which I am disposed to think could not be withheld. Income from which tax is deducted under Schedule D is not income charged to tax in the hands of the recipient. Nor is it contended for the Revenue that the tax to be charged includes surtax, for reasons which I do not find it necessary to examine. It may be noted also in passing that the non-fraudulent offender has a method of escape from the stringency of the penalties under section 55 of the Act, which gives opportunity for rectification of returns and other relief.

Sections 48 and 49 of the Act are as follows:

"48.—(1) Where a person who ought to be charged with "tax, as directed by this Act, is not duly assessed and charged "by reason that he has—(*a*) fraudulently changed his place of "residence or fraudulently converted, or fraudulently released, "assigned or conveyed any of his property; or (*b*) made and "delivered any statement or schedule which is false or fraudu-"lent; or (*c*) fraudulently converted any of his property, which "was chargeable, by altering any security relating thereto or by "fraudulently rendering it temporarily unproductive, in order not

[16] [1910] A.C. 50.

[17] (1931) March 3, unrep.

" to be charged for the same or any part thereof; or (*d*) been guilty " of any falsehood, wilful neglect, fraud, covin, art or contrivance " whatsoever, such person shall, on proof thereof to the General " Commissioners for the division in which he has been charged, " or, if he has not been charged, then for any division in which " he is chargeable, be assessed and charged treble the amount of " the charge which ought to have been made upon him: Provided " that, if any charge has been made, but that charge is less than " the charge which ought to have been made, such person shall " be assessed and charged, over and above the former charge, " treble the amount of the difference between the charge which " was made and the charge which ought to have been made, such " amount to be added to the assessment. (2) A person who " knowingly and wilfully aids, abets, assists, incites or induces " another person to make or deliver a false or fraudulent account, " statement, or declaration, of or concerning any profits or gains " chargeable, or the yearly rent or value of any lands, tenements, " hereditaments or heritages, or any matters affecting any such " rent or value, shall for every such offence forfeit the sum of " five hundred pounds.

" 49.—(1) If the Additional Commissioners or the General " Commissioners—(*a*) have made a charge to tax under Schedule " D in respect of a sum in excess of the amount contained in " either the statement or the schedule of a person to be charged; " or (*b*) discover, from the information of the surveyor, or other- " wise, that a charge to tax in respect of a sum in excess of either " such amount ought to be made, and an assessment is made, " at any time within the year of assessment or within three years " after the expiration thereof, they may, unless the person to be " charged proves to their satisfaction that the omission by him " did not proceed from any fraud, covin, art or contrivance or " any gross or wilful neglect, charge that person, in respect of " such excess, in a sum not exceeding treble the amount of the " tax on the amount of the excess. (2) If the person to be " charged has neglected or refused to deliver a statement or " schedule, the said commissioners may charge him in a sum not " exceeding treble the amount of the tax with which, in their " judgment, he ought to be charged, and such sum shall be added " to the assessment and applied in the same manner as other " increased charges are applied."

The proviso to subsection (1) of section 48 clearly limits the penalty to treble the tax on the amount of income undisclosed where a charge has already been made on the disclosed amount. There may be observed, however, several new features in the matter of penalty. There is no £20 penalty. There is no provision for proceedings for penalty in a court. The penalty is a fixed penalty of treble tax, not a maximum within which the commissioners have a discretion to operate. Lastly, if the fraud is discovered before any tax is imposed the penalty is treble tax. Only where tax has already been charged does the taxpayer escape

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with treble tax measured by what he has fraudulently concealed. It may be doubted whether this sections shows any leniency to the fraudulent taxpayer as contrasted with the treatment accorded to a neglectful taxpayer under section 25. The restricted penalty imposed by the proviso, limited though it be by the amount fraudulently undisclosed may be a very heavy penalty, as compared with a discretionary penalty that the commissioners are entitled to impose under section 25. Only in contrast with the penalty imposed by a court under section 25 can it be said that the fraudulent taxpayer who comes under the proviso may escape relatively lightly. That is undoubtedly an anomaly. But it would seem to be no greater an anomaly than that accorded to two fraudulent taxpayers under section 48 itself, according as an assessment has already been made on one and not on the other, a difference in treatment which I confess I find it difficult to understand. Whatever anomalies exist between section 25 and section 48 these provide no ground for reading into section 25 (3) (*a*) the proviso of section 48 (1), as the Court of Appeal in effect would seek to do, with the result incidentally of repeating in the case of neglectful taxpayers the anomaly already observed to exist as between fraudulent taxpayers. The reference in the section to "the charge which ought to have been made" as contrasted with the words "the tax which ought to be charged" in section 25 (3) raises another question which seems to me to lead nowhere. It would, I think, make no real difference if the words of section 25 were substituted for the words in section 48 so far as the meaning of section 48 was concerned.

Section 49 provides another variation of a penalty clause. It applies only to charges to tax under Schedule D. The words "not "exceeding" reappear in this section. The penalty in the circumstances to which the provisions of the section apply is a sum not exceeding treble tax on the amount the taxpayer has omitted to return. Again there is no question of a £20 penalty.

Lastly, I come to paragraph 4 of Schedule VI. It runs as follows: "(1) A person who, in making a claim for or obtaining "any relief to which this Schedule relates, or in obtaining any "certificate as aforesaid—(*a*) is guilty of any fraud or contrivance; "or (*b*) fraudulently conceals or untruly declares any income or "any sum which he has charged against or deducted from, or was "entitled to charge against or to deduct from, another person; or "(*c*) fraudulently makes a second claim for the same cause, shall "forfeit the sum of twenty pounds and treble the tax chargeable "in respect of all the sources of his income as if such claim had "not been allowed. (2) A person who knowingly and wilfully aids "or abets any person in committing an offence under this para-"graph shall forfeit the sum of £500."

Here your Lordships find a further variation of penalty in cases of fraudulent claims for relief, reflecting often relatively small results in the matter of tax liability. The penalty here is the severest of all. The £20 penalty makes its appearance again:

treble tax is mandatory; and it is imposed "in respect of all the "sources of his income as if such claim had not been allowed." It is thus not limited as in sections 18, 25 and 48 to income subject to direct assessment.

I have referred to these sections because they all disclose in the circumstances to which they apply a variety of penalties which present no intelligible pattern and which, in relation to one another, seem often highly inequitable. Nor does the general power of mitigation vested in the Commissioners of Inland Revenue and the Treasury by section 500, in my opinion, really affect this result. The survey of these sections has, I think, this relevance to the subject-matter of this appeal. It shows that it is impossible to argue from one penalty section to another or to infer because of illogicalities between different sections, or inequitable results that may follow from a particular construction, that therefore the legislature cannot have meant what the words of section 25 (3) plainly say. I would add that these sections have an ancient lineage dating back more than 150 years and show very little essential change in that period. Section 25 (3) shows a greater number of changes evolved during that period, but in spite of opportunities thus afforded Parliament has not thought fit to make any substantial change, apart from quantum of penalty, in the form of language by which the penalty was imposed from at least 1805.

In conclusion I would say a word about the effect of section 25 on certain sections of the Act to which it applies. These are notably sections 21 to 23 and 27 to 29 inclusive. The results on the view of the Court of Appeal were so startling as to play a large part in their reaching a construction of section 25 (3) that would enable them to escape the rigour of a literal construction of its words. For the reasons I have given I think, on any view of its effect on the sections in question, that escape would be impossible. But it is a question whether any talk of escape is necessary. In any case in which it was necessary to consider the matter I would wish to hear argument on two points. First, whether the impact of section 25 on sections like 21 and 22 affects tax on the income of any person other than the constituent in respect of whose income a return is made by a person in a representative or quasi-representative capacity. Secondly, whether when a return is made under such sections as 23, 27 or 29, which are not concerned with returns of income but with lists of names of persons who may be chargeable to tax in respect inter alia of payments made by the person responsible for the return, there is any basis for a penalty under section 25 other than that of the fixed penalty of £20. In other words, whether there is any income covered by the subject-matter of the return in respect of which it can be said that the person making the return "ought to be charged to tax under the Act." These are incidental matters which cropped up in the course of the argument before this House and which, on the view taken by the

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Court of Appeal of resulting personal chargeability, seem to have weighed heavily with the court. I say no more about these two questions which on any view can, in my opinion, have no effect on this case.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitor: *Solicitor of Inland Revenue.*

F. C.

[COURT OF APPEAL.]

C. A. 1960 *Jan.* 22, 25, 26.

Lord Evershed M.R., Willmer and Upjohn L.JJ.

In re STEED'S WILL TRUSTS.

[1958 S. No. 1486.]

Trusts — Variation — Act of 1958 *— Protective trust — Opposition by trustees—Variation proposed by sole beneficiary—"Arrangement"—Power of court to override discretion of trustees—Interest of spectral husband in wife's welfare—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

Trusts—Discretion of trustees—Control by court—Variation of trusts under Act of 1958*—Power of court to override trustees.*

By his will, a testator gave and devised certain farm property to his trustees upon trust for sale upon protective trusts, as defined by section 33 of the Trustee Act, 1925, for the benefit of the plaintiff for life, and after her death for such persons as she might by deed or will appoint, and in default of appointment, upon trust for the persons entitled on the distribution of her estate, with a proviso that the plaintiff should have the use and enjoyment of the capital value thereof if she needed it, and that the trustees might apply capital moneys arising on the sale of the farm to or for her benefit provided that they should consider the necessity for retaining sufficient capital to prevent her from ever being without adequate means. The testator also gave to the trustees a sum of £4,000 on trust for the plaintiff on the same protective trusts, and with similar powers of appointment by the plaintiff, and for the use of capital for her benefit, and authorised the trustees to use the legacy for the purpose of providing a residence for her. The plaintiff exercised both powers of appointment by deed irrevocably in her own favour.

The trustees were about to sell the farm in exercise of the discretionary powers conferred by the will but the plaintiff opposed the sale. She made an application under section 1 of the Variation of Trusts Act, 1958,[1] for approval by the court of an arrangement

[1] Variation of Trusts Act, 1958, s. 1: "(1) Where property, whether "real or personal, is held on trusts "arising, whether before or after the "passing of this Act, under any will, "settlement or other disposition, the "court may if it thinks fit by order "approve on behalf of— . . .

"(*b*) any person (whether ascer- "tained or not) who may become "entitled, directly or indirectly, to an "interest under the trusts as being at "a future date or on the happening "of a future event a person of any "specified description or a member of "any specified class of persons, so

proposed by her varying the trusts so that the trustees would hold the farm and the legacy on trust for her absolutely. The trustees did not consider that the proposal would be for the benefit of the plaintiff and declined to approve it:—

Held, (1) that the duty imposed by section 1 of the Act of 1958 was not confined to inquiring into the effect of a proposed scheme on those on whose behalf approval was sought, but required also consideration on behalf of any person or persons who might have an interest under the discretionary trusts, and whose presence prevented the sole beneficiary from putting an end to the settlement. The proposal had to be looked at as a whole to see whether it was proper to be sanctioned by the court, and the court had to have regard not only to the material benefit of the person who was unable to give his consent because he was not in a position to do so, but to the purpose of the trust. The views of the trustees were relevant though not conclusive (post, pp. 481, 483, 484).

(2) That, applying that test, and having regard particularly to the interest of any husband that the plaintiff might hereafter marry, the court should not approve the proposed variation (post, p. 484).

(3) That the court should not interfere with the exercise of the tustees' discretionary powers in fulfilment of the duty imposed by the will (post, p. 480).

In re Mayo [1943] 1 Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440 applied.

Decision of Harman J. [1959] Ch. 354; [1959] 2 W.L.R. 470; [1959] 1 All E.R. 609 affirmed but for different reasons.

APPEAL from Harman J.

By his will, dated August 6, 1954, the testator, Joshua Owen Steed, gave and devised to his trustees, by clause 9 thereof, "Loft Farm Cockfield upon trust to sell the same with power "to postpone such sale for so long as they in their absolute "discretion shall consider desirable and until any sale shall be "effected to hold such property and on sale the proceeds of sale "thereof upon protective trusts as defined by section 33 of the "Trustee Act, 1925, for the benefit of . . . Gladys Louise Sandford "[the plaintiff] during her life And from and after the death of "the said Gladys Louise Sandford Upon trust to hold the said "properties or the proceeds of the sale thereof in trust for such

"however that this paragraph shall "not include any person who would "be of that description, or a member "of that class, as the case may be, "if the said date had fallen or the "said event had happened at the date "of the application to the court, "or . . .

"(*d*) any person in respect of any "discretionary interest of his under "protective trusts where the interest "of the principal beneficiary has not "failed or determined, any arrange-"ment (by whomsoever proposed, and "whether or not there is any other "person beneficially interested who is "capable of assenting thereto) vary-"ing or revoking all or any of the "trusts, . . .

"Provided that except by virtue of "paragraph (*d*) of this subsection the "court shall not approve an arrange-"ment on behalf of any person unless "the carrying out thereof would be "for the benefit of that person.

"(2) In the foregoing subsection "'protective trusts' means the trusts "specified in paragraphs (i) and (ii) "of subsection (1) of section thirty-"three of the Trustee Act, 1925, or "any like trusts, 'the principal bene-"ficiary' has the same meaning as "in the said subsection (1) and "'discretionary interest' means an "interest arising under the trust "specified in paragraph (ii) of the said "subsection (1) or any like trust."

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" person or persons as the said Gladys Louise Sandford may by " deed revocable or irrevocable or by will or codicil appoint And " in default of appointment upon trust for the persons who may " be entitled in distribution to her estate Provided nevertheless " and I hereby declare that the settlement of this property upon " the said Gladys Louise Sandford is made for the purpose of " providing for her during her life but it is my wish that she shall " have the use and enjoyment of the capital value thereof if she " needs it during her life And I direct that if and when such " property shall be sold my trustees may apply capital moneys " from such sale to or for her benefit at such times and in such " proportions as they may consider to be most to her advantage " and that any portion of the capital may be paid to her as income " annually or at any other periods which my trustees may think " desirable provided that they shall consider the necessity for " retaining sufficient capital to prevent her from being without " adequate means at any time during her life and if they shall " think it desirable in her interest to buy an annuity for that " purpose."

By clause 10, the testator gave a legacy of £4,000 to the trustees to be held on trusts similar to those elaborated in clause 9. He concluded clause 10 as follows: " The amount of this " legacy is intended as a recognition of the interest which I feel " sure the . . . [plaintiff] will take in the welfare " of a named brother.

The testator died on December 13, 1954, and his will was duly proved by the three defendants, the executors and trustees named therein. The plaintiff was then 48 years old, unmarried, and had remained so. She exercised both powers of appointment by deed irrevocably in her own favour.

Loft Farm (which comprised about 50 acres) had been let by the testator to one of the plaintiff's brothers—not being the brother named in clause 10 of the will.

After the testator died the trustees bought for the plaintiff a café in Long Melford for a little under £2,000 out of the capital fund, but that venture was not successful and the plaintiff wanted to be relieved of it and desired the trustees to build a bungalow on the farm so that she could live there.

During the brother's tenancy of the farm the evidence was that he had apparently done considerable work there and it was possible that he had improved it, but that his own financial position was precarious. It was uncertain whether he had in fact paid any rent, though the evidence was that the plaintiff (who, as Lord Evershed M.R. said, would be in effect entitled to receive it under the trusts) had given him receipts. The trustees were also concerned about possible liability for capital expenditure for repairs. They came to the conclusion that the farm was not a desirable asset from the point of view of the trusts which they were under a duty to administer, and that it ought to be sold. They took the best advice that they could get and were informed

by qualified experts that the value of the farm, if sold with the tenant in occupation, would not be much above the value for probate of about £1,300. But they eventually succeeded in obtaining an offer of £2,250 on the same basis, which, as Lord Evershed M.R. commented, was, on the evidence, a very good offer indeed.

The trustees were about to proceed when, on May 9, 1958, the plaintiff issued a writ against the trustees seeking to restrain them from giving effect to the sale and, by a summons taken out in the action on May 15, she invoked the equitable jurisdiction of the court to control trustees and to direct them not to sell the farm. Subsequently, the plaintiff was given leave to amend the writ and the summons to ask the court, in pursuance of the powers conferred on it by the Variation of Trusts Act, 1958, to approve an "arrangement" varying the trust put forward by the plaintiff whereby the trustees should stand possessed of the farm and the property, investments and cash representing the legacy upon trust for the plaintiff absolutely. The trustees opposed the proposals, which they did not consider were for the plaintiff's benefit. Harman J. refused to grant the relief sought on the ground that the proposals were not an "arrangement" within section 1 [1] of the Variation of Trusts Act, 1958, which referred to an arrangement to which the trustees were a party. The courts had no power to override the discretion of the trustees for it had been properly exercised. The plaintiff appealed.

G. H. Newsom Q.C. and *Eric W. Griffith* for the plaintiff.

L. H. L. Cohen for the defendants, trustees of the will.

In addition to the case referred to in the judgment of Lord Evershed M.R., the following were cited in argument: *In re Smith* [2]; *Hampden* v. *Buckinghamshire (Earl)* [3]; *In re D'Epinoix's Settlement* [4]; *In re Hylton's (Lord) Settlement* [5]; *In re Buchanan-Wollaston's Conveyance* [6]; *In re Downshire Settled Estates.* [7]

LORD EVERSHED M.R. This is in more ways than one, including matters of procedure, a somewhat unusual case, as Mr. Newsom observed. It is also in many respects an unhappy case, and I cannot refrain from expressing my own sympathy for the plaintiff on the one side, and for the three defendant trustees on the other.

I propose in this judgment to forbear from entering, except where absolutely necessary, into matters of fact which might only serve to rub salt into existing wounds. Suffice it to say that the plaintiff was one who served loyally and most skilfully for a long

[1] For footnote 1 see p. 474.
[2] [1928] Ch. 915.
[3] [1893] 2 Ch. 531.
[4] [1914] 1 Ch. 890.
[5] [1954] 1 W.L.R. 1055; [1954] 2 All E.R. 647.
[6] [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302.
[7] [1953] Ch. 218; [1953] 2 W.L.R. 94; [1953] 1 All E.R. 103.

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period of time the testator and the testator's wife. In consideration for those services the testator included in his will provisions for her benefit, contained in clauses 9 and 10.

It is, I think, quite plain on the evidence that the testator, while anxious to show his gratitude to the plaintiff, was no less anxious she should be well provided for and not exposed to the temptation, which he thought was real, of being, to use a common phrase, sponged upon by one of her brothers. I fully realise that the plaintiff's natural affection for that brother is not a matter which one can in any sense condemn. Blood is, after all, thicker than water, and the happiness of the plaintiff, according to her own view at any rate, is very much linked up with the association with that brother and the brother's daughter and wife.

On the other side, however, are these trustees upon whom has been placed an obligation, a duty to give effect to the intentions of the man who provided the money. Mr. Newsom pointed out (and it is an unfortunate aspect of this case) that during the years since the testator died, that is, a little over five years, relations between the plaintiff and these trustees have become somewhat strained because the trustees took a view which the plaintiff thought unkind to her.

The duty of a trustee is not always an easy one. Indeed, I may recall the famous saying of Professor Maitland: "Equity "evolved one novel and fertile institution, namely, the trust," the effects of which have become internationally famous. Though trustees may sometimes take the easy line, on other occasions trustees may feel that they must try to do, to the best of their ability, the duty cast upon them, however distasteful.

I will now just state the procedural anomaly in this case. In the month of May, 1958, the plaintiff issued a writ against the trustees in which she sought to restrain them from giving effect to a sale of a certain farm which was part of the property, the subject of the trusts I have mentioned. The farm is known as Loft Farm, Cockfield. In extent, we were informed, it was 50 acres, or perhaps a little over; but since the proceedings were started an added trouble has arisen. The farmhouse appears to have been substantially destroyed by fire. We understand, however, that to nothing with which we are concerned is that really relevant.

The reason for the issue of the writ was that the trustees in the exercise of their powers and discretions, to which I will allude more fully in a moment, were on the point of giving effect to a bargain which they had made for the sale of the farm. I have used rather loose phrases deliberately because there was a question, and there is a question, whether the trustees are in law bound in any case to the proposing purchaser. It will suffice for me to say, because Mr. Newsom conceded so much, that it may be that if the proposing purchaser took the appropriate steps he could bring proceedings in respect of the bargain if the trustees

did not fulfil it; but he has not done so. He seems to have been a most amiable purchaser.

The proceedings, having started, a summons was then taken out in the action in which the equitable jurisdiction of the court to control trustees was invoked. Later still, when the matter came before the court, the summons was by leave and by consent amended, so that it now is also entitled "In the matter of the "Variation of Trusts Act, 1958," in order to invite the court to exercise the powers under that Act to approve the "arrangement" (according to the word used in the section) which the plaintiff has put forward. It is by way of appeal from the judge's refusal to grant any relief on that summons that the present matter now has come before the court. Nothing now turns upon the procedural aspect of the matter, as I conceive, but I have thought it right to refer to it. [His Lordship read clause 9 of the will, referred to clause 10 and stated the facts. He went on:]

Mr. Newsom put forward an argument that the proposed sale was an improvident exercise of the trustees' discretion on any footing. He said that if the trustees wanted to get rid of the farm, the thing for them to do was to get rid of the tenant and then sell with vacant possession, when they would get very much more. There is no reliable evidence that they would get very much more if they took that step, and we all know that to get rid of a sitting tenant in these days, particularly where the evidence shows what he has done to his farm, would be no easy matter at all, nor does it come very naturally so to suggest from the advocate for the plaintiff. I cannot, I am afraid, pay much regard to that view.

I think that the matter—and I am not so far saying anything about the Variation of Trusts Act jurisdiction—is really capable of being put in the smallest compass. In what circumstances are the trustees to be overridden in exercising their discretion as they propose by a sale, notwithstanding the very firm opposition of the plaintiff? Her interest in the property is not now confined to that of a life interest, for about the time when these proceedings started she exercised her power under clause 9 irrevocably to appoint to herself, so that upon her death her estate becomes entitled to the corpus of the trust property.

She is at the moment still unmarried, so that there is no other living person who can be ascertained, at any rate, who has any interest in the property. I put it in that form because, of course, there may be some man to whom later the plaintiff will become married. There may be more than one. So long as the protective trusts survive and are not displaced by an exercise of the jurisdiction under the Act of 1958, the plaintiff is incapable of putting an end to the trusts and requiring that the property be handed over to her.

So, I repeat, the problem seems to be: ought the trustees to exercise their discretion as they propose by a sale, or should they rather succumb to the plaintiff's wishes, she being the person who

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has such an overwhelmingly preponderant interest in the trust property? I put it in that form. It may well be that other trustees might have been, as I earlier indicated, submissive and said: "Well, in all the circumstances, money, as the plaintiff "said, is not everything, and we will let the matter stand as it is. "If the plaintiff chooses to part with her money, that is her "affair," but they have not taken that line. The line they have taken has been a deliberate exercise of the discretion and a deliberate discharge of the duty. There is no ground whatever for suggesting they have done any wrong thing, as that word is ordinarily understood. How then can the court now be asked to override the discretion which the testator conferred upon them, particularly in the circumstances which, as is proved clearly by the evidence, were in his mind, and for the purposes of preventing which the trusts were imposed?

The judge in the course of his judgment [1] may perhaps have based himself on the view that the court could not, that is to say, had no power to, interfere with the trustees' exercise of their discretion unless the case was one in which a decree for administration or execution of the trusts, if not asked for, at any rate would have been granted on the material before the court if it had been asked for.

Mr. Cohen, for the trustees, has not founded himself on so broad a proposition. What he has said is that in the absence, of course, of mala fides or some other special circumstances which would show at least grave misdirection of themselves by the trustees, the court will not interfere, particularly in a case where there is an express trust for sale, and where the trusts, as declared, clearly impose, and are intended to impose, a duty in the discharge of which, as the evidence shows, the trustees have reached their conclusion.

Mr. Cohen cited the language of Simonds J. in *In re Mayo* [2] which, I think, supports the general proposition as Mr. Cohen put it. I, therefore, would not desire to base myself upon the suggestion which appears to underlie the language of the judge in *In re Steed's Will Trusts*.[3] On the other hand, I am quite satisfied, upon the general principles which are applicable to these matters, that this court ought not to interfere, and will not interfere here with the exercise of the trustees' discretion. Why, after all, one may ask, when the testator who has given this bounty has made plain what his purpose is, if the trustees have established they have done their utmost to give effect to the duty which is imposed upon them, should the court disregard the testator and overrule the trustees out of a natural sympathy for the plaintiff? I think the answer to that is, there is no reason whatever. That is all I propose to say upon that part of the case.

I now come to what has caused me greater difficulty, namely,

[1] [1959] Ch. 354, 360; [1959] 2 W.L.R. 470; [1959] 1 All E.R. 609.

[2] [1943] 1 Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440.

[3] [1959] Ch. 354, 360.

the effect of the Variation of Trusts Act, 1958. I do not take time to read the whole of section 1 or the subsections, but the relevant language is that where property is held on trusts, the court "may, "if it thinks fit, by order approve on behalf of"—and there are then set out in four lettered paragraphs the classes of person, which include infants and unborn persons. Under paragraph (*d*) is included: "any person in respect of any discretionary interest "of his under protective trusts where the interest of the principal "beneficiary has not failed or determined." The subsection continues: "any arrangement (by whomsoever proposed, and whether "or not there is any other person beneficially interested who is "capable of assenting thereto) varying or revoking all or any of "the trusts." There follows a proviso: "Provided that except "by virtue of paragraph (*d*) of this subsection the court shall not "approve an arrangement on behalf of any person unless the "carrying out thereof would be for the benefit of that person."

There was some discussion of the use of the word "arrange-"ment." Again, if I may respectfully say so, the language used by the judge seems to indicate that an arrangement must be in some sense inter partes, some kind of scheme which two or more people have worked out. I do not myself accept that. I think that the word "arrangement" is deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts.

In the present case, the proposed variation (that is, the "arrangement") which the plaintiff puts forward may be most briefly and accurately stated as involving this: in clause 9 of the will the words: "upon protective trusts as defined by section 33 "of the Trustee Act, 1925," should be omitted, and similarly in the next clause the word "protective" should be omitted. If those words were omitted, the result would be that the plaintiff would become absolutely entitled to the property, because she would then be the life tenant, having appointed by irrevocable deed to herself the reversion; and that is what she seeks.

The trustees have taken the view it is not an arrangement which, having regard to their conception of their duties and the wishes of their testator, they should approve. For my part, I do not think that approval on behalf of the trustees is the court's function in this case, though the court in exercising its general discretion will certainly pay regard to what the trustees say and the grounds for their saying it. Nor can I see, if this was the judge's view, that the court is called upon by the language of this section to approve the arrangement or proposal on behalf of the proposer; that is to say, whether they think she was wise or unwise to put her idea forward.

The duty of the court, as I read the section on the facts of this case, is that they must approve it on behalf of the only person or persons who might have an interest under the discretionary trusts and whose presence under the trusts now prevents the plaintiff saying that she can put an end to the settlement.

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Having regard to the plaintiff's age, no doubt it is true to say that she will not and cannot now have children, but she might marry, and marry more than once. She says, with some reason, that having lived for 53 years unmarried she does not feel in the least likely to marry now. That may well be right, though many have said that before and subsequent events have proved them wrong. That, however, is neither here nor there. There does exist a discretionary trust, and a future husband of the plaintiff's is a person interested under those trusts, on whose behalf the court must now approve the proposal.

Having regard to what has happened between the plaintiff and her brother, it is possible that, strictly speaking, there has been a forfeiture, and if so, the future husband or husbands would be within paragraph (*b*) of the subsection, but if not, he would be within paragraph (*d*). Again, I think that does not, for present purposes, matter.

I repeat that the duty of the court is now to consider whether in the exercise of its discretion, which is framed in the widest possible language, it should approve the arrangement on behalf of what has been described in argument as the spectral spouse of the plaintiff. In doing that, what must the court consider? Not, I conceive, merely the material benefit or detriment of such spouse. Certainly not if he is to be regarded as being a person under paragraph (*d*), though if he is to be regarded as falling under paragraph (*b*) it is expressly enjoined that the court shall not approve the arrangement unless it is for his benefit.

As I have said, I do not so read this Act as to mean that the court's duty in the exercise of this very wide and, indeed, revolutionary discretion is confined to saying: "Would it really "much harm this spectral spouse if we approve the proposal?" Bearing in mind, of course, the admitted possibility that the spouse might cease to be spectral and become a reality, I think what the court is bound to do is to see whether, looked at on behalf of the person indicated, it approves the arrangement. It is the arrangement which has to be approved, not just the limited interest of the person on whose behalf the court's duty is to consider it.

If that is right, it then follows that the court must regard the proposal as a whole, and so regarding it, then ask itelf whether in the exercise of its jurisdiction it should approve that proposal on behalf of the person who cannot give a consent, because he is not in a position to do so. If that is a right premise, then it follows that the court is bound to look at the scheme as a whole, and when it does so, to consider, as surely it must, what really was the intention of the benefactor. That such is a proper approach is at least supported by the provisions of R.S.C., Ord. 55, r. 14A (3) (A), which provides that in the case of an application under this Act, where there is a living settlor the living settlor is to be a party before the court. That rule

seems to me to reinforce what I conceive to underly this provision, namely, that the court must, albeit, that it is performing its duty on behalf of some person who cannot consent on his or her own part, regard the proposal in the light of the purpose of the trust as shown by the evidence of the will or settlement itself, and of any other relevant evidence available.

Having so formulated the duty, I have, for my part, come to the conclusion that it would not be right for the court in the exercise of its discretion to approve this variation or arrangement. I am not uninfluenced in coming to that conclusion by any means by the circumstance that the judge obviously did not think it was a proposal which should be approved, though it is quite true that for reasons which I have indicated it may be said he was looking at it and basing his jurisdiction upon an interpretation of the section which I have not been altogether able to share, namely, it was his duty to approve it on behalf of the proposer, the plaintiff, and also that the scheme must be regarded as intended to be in some sense inter partes and, therefore, that he had to approve it on behalf of the trustees.

Disagreeing, if that is a fair view of his judgment, with that premise, nevertheless it is quite clear, I think, that the judge was by no means unsympathetic to the feelings and views of the plaintiff, but, on the other hand, was no less clear in his mind that the arrangement was one which so cut at the root of the testator's wishes and intentions that it was not one which the court should approve.

After all, if the court is asked to approve this proposal on behalf of a spectral spouse (if I may revert to that phrase), it must ask, I take it, why is the spectral spouse there at all under the trust? If one asks that question, nearly everything else, as it seems to me, follows. There is no doubt why the spectral spouse is there. It was part of the testator's scheme, made as I think manifest by the language which I have read from the clauses in the will, that it was the intention and the desire of the testator this trust should be available for the plaintiff so that she would have proper provision made for her throughout her life, and would not be exposed to the risk that she might, if she had been handed the money, part with it in favour of another individual about whom the testator felt apprehension, which apprehension is plainly shared by the trustees.

For those reasons, therefore, I also conclude adversely to the plaintiff that we should not exercise jurisdiction under the Act of 1958 to approve the arrangement which has been put forward, and which I have tried to define. That is the end of the case. I only repeat the sympathy I have felt in a distressing matter of this kind, both with the plaintiff and with the trustees, whose difficulties in discharging their duty are obvious. I should like to express the hope that perhaps time, the healer, will do much to put an end to these troubles.

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Willmer L.J. I entirely agree, and I do not find it necessary to add any words of my own.

Upjohn L.J. I also agree. When considering applications under the Variation of Trusts Act, I agree that this court is not confined to the narrow duty of inquiring into the effect of a proposed scheme upon those on whose behalf approval by the court is sought. The court must be satisfied that the scheme, looked at as a whole, is proper to be sanctioned by the court. Upon that matter, the views of the trustees are entitled to respect but are not conclusive.

In the circumstances, and for the reasons stated by my Lord. I agree that this is not a scheme that is proper to be approved by the court.

Appeal dismissed. No order as to plaintiff's costs, except an order under Schedule III to the Legal Aid and Advice Act, 1949, for taxation of her costs as between solicitor and client. Trustees' costs out of the corpus.

Solicitors: *Field, Roscoe & Co. for Pretty, Dawson & Butters, Ipswich; Sharpe, Pritchard & Co. for Barr & Co., Cambridge.*

E. D.

[Queen's Bench Division.]

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Jan. 20, 21; *Feb.* 2.

Mounsdon and Another *v.* Weymouth and Melcombe Borough Council.

Lord Parker C.J., Cassels and Ashworth JJ.

Town and Country Planning—Enforcement notice—Justices' jurisdiction—Question whether permission to develop necessary—Limited permission already given—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23 (4) (*a*).

Town and Country Planning — Development — Planning permission — Whether appellants estopped from contending that there has been no development by reason of prior application for and grant of planning permission—Town and Country Planning Act, 1947, *s.* 23.

On August 30, 1958, the respondents, as the local planning authority, issued enforcement notices under the provisions of section 23 of the Town and Country Planning Act, 1947, in respect of land which the appellants on April 9, 1952, had obtained planning permission to use as a caravan site subject to certain conditions under which the number of caravans was limited to three. In July, 1954, there were 14 caravans on the land; in July, 1958, the number had risen to 26. It was alleged in the enforcement notices that development of the land consisting of a material change in

[Reported by Miss Eira Caryl-Thomas, Barrister-at-Law.]

the use thereof by using it as a site for caravans exceeding three in number had been carried out within the four years preceding the date of the notice, which change of use constituted development within the meaning of the Act, that the conditions set out in the notice of permission to develop dated April 9, 1952, had not been complied with inasmuch as the land had been used for siting more than three caravans, and requiring the appellants to discontinue the use of the land as a site for caravans. On September 25, 1958, the appellants applied to the justices to set aside the notices dated August 30, 1958, contending that they had an "established user" of the land for siting caravans as at July 1, 1948, and therefore did not require planning permission; their application was dismissed. On appeal:—

Held, allowing the appeal, (1) that on an application to set aside an enforcement notice alleging non-compliance with conditions on which permission to develop was granted, it was open to the justices to quash the notice if satisfied of any of the three grounds set out in section 23 (4) (*a*) of the Town and Country Planning Act, 1947 [1] (post, p. 491).

Dicta of Lord Evershed M.R. in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.* [1959] 2 Q.B. 92, 106–107; [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102 applied.

(2) That the appellants were not precluded from raising the issue as to whether there had been development by reason of the prior application for and grant of planning permission.

Swallow and Pearson v. *Middlesex County Council* [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580 applied.

(3) That, in the circumstances, the development alleged to have been carried out within the period of four years preceding the notices had not been established; accordingly, the enforcement notices should be set aside.

CASE STATED by Weymouth and Melcombe Regis justices.

On September 25, 1958, complaints were preferred by the appellants, Mr. and Mrs. Mounsdon, against enforcement notices dated August 30, 1958, issued by the respondents, the Weymouth and Melcombe Borough Council, under the provisions of section 23 of the Town and Country Planning Act, 1947; the complaints were heard on November 18, 1958, and December 1, 1958, and the decision of the justices was given on December 12, 1958.

The following were among the facts found by the justices:

The land referred to in the notices was ·37 of an acre in extent. There were two caravans placed on it during the winter of 1945/46, and in the summer of 1946 there were three caravans on the land. During the winter of 1946/47 there were 18 caravans on the land; during the summer of 1947 six of these remained, and

[1] Town and Country Planning Act, 1947, s. 23: " . . . (4) If any person " on whom an enforcement notice is " served under this section is " aggrieved by the notice, he may . . . " appeal against the notice to a court " of summary jurisdiction for the " petty sessional division or place " within which the land to which the " notice relates is situated; and on " any such appeal the court—(*a*) " if satisfied that permission was " granted under this Part of this Act " for the development to which the " notice relates, or that no such permission was required in respect " thereof, or, as the case may be, " that the conditions subject to which " such permission was granted have " been complied with, shall quash " the notice to which the appeal " relates; . . ."

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the remainder were moved to caravan sites elsewhere. At the end of the summer of 1947 the appellants placed a further 15 caravans on the land, making a total of 21 caravans, and these 21 caravans remained unoccupied on the land throughout the winter; on July 1, 1948, eight of these caravans remained on the land and were let for occupation by holiday-makers. On or about June 26, 1951, an enforcement notice was served by the respondents on the appellants ordering them to cease to use the land as a camping site and for stationing or storing caravans. An appeal against this enforcement notice was lodged and set down for hearing on October 23, 1951. The solicitor for the appellants asked for an adjournment pending an application being made for planning permission, and the appeal was withdrawn in April, 1952. On April 9, 1952, a notice of the grant of planning permission was issued by the Weymouth Town Council acting for and on behalf of the Dorset County Council, being the local planning authority, addressed to " Mrs. Mounsdon," imposing conditions (inter alia) that not more than three caravans should be sited on the land. No appeal was lodged against the conditions contained in this grant of planning permission.

It was contended by the appellants that they had an " estab- " lished user " of the land for siting caravans as at July 1, 1948, and required no planning permission to continue to use the land for that purpose, and that the enforcement notice ought to be quashed under section 23 (4) (*a*) of the Act of 1947; that the enforcement notice must be construed strictly, and against the council where ambiguous; that the number of caravans was first increased above three before July 1, 1948, and was not therefore development within section 12 of the Town and Country Planning Act, 1947, and the notice should be quashed. Alternatively, it was contended that the enforcement notice was ineffective in so far as it related to breaches of condition outside a period of four years before service, and ought to be varied so as to direct the appellants to discontinue the use of the land as a site for caravans exceeding 14 in number; and the proper construction of the planning permission of April 9, 1952, was that the permission had reference only to the use of the land as a camping site during the period between Easter and September 30 in any year, and that the enforcement notice ought to be varied so as to be applicable only to such period in each year.

It was contended by the respondents that the appellants had not appealed against or objected to the planning permission of April 9, 1952, that the increase in the number of caravans amounted to material change of use, and hence to development as defined by section 12 (2) of the Act of 1947; that the justices must accept the statement in the enforcement notice that development had taken place, and could not inquire into the facts relating to the alleged change of use to decide whether or not it constituted development; that the period of 28 days in every year during which the General Development Order, 1950, permitted

land to be used for certain purposes without planning permission had been greatly exceeded; that the enforcement notice might require more to be done than was necessary having regard to the requirement as to the period within which a notice must be served under section 23 (1) of the Act of 1947.

The justices decided that permission was granted as shown in the notice of permission dated April 9, 1952, and in the enforcement notice for not more than three caravans to be sited on the land; that permission was required in respect of any further development, and that such permission had not been granted. They accordingly dismissed the complaints.

Michael Albery Q.C. and *Ingram Poole* for the appellants.

John Stuart Daniel for the respondents.

The following case, in addition to those referred to in the judgment, was cited in argument: *Mead* v. *Chelmsford Rural District Council.*[2]

Cur. adv. vult.

February 2. ASHWORTH J. delivered the judgment of the court: This is an appeal by way of case stated from a decision of justices for the borough of Weymouth and Melcombe Regis dismissing complaints preferred by the appellants for the purpose of setting aside enforcement notices issued by the respondents under the provisions of section 23 of the Town and Country Planning Act, 1947.

The piece of land with which the case is concerned is situate in the borough of Weymouth and is a little over one-third of an acre in extent. In the winter of 1945/46 two caravans were placed on the land and thereafter the number of caravans increased, though it varied as between winter and summer. On July 1, 1948, the number was eight, such caravans being let for occupation by holiday-makers. In June, 1951, the respondents issued enforcement notices requiring the appellants to cease to use the land as a camping site; proceedings by the appellants for the purpose of setting aside these notices were withdrawn in April, 1952, as the appellants had meanwhile applied for and obtained planning permission to use the land as a caravan site, subject to certain conditions under which the number of caravans was limited to three, and the period during which the land might be used as a camping site was limited to the period between Easter and September 30 in each year.

The appellants did not observe these conditions. In August, 1952, there were 11 caravans on the land, in August, 1953, there were 13, and in July, 1954, there were 14. In July, 1958, the number of caravans had risen to 26. On August 30, 1958, the respondents issued the enforcement notices now in question. In

[2] [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

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the first recital of these notices it was alleged that development of the land in question "consisting of the making of a material "change in the use thereof by using the same as a site for "caravans exceeding three in number has been carried out within "the four years preceding the date of this notice." The second recital was in these terms: "Whereas the aforementioned change "of use constitutes development within the meaning of the Act "and the conditions set out in a notice of permission to develop "land granted in respect of the said land and dated April 9, 1952, "under the provisions of Part III of the Act have not been "complied with inasmuch as the land to which the permission "relates has been used for siting more than three caravans." The notices then required the appellants to discontinue the use of the said land as a site for caravans exceeding three in number and to remove all the caravans exceeding three in number from the land within seven days from the expiration of 28 days after service of the notices.

On September 25, 1958, the appellants preferred complaints with the object of setting aside the notices dated August 30, 1958, and these complaints were dismissed on December 12, 1958. It is only fair to the justices who heard the complaints to state that at that time the Court of Appeal had not heard the appeals in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[1] and *Guildford Rural District Council* v. *Fortescue.*[2] The decision of this court in the first of these cases (which was subsequently reversed by the Court of Appeal) was cited to the justices and was duly regarded by them as binding.

On the hearing of the present appeal the main issue between the parties raised the following problem: If a local planning authority serves on a person an enforcement notice alleging a breach of the conditions subject to which permission to carry out development was granted, is it open to that person in proceedings under section 23 (4) to contend that permission was not required and that there has been no development?

It is, in our view, clear from the decisions of the Court of Appeal in the cases already cited that if an enforcement notice merely contains an allegation that development has been carried out without permission, it is open to the person aggrieved by the notice to contend that no development within the meaning of section 12 has taken place. Although the problem raised by the present appeal might, as it seems to us, have been brought before the courts in the *Guildford* case [2] since a limited permission was in fact granted in that case, there is no direct reference to it in the judgments of the Court of Appeal.

It was contended for the respondents that throughout section 23 there is to be found a clear distinction between a case in which no permission was sought or granted and a case in which a conditional

[1] [1959] 2 Q.B. 92; [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102.

[2] [1959] 2 Q.B. 112; [1959] 2 W.L.R. 643; [1959] 2 All E.R. 111.

permission was granted. Thus, by subsection (1) a planning authority is given power to serve an enforcement notice in either of two situations: (a) if development has been carried out without the grant of permission required in that behalf, or (b) if any conditions subject to which such permission was granted in respect of any development have not been complied with. By subsection (2) the notice is to specify the development alleged to have been carried out without such permission or, as the case may be, the matters in respect of which it is alleged that any such conditions have not been complied with. By subsection (4) (*a*) a court is directed to quash the notice if satisfied (i) that permission was granted for the development to which the notice relates, or (ii) that no such permission was required in respect thereof, or (iii) as the case may be, that the conditions subject to which such permission was granted have been complied with. By paragraph (*b*) a court is directed to vary the notice if, though not satisfied under paragraph (*a*), it is nonetheless satisfied that the requirements of the notice exceed what is necessary for restoring the land to its condition before the development took place or for securing compliance with the conditions, as the case may be.

It is to be observed that the phrase "as the case may be" appears in subsection (2) and in paragraphs (*a*) and (*b*) of subsection (4). This phrase was relied on by counsel for the respondents as emphasising and so to speak maintaining the distinction drawn in subsection (1) between absence of permission and conditional permission. Accordingly, he says, when paragraph (*a*) of subsection (4) is considered, the first two grounds are appropriate to a case in which absence of permission is alleged, whereas the third ground, prefaced by the words "as the case "may be," is appropriate to a case in which non-compliance with conditions is alleged.

The respondents' argument, however, involves one further step, namely, that the distinction between the first two grounds in paragraph (*a*) of subsection (4) and the third ground is a distinction for all purposes. That is to say, a person aggrieved by a notice alleging non-compliance with a conditional permission is limited to the third ground if he seeks to have the notice quashed.

While we accept the argument that in section 23 a distinction is drawn between absence of permission and conditional permission, we are unable as a matter of construction to interpret paragraph (*a*) of subsection (4) as both drawing a distinction and imposing a limitation. The phrase "as the case may be" seems to us to have been inserted for the purpose of clarification and not for the purposes of restricting a court's right to quash a notice alleging non-compliance with conditions. An essential element in an enforcement notice is that development should have taken place, and, in our view, if an aggrieved person is to be precluded from challenging this point in the case of a notice alleging non-compliance with conditions on which permission to develop was

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granted, clearer provisions are required than those contained in paragraph (*a*) of subsection (4). Before the decision of the Court of Appeal in the two cases already cited, it was open to a planning authority to argue that an aggrieved person could not challenge the allegation of development, whichever of the three grounds mentioned in paragraph (*a*) was relied on by him for the purpose of setting aside the notice. Such an argument can no longer be put forward when either of the first two grounds is relied on and, in our view, to allow it to be raised when the third ground is relied on involves a result so much at variance with what appears to be the general sense of the section that we should avoid it unless clearly compelled otherwise.

This conclusion appears to us to be in accord with the reasoning of the Court of Appeal. In the *Eastbourne* case [3] Lord Evershed M.R. said: "I return to the vital language of section 23 "(4) of the Act of 1947; and, in my judgment, much assist- "ance towards a proper solution is to be found in the last "seven words, '. . . the development to which the notice relates.' "For properly expounded by reference to the earlier subsections "(1) and (2), these words must, in my view, mean (and I am "again indebted to Mr. Megarry in the *Guildford* case [4]) 'the "'development which is alleged to have been carried out without "'the grant of permission required in that behalf under this Part "'of the Act.' In my judgment, it is the use of the word "'alleged' derived from subsection (2) that provides the all- "important clue. It is, as I think, an essential requirement of "the enforcement notice that it should *allege* development carried "out without permission; and I can see no compelling reason for "holding that the only subject of the 'allegation' is the absence "of permission, the development itself (that is, the requirement) "being assumed. On the contrary, it appears to me more natural "to treat the allegation as being, as it were, a double allegation— "an allegation both of the development (requiring permission) "having been carried out and of the absence of permission; and, "if so, that the justices' powers conferred by the formula in "question involve inquiry whether no permission under Part III "of the Act was required on the ground that there had been in "fact no development either after 1948 or at all, no less than on "the ground that, though post-1948 development had occurred, "it was of a kind that did not require permission." And in the *Guildford* case he said [5]: "These two appeals raise precisely the "same questions, namely: first, whether the justices at Woking "had jurisdiction under the Town and Country Planning Act, "1947, to inquire into and determine whether there had in fact "been development on the land owned and occupied by the "appellants, within the meaning of section 12 of the Act; and "second, if so, whether they were entitled to conclude, as they

[3] [1959] 2 Q.B. 92, 106–107.
[4] [1959] 2 Q.B. 112.
[5] Ibid. 123.

" did, that there had not been any development. In the circum- " stances, Mr. Megarry confined himself in argument to the " appeal by Mr. and Mrs. Penny, the owners of the land in " question; and this judgment is similarly confined in terms.

" The facts appear from the case stated and may be briefly " summarised as follows. The appellants, Mr. and Mrs. Penny, " are the proprietors of 1½ acres of land within the jurisdiction of " the respondents, the Guildford Rural District Council, as the " appropriate local planning authority. On July 1, 1948—the " date of the coming into operation of the Town and Country " Planning Act, 1947—the 1½ acres were being used (as they had " been before that date and as they have continued to be used " since) as a site for residential caravans. On July 1, 1948, the " number of such caravans appears to have been eight, but there- " after the number steadily increased. In 1955 and 1956 recourse " was had to the powers and jurisdiction of the local planning " authority and (on appeal) to the Minister, the result of which " was that the Minister permitted 21 caravans to be placed on the " 1½ acres. The appellants, however, were not satisfied with the " scope allowed by this determination on the part of the Minister; " and it is not now in doubt that, in spite of the time and the " trouble taken, we must determine the question before us with- " out regard to what was then done."

Although, as already stated, the question was not argued in the *Guildford* case [6] whether the jurisdiction of the justices in a case where conditional permission was granted was limited to the third ground mentioned in paragraph (*a*) of subsection (4), we can hardly think that if that limitation (for which the respondents now contend) were imposed by the section, it would have passed unnoticed.

In our judgment, therefore, if an aggrieved person seeks to set aside an enforcement notice alleging non-compliance with the conditions on which permission to develop was granted, it is open to the justices to quash the notice if satisfied of any of the three grounds set out in section 23 (4) (*a*).

The respondents further contended that even if they were wrong on the major issue already considered, the appellants had " put themselves within the planning net " by applying for and obtaining permission after the enforcement notices issued in 1951. In passing, it may be noted that counsel for the respondents conceded that these notices were defective in form and of no effect. It was contended that, having obtained planning permission, the appellants could not now argue that it was unnecessary and it was suggested that *Swallow and Pearson* v. *Middlesex County Council* [7] was distinguishable on the ground that planning permission was not obtained in that case, whereas in this case it was. We do not think that the distinction affects the principle

[6] [1959] 2 Q.B. 112.

[7] [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

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applied in that case and in others to which reference was made in the course of the argument. In our view the appellants are not precluded from raising the issue as to development by reason of the grant of planning permission in 1952.

The last point taken on behalf of the respondents was that on the facts the appellants had not done enough to satisfy the justices that permission was not required. In this connection it is to be noted that by subsection (1) of section 23 the planning authority is limited to a period of four years after alleged development has taken place, within which an enforcement notice can be served. In the present case the enforcement notice was issued in August, 1958, and expressly referred to development alleged to have been carried out within a period of four years preceding the notice. The development complained of in the enforcement notice is an increase in the number of caravans beyond three, but as the number of caravans in 1954 was 14, the development alleged was carried out before that date. In these circumstances the alleged development was not established.

Having regard to the interpretation of the Act prevailing at the time when the justices considered this case, we can well understand how they reached their conclusion, but, in our judgment, for the reasons which we have endeavoured to state, it was wrong and, accordingly, this appeal should be allowed. The case should be sent back to them with a direction to quash the notices.

Appeal allowed with costs.

Solicitors: *Peacock & Goddard for Hollowell & Bollam, Weymouth; Sharpe, Pritchard & Co. for E. J. Jones, Town Clerk, Weymouth.*

[COURT OF APPEAL.]

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Feb. 2, 3, 22.

Sellers and Pearce L.JJ.; Havers J.

BAKER *v.* MERCKEL. ANSON (Third Party).

[1958 B. No. 51.]

Landlord and Tenant—Option to extend term—Assignment—Whether assignor liable under lease after exercise of option by assignee—Whether original lessee liable for defaults of assignee—Effect of supplemental deed giving option in law—Doctrine of surrender and regrant on alteration of term of lease.

Landlord and Tenant—Surrender and regrant, doctrine of—Alteration in term of existing lease—Supplemental deed giving option to extend term.

Election or Option—Effect of exercise—Lease, extension of—Exercise by assignee—Liability of assignee under lease.

By a lease dated February 17, 1947, a lessor B. demised to a lessee M. a dwelling-house for a term of seven years from November 1, 1946, with the usual lessee's covenants as to rent and repair.

On March 23, 1949, by a supplemental deed, the lessor agreed with the lessee that "if the tenant shall give notice in writing to the "landlord before November 1, 1952, of such his desire, the within-"written lease shall thereupon be read, construed and take effect as though the term thereby granted was for a period of 11 years from "November 1, 1946"; and there was a variation of the covenant to paint the exterior.

On April 9, 1951, the lessee assigned the premises with the benefit of the option to a third party A.; and in October, 1951, A. assigned them to a fourth party W., who, on March 21, 1952, validly exercised the option to extend. Later W. assigned the premises to his wife. In September, 1957, the wife gave up the premises, leaving rent unpaid and having committed breaches of the covenant to repair.

The lessor B. obtained judgment against her for £818. No recovery was made under that judgment, and the lessor thereupon instituted the present proceedings against the original lessee M., who contended that his liability terminated at the expiry date of the original seven-year lease, November 1, 1953. He brought in the first assignee as third party, claiming an indemnity against her, and she, in turn, brought in W., claiming a like indemnity under the second assignment.

On a preliminary issue as to whether the original lessee remained liable for the defaults of the assignee after the expiration of his original lease:—

Held, that the original lessee remained liable by privity of contract, for the effect in law of the supplemental deed was to vary at its date, namely, March 23, 1949, the seven-year lease by building into it an option which, when exercised, would enlarge the term retrospectively to one of 11 years. Accordingly, if the rule of law that an alteration in the term of an existing lease can operate only as a surrender of the old lease and a grant of a new one applied at all, it applied in March, 1949, and not when the option was exercised in 1952, for the exercise of the option was not a consensual matter but a unilateral act, consistent with the contract between the original parties, which by its own force enlarged the demise.

Dictum of Maugham J. in *In re Savile Settled Estates* [1931] 2 Ch. 210, 217 considered.

Decision of McNair J. affirmed.

APPEAL from McNair J. on a preliminary issue.

By a lease under seal dated February 17, 1947, made between the plaintiff, Frederick Jonas Baker, as the landlord of a dwelling-house, and the defendant, Henry Merckel, as the tenant (which expression included his successors in title), the landlord demised to the tenant certain premises for a term of seven years from November 1, 1946, at a yearly rent of £150. The tenant covenanted to keep the demised premises in good and tenantable repair, and in the third and last years of the term to paint the external wood and iron work.

In 1949 the landlord and the tenant came to an agreement which was embodied in a supplemental deed endorsed on the lease. It was in the following terms: "This deed made March 23, "1949, between the within-named Frederick Jonas Baker of the "one part and the within-named Henry Walter Merckel of "the other part is supplemental to the within-written lease.

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"Whereas it has been agreed between the parties hereto that "the term granted by the within-written lease shall be extended "for a further period of four years at the option of the tenant. "Now this deed witnesseth and it is hereby agreed and declared "that if the tenant shall give notice in writing to the landlord "before November 1, 1952, of such his desire the within-written "lease shall thereupon be read, construed and take effect as "though the term thereby granted was for a period of 11 years "from November 1, 1946, and that the tenant shall paint the "external wood and iron work of the demised premises with two "coats of good oil paint and in a workmanlike manner in the "fifth, eight and last years of the term and not as provided in "clause 2 (e) of the within-written lease."

By a deed of assignment made on April 9, 1951, the tenant assigned to the third party, Mrs. Anson, the premises comprised in the original lease, with the benefit of the option to renew referred to in the recital to the deed, being the option conferred by the deed of March 23, 1949.

On October 18, 1951, the third party by a similar document assigned the premises to the fourth party, James Donald White. In 1952 the fourth party validly exercised the option. Later in 1952 the fourth party, in his turn, assigned to one Mrs. Dorothy White.

In September, 1957, Mrs. Dorothy White gave up possession, leaving rent unpaid, and having committed breaches of the covenant to repair. The landlord obtained judgment against her for £818 8s. 11d. No recovery was made under that judgment, and the landlord then instituted proceedings against the original tenant, Merckel, seeking to recover the same sum against him. The defence admitted the original lease and the supplemental deed but denied that the option was validly exercised. The original tenant contended that his liability terminated at November 1, 1953, the expiry date of the original lease. He brought in his assignee, Mrs. Anson, as third party, claiming from her an indemnity under the first assignment, and she brought in White, the fourth party, claiming the like indemnity under the second assignment.

McNair J. had three preliminary issues to decide: (1) Whether the option to call for an extension of the lease could be validly exercised by the subsequent assignee; (2) if so, whether it was validly exercised; and (3) if it was validly exercised, whether the tenant Merckel, as the original lessee, was liable for rent falling due and dilapidations arising after the expiration of the term of his original lease. He decided on December 10, 1958, that the option could be and had been validly exercised, and that the original tenant was liable in respect of rent and dilapidations arising after the expiration of the term of the original lease.

The original tenant and the third party, Mrs. Anson, appealed, the main burden of the argument being carried on behalf of the

third party, Mrs. Anson, the original tenant Merckel being represented at the hearing of the appeal and adopting the submissions for the third party in order to maintain his position on the issue of costs.

R. O. Wilberforce Q.C. and *Alan Campbell* for the third party.
R. E. Megarry Q.C. and *Michael Underhill* for the landlord.
T. M. Eastham and *Brian Higgs* for the original tenant.
The fourth party was not represented and did not appear.

The following cases were referred to in the course of argument: *In re Savile Settled Estates* [1]; *Hand* v. *Hall* [2]; *Inland Revenue Commissioners* v. *Earl of Derby* [3]; *Hankey* v. *Clavering* [4]; *Cornish* v. *Brook Green Laundry Co. Ltd.* [5]; *Dodd* v. *Acklom* [6]; *Lawes* v. *Bennett* [7]; *Gray* v. *Spyer* [8]; *Holme* v. *Brunskill* [9]; *In re Bruce, Brudenell* v. *Brudenell* [10]; *In re Arkwright's Settlement, Phoenix Assurance Co. Ltd.* v. *Arkwright* [11]; *Weeding* v. *Weeding.* [12]

Cur. adv. vult.

Feb. 22. SELLERS L.J. I would uphold the decision of McNair J. on the basis that the supplemental deed of March, 1949, had the effect in law of supplanting the original lease by a new one, the terms of which are derived from reading the two documents together. The effect is to include the option as if it had been in the original lease. There was, therefore, while the landlord and tenant were in direct contractual relationship, a contractual right by unilateral action of the tenant to enlarge the term from seven to 11 years, and to vary by the same action the provisions as to the painting of the outside of the premises.

The rule of law on which the appellant relied to attack both the findings of the judge on the only issue under appeal was stated by Maugham J. in *In re Savile Settled Estates* [1]: "An "alteration of an existing lease so that it will operate for a term "extending beyond the original term can operate, in law, only "as a surrender of the old lease and a grant of a new one," and I do not understand Mr. Megarry to challenge the rule. It does not involve the universal application of a rule of surrender and regrant in the case of every alteration of the term of a lease.

The argument for the appellants was that the operation of the rule did not take place until the option was exercised in 1952 by the fourth party as assignee of the third party, who was an assignee of the defendant, the original lessee, and, therefore, the

[1] [1931] 2 Ch. 210.
[2] (1877) 2 Ex.D. 318, 355 (C.A.).
[3] [1914] 3 K.B. 1186.
[4] [1942] 2 K.B. 326; [1942] 2 All E.R. 311 (C.A.).
[5] [1959] 1 Q.B. 394; [1959] 2 W.L.R. 215; [1959] 1 All E.R. 373 (C.A.).
[6] (1843) 6 Man. & G. 672.
[7] (1785) 1 Cox Eq.Cas. 167.
[8] [1922] 2 Ch. 22 (C.A.).
[9] (1878) 3 Q.B.D. 495 (C.A.).
[10] [1932] 1 Ch. 316.
[11] [1945] Ch. 195; 61 T.L.R. 257; [1945] 1 All E.R. 404.
[12] (1861) 1 J. & H. 424.

[1] [1931] 2 Ch. 210, 217.

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tenant was not bound to the landlord after the expiration of the seven years as he was not a party to the extended lease.

But what was done in 1949 was not a mere agreement for the future; it was the granting and obtaining by mutual agreement of a right which the tenant could at his option exercise, and which at once became an enforceable part of the contract. The agreement did not of itself enlarge the original term but it provided that it might be extended without any further consent of the lessor and was, therefore, a substantial alteration of a character to which the rule applies.

While the agreement for the option was consensual and in law effected a new lease, the exercise of the option, as I think Mr. Megarry rightly contended, was unilateral. He cited, aptly and with resource, the words of Lord Greene M.R. in *Hankey* v. *Clavering*[2]: "Notices of this kind are documents of a technical "nature, technical because they are not consensual documents, "but, if they are in proper form, they have of their own force, "without any assent by the recipient, the effect of bringing the "demise to an end." Here the notice had the effect of enlarging the demise, of its own force. It was in fulfilment of and in accordance with the agreement and not inconsistent with it or in variation of it. No new bargain was struck in 1952. That which had been agreed as permissible became effective.

I have not restated the facts and the relevant documents which have been so clearly and concisely summarised by the judge, and in the judgment of Pearce L.J., with which Havers J. asks me to say he agrees, as I do also in its more complete review of the arguments and in its conclusions.

I do not think the original tenant can escape from the burden he undertook as a lessee of the landlord, and I would dismiss the appeal.

Pearce L.J. stated the facts as set out above, and continued: The appellants contend before us that on the last point the judge was in error on the following grounds: The alteration of the term of a lease is the alteration of an interest in land. The nature of the tenant's interest could only be altered during the currency of the lease by the surrender of the existing interest and a new grant of the fresh interest. That is not a matter of intention but a matter of legal implication. In *In re Savile Settled Estates*[3] Maugham J. said: "I should add that, in my opinion, an altera-"tion of an existing lease so that it will operate for a term "extending beyond the original term can operate, in law, only "as a surrender of the old lease and a grant of a new one. . . ."

The original lease, therefore, was surrendered when the option was exercised by the fourth party in 1952. Thereafter, the defendant was divested of his liability as original lessee, and the fourth party became the original lessee of the fresh grant under which,

[2] [1942] 2 K.B. 326, 329; [1942] 2 All E.R. 311 (C.A.).

[3] [1931] 2 Ch. 210, 217.

thenceforward, the premises must be deemed to be held. The judge, it is said, was wrong in deciding that the surrender and fresh grant need not be implied or that they must, in any case, have occurred in 1949 at the time when the option was embodied in the supplemental deed, for that option did not affect the lease until it was exercised. It never became part of the demise but was merely a collateral bargain as in *Hand* v. *Hall*,[4] where it was held that the presence of an option in the agreement there under consideration did not vary or modify the original demise until the option was exercised.

The present case, it was said, was in some sense stronger than *Hand* v. *Hall*,[4] since in our case the option was a separate subsequent contract embodied in a supplemental deed, and the use of the word "thereupon" suggests that the option was to affect the lease on the exercise of the option and not before. Reliance was also placed on *Inland Revenue Commissioners* v. *Earl of Derby*,[5] as showing that the implied surrender and fresh grant do not take effect until all the conditions of the fresh grant (in our case the exercise of the option) have been fulfilled, and until specific performance could have been granted.

The point is short and turns on when the supplemental deed affected the demise and what that effect was.

In spite of the clarity and force of Mr. Wilberforce's argument, I find myself unable to assent to it. I think it would be wrong to hold that the demise was unaffected by the option until its exercise in 1952. The judge did not feel that it was necessary to imply a surrender and fresh grant. However, he held that in any event, if, contrary to his view, there had to be such an implication, it occurred in 1949 when the option was given, when the tenant would still be the original lessee of the fresh grant, and when the same legal consequences would follow as under the original grant. I incline to the latter view in preference to the former. Although the implication of surrender and fresh grant is a fiction based on estoppel, and, as Clauson J. said in *In re Bruce, Brudenell* v. *Brudenell*,[6] it is not to be encouraged or extended, it is not easy on the authorities to avoid the implication of a surrender and fresh grant where such a change is made in the term, namely, a variation of a term of seven years to a term of seven years with an option for a further four years. But I agree with the judge when he said that, if it be necessary that the variation of the existing term could only operate as a surrender of the original lease and the grant of a new lease, he should feel no difficulty in saying that the effect of the supplemental deed was to work a surrender of the original lease and the grant of a new lease for seven years or, on the happening of a specified event, for 11 years. So to hold would, in my view, carry out the intention of the parties as it appears from the document. By a consensual variation embodied in the supplemental deed

[4] (1877) L.R. 2 Ex.D. 318, 355 (C.A.).
[5] [1914] 3 K.B. 1186.
[6] [1932] 1 Ch. 316, 328.

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endorsed on the lease there was built into the original lease of seven years an option that changed the demise from one of seven years to one which might extend to 11 years on the exercise of the option. It was at that stage that the variation was made. Owing to the clause which was so built into the lease, the happening of an event (namely, the exercise of the option), was to have a retrospective effect and to cause the deed to be read and construed as though it had originally been a lease for 11 years, and to affect the repairing covenant not only thereafter but retrospectively. From the wording of that document, I do not find it possible to regard it as a mere collateral option which did not affect the demise until it was exercised. It is plain that when the supplemental deed was endorsed on the lease the parties regarded the transaction as one demise which might be for seven years or might, on a certain event, continue for 11 years.

There was, therefore, no consensual variation after 1949. The exercise of the option was not a consensual matter. In a dictum which Mr. Megarry's learning elicited from an otherwise irrelevant case (*Hankey* v. *Clavering* [7]), Lord Greene M.R., dealing with a notice to determine, said [8]: "Notices of this kind are documents "of a technical nature, technical because they are not consensual "documents, but, if they are in proper form, they have of their "own force, without any assent by the recipient, the effect of "bringing the demise to an end." The words are equally applicable to a notice of extension. The extension caused by the exercise of the option was not dependent on the landlord's consent. It was not in conflict with the lease as altered in 1949, but arose out of and in accordance with its terms.

Like the judge, I see no rule of law on the facts of this case that prevents us from giving effect to what the parties intended. In my view, he was right in deciding that the tenant is still by privity of contract as original lessee liable in respect of the fourth party's defaults.

Appeal dismissed with costs to be paid by the third party to the plaintiff and to the defendant.

Solicitors: *Otto K. Pollak; Wilkinsons for F. E. Baldock, Guildford; Kenneth Brown, Baker, Baker.*

M. M. H.

[7] [1942] 2 K.B. 326. [8] Ibid. 329.

[COURT OF APPEAL.]

WRIGHT *v.* WRIGHT.

C. A.

1960
Jan. 21, 22, 25;
Feb. 22.

Hodson and Harman L.JJ.; Havers J.

Husband and Wife—Cruelty—Intention to injure—Child of marriage, brutality to—Whether cruelty to wife—Whether intention to injure necessary.

A wife petitioned for a decree of dissolution of marriage on the ground of her husband's cruelty, the cruelty consisting of the husband's punishment of a child of the marriage by beating him over the head and ears with unnecessary brutality, to which he knew his wife was averse, and which the judge found affected her health. There was no evidence that the husband had any express intention to injure his wife's health:—

Held, that in order to establish cruelty it was not necessary to aver or prove an express intention on the part of the husband to injure the health of his wife, and the husband, knowing that his wife intensely disliked his conduct towards the child, must have known that it would injure her health, as it did, and cruelty was established (post, pp. 508, 509).

Squire v. *Squire* [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51, C.A. applied.

Birch v. *Birch* (1873) 28 L.T. 540 and dictum of Bucknill L.J. in *Kaslefsky* v. *Kaslefsky* [1951] P. 38, 43; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398, C.A. distinguished.

Per curiam. There is no difference in principle between cases of indecent assault upon a child of the marriage and cases of ill-treatment by beating, the distinction between them being that no evidence is required to establish that an indecent assault was an unjustifiable act, whereas, on the other hand, a petitioner relying upon the beating of a child must show that what was done was more than reasonable chastisement and was unjustifiable (post, p. 508).

Cooper v. *Cooper* [1955] P. 99; [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415, Divl.Ct.; and *Ivens* v. *Ivens* [1955] P. 129; [1954] 3 W.L.R. 887; [1954] 3 All E.R. 446, C.A. considered.

Decision of Wrangham J. affirmed.

APPEAL from Wrangham J.

By an order dated February 6, 1959, Wrangham J. granted a wife a decree nisi of divorce on the ground of her husband's cruelty.

The following statement of facts is taken substantially from the judgment:

The parties were married on June 9, 1935, the wife then being 22 and the husband 27. There were three children of the marriage: Valerie, born on July 30, 1937; Iris, born on May 5, 1940; and David, born on July 8, 1943. Apart from two incidents, one in August, 1935, and the other in July, 1942 (which Wrangham J. and the Court of Appeal thought of no importance), the cruelty alleged by the wife against the husband was the ill-treatment of the two children Iris and David, in the presence of the wife and despite her protests, by beating them on the head and ears with his hand with unnecessary violence and without good reason. This conduct of the husband was alleged to have

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caused the wife great distress and led to the impairment of her health.

So far as Iris was concerned, the conduct of the husband towards her which was complained of took place while the husband and wife and the children were living in the home of the wife's parents for 12 to 18 months in 1949–1950, which Wrangham J. found was a singularly unwise arrangement. At this time Iris was aged about nine or ten years and slightly obtrusive, and the husband found her rather a nuisance and in his way. Wrangham J. found that the husband would punish her, not maliciously nor with any notion that he was really punishing her, with a smack over the head or the ears—and not one but more than one—for merely being in his way at the time. The judge accepted the evidence of Iris that at that time she actually became frightened of her father. The wife used to ask her husband to stop, and he refused. The judge thought that the wife was entitled to object to this conduct of the husband, not because it was necessarily cruel but because the husband was not deliberately and thoughtfully punishing the child for her good, he was merely in a fit of temper or irritation, hitting the child harder than she should have been hit, and in circumstances in which it was not really justifiable to hit her at all.

The judge, however, regarded the treatment of Iris as of no importance except in so far as it threw light on the character and disposition of the husband in this case, because it did not last for more than 12 to 18 months and had ceased for years before action brought. The Court of Appeal agreed with those findings. The whole case of the wife, therefore, rested on the conduct of the husband towards David between 1950 and July, 1957. By this time the husband and wife and the children had moved to their own home. David was then about eight; and the judge found that the same thing happened with David as had happened with Iris. He got in his father's way and irritated his father. The result of his getting in his father's way and irritating him was that he got continually slapped on the side of the head and on the head.

The judge believed the evidence of Mr. Everitt, the wife's father (whom he thought was a convincing witness), that the way in which the husband treated David went far beyond anything that was reasonable at all. Her father told the husband that this was not the way to punish the boy, but the husband paid no attention. Iris stated in evidence that David was struck with great severity, mostly about the ears or face, and the result was that her mother was very upset. The judge found that the husband was treating this boy in a way in which he ought not to be treated; that he did not confine himself to a single clip on the ear for a naughty boy but was hitting him on the head more than once; that there were occasions when the wife attempted to interfere and was pushed out of the way. He did not believe that these punishments were administered in order to teach the child

not to do it again nor for the child's good; they were mere outbursts of ill-temper against a child which had irritated its father, possibly by doing something that was wrong or possibly by doing something that was not really, from the child's point of view, wrong at all. The judge found that this form of treatment was particularly bad for David because he was a boy who could not stand that type of thing.

The judge did not find proved an allegation that David tried to gas himself with a gas-poker, but he accepted that the boy said, and at the moment believed, that nobody loved him, and that he had a chip on his shoulder, but did not accept that the state of the boy was wholly due to his father's treatment of him. The criticism which the judge made about the father was that if he had been an affectionate and observant father, he would have known about it and noticed it, but instead of noticing it he went on treating the boy in the same way throughout those years.

The judge also found that the husband must have known very well that his wife's health was very likely to have been impaired by his continuance of treatment which she clearly disliked as being harsh, but despite that knowledge that he must have had as to the effect upon his wife he continued in the same course.

Matters went on in this way and by the summer of 1957 the situation was getting worse and worse. Some time in the summer of 1957 the wife said that she heard a noise and banging in the front room and went in and found the husband hitting David very hard about the head and ears again. The wife said that she complained and told her husband that, if the boy had done anything wrong, would he please correct him in the proper manner. He told her to mind her own bloody business and he would do as he liked in his own house and that her bloody parents had spoilt David. He said he would hit the boy where he liked and called the boy "a swine." There was no express finding about this, but the husband said there was an occasion when he said he would strike the boy when and where he liked; he could not recollect calling him "a swine," but he might have said it on that one occasion when he was annoyed.

After this incident the wife consulted her doctor, Dr. Gold, about this matter. She said she went with her husband and that they were both present when the doctor told the husband that he ought not to hit David any more about the head or face. The husband says he went alone, as his wife had told him the doctor wanted to see him. The husband said that from that time he did not strike the boy again. There was no evidence that he ever did. Unfortunately, he never told his wife, because he was annoyed with her for consulting the doctor about David.

During July or early August, David went to stay with the wife's parents and while he was there the wife arranged for him to stay permanently with her parents and changed his school. This annoyed the husband intensely. They returned home without David and there were quarrels on their return. Shortly

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afterwards the husband and wife consulted solicitors about their matrimonial affairs. On March 6, 1958, the wife filed the petition in this suit for dissolution of marriage, and on March 8, 1958, she left the matrimonial home with Iris and had never returned. Valerie had already left in February, 1958.

Upon these facts the judge held that the wife had established cruelty against the husband. The husband appealed from that decision.

James Comyn and *R. B. Holroyd Pearce* for the husband.
Stanley Rees Q.C. and *H. S. Law* for the wife.

Cur. adv. vult.

Feb. 22. HODSON L.J. read the judgment of the court and, having stated the facts, continued: Mr. Comyn, for the husband, contended before us: (1) that the facts found by the judge with regard to the conduct of the husband towards David were against the weight of evidence; (2) that the finding of the judge that the conduct of the husband towards David impaired the health of the wife was against the weight of the evidence; (3) that the fact found by the judge that the conduct of the husband towards David gave reasonable apprehension of injury to the health of the wife was against the weight of the evidence; (4) that the judge wrongly drew an inference unfavourable to the husband from the fact that the daughter Valerie was not called as a witness; (5) that the facts found by the judge do not amount to cruelty in law; (6) that on the facts found by the judge, he ought to have drawn an inference that the husband's cruelty to the wife, if any, had been condoned.

The judge had the advantage, which we have not had, of seeing and hearing the witnesses. He made a careful assessment of the credibility of each of the witnesses called as follows: "To "deal with the witnesses called on the wife's side, first, the wife "herself is a very neurotic woman, inclined to exaggerate and "distort facts, but not, I think, capable of telling a flat lie, and "not at all likely to invent an incident for which there was no "foundation at all. There were called on her behalf her daughter, "Iris, whose evidence has been generally accepted as truthful, "and who, in addition, I believe to be accurate; her doctor, whose "evidence naturally I accept as accurate; her father, Mr. Everitt, "who struck me as a sensible man, and whose evidence in "substance I accept; and her mother Mrs. Everitt, a foolish and "malicious woman, whose evidence, except where it is confirmed "by other witnesses, I unhesitatingly reject. On the other side, "the only witness was the respondent himself, who I am satisfied "was doing his best to respect the oath, and who was as candid "a witness as one ever sees in a case of this kind. That does not "mean that I think everything he said was accurate from start "to finish, because it is really difficult for either a husband or a "wife, in circumstances of this kind, where emotions are aroused

" and where there is a natural tendency to justify oneself, to be " completely accurate. But I do think he was doing his best, " and I was very much impressed by the way in which, unlike " his wife, he did not fence with questions, but made a great " many admissions which were, in a sense, against his own " interest—though I hope it is not against anybody's interest to " tell the truth."

When an appellate court is asked to disturb the finding of fact in a suit for divorce, particularly on the ground of cruelty, the court must be guided by the decision of the House of Lords in *Watt or Thomas* v. *Thomas*.[1] Lord Thankerton in his speech said[2]: " It will hardly be disputed that consistorial cases form a " class in which it is generally most important to see and hear " the witnesses, and particularly the spouses themselves; and, " further, within that class, cases of alleged cruelty will afford " an even stronger example of such an advantage."

The judge said that, if the case rested upon the evidence of the wife alone, he did not think he would be prepared to act upon it. Her evidence was, however, corroborated by the evidence of Mr. Everitt and Iris, whom the judge regarded as truthful and accurate witnesses. It is true that in 1954 when Dr. Gold saw David he could find no marks upon him. David was never taken to Dr. Gold for examination in 1957 or at any time other than the occasion in 1954. The husband, however, admitted that on perhaps half a dozen occasions he struck David three times for a single fault, though he did not admit that the blows were unduly severe.

Though, as Mr. Rees conceded, this is a border-line case, we do not think that it is possible in this court to disturb the finding of the judge that the treatment of David by the husband was unjustifiable.

[The court reviewed the evidence relevant to the second contention on behalf of the husband, that the finding that the conduct of the husband towards David impaired the health of the wife was against the weight of the evidence, and continued:] We are of the opinion that the finding of injury to health brought about by the husband's conduct was right.

In view of this finding it is not necessary to decide the next question, namely, whether the judge was right in deciding that the conduct of the husband to David gave rise to reasonable apprehension of injury to the health of the wife, if she continued to live with her husband.

The judge commented on the fact that the eldest daughter, Valerie, who knew most of the truth of the matter apart from the husband and wife, had not been called as a witness either by her mother or father. From this he drew the inference that Valerie's evidence, had she been called, would not have supported her

[1] [1947] A.C. 484; [1947] 1 All E.R. 582, H.L.

[2] [1947] A.C. 484, 488.

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mother's evidence, at least in full, and would not have supported her father's evidence either. Mr. Comyn contended before us that the judge was not entitled to draw the inference that her evidence would not have supported the father's evidence. Mr. Comyn could, if he had thought fit to do so, have compelled her to give evidence on subpoena, but in the exercise of his discretion he did not do so. It is clear from the observations of the judge that the inference which he drew was far more adverse to the wife than to the husband, and we do not think that, in so far as he drew any inference unfavourable to the husband, he attached any weight to it.

Mr. Comyn applied to us for leave to call Valerie as a witness before this court. He did not suggest that Valerie could not have been called as a witness at the trial, but stated that at that time she was unwilling to be called. In our view it would be wholly contrary to the practice of this court to allow her to be called in these circumstances, and the application of Mr. Comyn was refused.

The next contention of Mr. Comyn was that the facts found by the judge do not amount to cruelty in law. Mr. Comyn relied upon the passage in the judgment of Sir James Hannen in *Birch* v. *Birch*,[3] a case in which a husband frequently beat one of his children in the presence of the wife with great violence and without cause. Sir James Hannen said[4]: "With regard to the "brutality of the husband towards the child, that cannot be relied "upon. I do not say that it could not be under all circumstances; "because, undoubtedly, if the evidence showed that the violence "was committed upon the child for the express purpose of wounding the feelings of the mother to such an extent as to injure her "health it would amount to cruelty. But there is nothing to "support such a charge in this case. . . ." Mr. Comyn contended, in our view rightly, that there was no evidence of "express purpose" in this case.

Bucknill L.J., in *Kaslefsky* v. *Kaslefsky*,[5] referring to this passage, said[6]: "That is a clear statement that brutality to the "child would not amount to cruelty to the wife, unless it were "shown to have been done for the express purpose of wounding "her feelings in such a way as to injure her health. The question "which one has to consider is whether the law contained in that "decision of Sir James Hannen[7] has been modified by the "decision of the Court of Appeal in *Squire* v. *Squire*.[8] I do not "think that the decision in *Squire* v. *Squire*[8] has had that "effect." In a later passage Bucknill L.J. said[9]: "I venture to "think that that is one of the tests which has to be applied: is "the conduct of the wife, unless done for the express purpose

[3] (1873) 28 L.T. 540.
[4] Ibid. 541.
[5] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398, C.A.
[6] [1951] P. 38, 43.
[7] 28 L.T. 540.
[8] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51, C.A.
[9] [1951] P. 38, 44.

" of injuring the health of the husband, innocent in the sense that " it is justified or justifiable under the circumstances? In cases " such as refusal of sexual intercourse, or sheer laziness, or " neglect of a child, I think that is conduct which is innocent, so " far as any charge of cruelty is concerned, unless it is done for " the express purpose of causing injury to the health of the " complaining spouse." Somervell L.J. agreed with the judgment of Bucknill L.J. and with the reasons given by him. Denning L.J. drew a distinction between conduct of one spouse which consists of actions or words actually or physically directed at the other spouse and misconduct of one spouse indirectly affecting the other spouse, such as drunkenness, gambling or crime. He said that in the former case it is not essential that there should be a specific intent to injure or even cause distress: in the latter case such misconduct [10] " can only properly be said to be aimed " at the other when it is done, not only for the gratification of " the selfish desires of the one who does it, but also, in some part, " with an intention to injure the other and to inflict misery on " him or her. Such an intention may readily be inferred from " the fact that it is the natural consequence of the conduct, " especially when the one knows, or it has been brought to his " notice, what the consequences will be, and nevertheless he does " it, careless and indifferent whether it distresses the other or " not."

In *Squire* v. *Squire* [11] the Court of Appeal held that the principle that a person must be presumed to intend the natural and probable consequences of his or her acts is applicable to acts alleged to amount to cruelty in matrimonial causes. It is not, therefore, necessary to constitute cruelty that the conduct complained of should have proceeded from malignity or an intention to harm the complaining spouse. Tucker L.J. cited [12] with approval a passage in the judgment of Shearman J. in *Hadden* v. *Hadden* [13]: " I do not question he had no intention of being " cruel but his intentioned acts amounted to cruelty."

Lord Merriman, in *Simpson* v. *Simpson*,[14] expressed his agreement with *Squire* v. *Squire*,[15] and adhered to that view when sitting in the House of Lords in *Jamieson* v. *Jamieson*.[16] In *Jamieson* v. *Jamieson*,[16] a wife's action in Scotland for divorce on the ground of cruelty, it was held by the House of Lords that averments that the husband had been guilty of conduct calculated to hurt her, and deliberately persisted in with knowledge of the resulting injury to her health, were relevant to go to proof. Lord Normand said [17]: " The Lord President, I think, reaches the " crux of the case when he says [18] that ' where the cruelty is of

[10] [1951] P. 38, 46.
[11] [1949] P. 51.
[12] Ibid. 51.
[13] The Times, Dec. 5, 1919.
[14] [1951] P. 320, 333; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955, Divl.Ct.
[15] [1949] P. 51.
[16] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875, H.L.
[17] [1952] A.C. 525, 535.
[18] 1951 S.C. 286, 294.

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" ' the type conveniently described as " mental cruelty," the " ' guilty spouse must either intend to hurt the victim or at least " ' be unwarrantably indifferent as to the consequences to the " ' victim.' There is room for differences of opinion about what " kinds of case may be covered by the words ' unwarrantably " ' indifferent.' I do not propose to go into that because I wish " to avoid the discussion of hypothetical cases and because I am " of the opinion that actual intention to hurt may have in a " doubtful case a decisive importance, and that such an intention " has been averred here. Actual intention to hurt is a circum- " stance of peculiar importance because conduct which is intended " to hurt strikes with a sharper edge than conduct which is the " consequence of mere obtuseness or indifference."

Lord Merriman said [19]: " I fully agree with your Lordships that " the averment of an intention on the part of the husband to impose " his will on the pursuer, and the averment of persistence in his " callous conduct although aware of its effect upon his wife's " health, both of which are plainly made, are important averments " in this case. In saying this, however, I must not be taken to " suggest that either in England or in Scotland it is essential to " impute to the wrongdoer a wilful intention to injure the aggrieved " spouse in order to establish a charge of cruelty." Lord Merriman then expressed his approval of *Squire* v. *Squire*.[20]

Lord Reid said [21]: " . . . there can hardly be a more grave " matrimonial offence than to set out on a course of conduct " with the deliberate intention of wounding and humiliating the " other spouse and making his or her life a burden, and then " to continue in that course of conduct in the knowledge that it is " seriously affecting his or her mental and physical health. . . . " What I have said is only intended to apply when a deliberate " intention such as I have described was the cause of the " defender's conduct. Such an intention need not be proved by " direct evidence; it may be inferred from the whole facts and " atmosphere disclosed by the proof. I do not doubt that there " are many cases where cruelty can be established without it " being necessary to be satisfied by evidence that the defender " had such an intention, but I do not intend to decide anything " about such cases. If the defender did not in fact intend to ill- " treat the pursuer, I desire to reserve my opinion whether, or to " what extent, it is necessary or proper to impute an intention " which did not exist by invoking a legal presumption that every- " one must be supposed to intend or foresee the natural and " probable consequences of his acts. . . ." In *King* v. *King* [22] Lord Reid repeated in substance the same observation.

Lord Merriman, in *Cooper* v. *Cooper* (*No. 2*),[23] pointed out

[19] [1952] A.C. 525, 540.
[20] [1949] P. 51.
[21] [1952] A.C. 525, 548, 549.
[22] [1953] A.C. 124, 140; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584, H.L.
[23] [1955] P. 99; [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415, Divl.Ct.

that Lord Reid was alone in this reservation and said [24]: "Neither "Lord Normand, nor Lord Tucker, who delivered the principal "judgment in *Squire* v. *Squire*,[25] dealt with the point at all, "while, as I have already said, I adhered to my opinion, "expressed in *Simpson* v. *Simpson*,[26] that *Squire* v. *Squire* [27] "was rightly decided." Lord Tucker, in *Jamieson's* case,[28] said: "Every such act must be judged in relation to its attendant "circumstances, and the physical or mental condition or sus- "ceptibilities of the innocent spouse, the intention of the offending "spouse and the offender's knowledge of the actual or probable "effect of his conduct on the other's health (to borrow from the "language of Lord Keith) are all matters which may be decisive "in determining on which side of the line a particular act or "course of conduct lies. For this reason I agree with Lord "Keith [29] that it is, generally speaking, not possible to 'com- "'partment acts for purposes of relevancy as being gross, so as to "'constitute cruelty, or less gross, so as not to constitute "'cruelty.'"

There is a line of cases, beginning in 1901, in which it has been held that indecent assaults on a child of the marriage or of one of the spouses and sexual offences against third parties may amount to cruelty to the innocent spouse, though in committing those acts the husband had no actual intention to injure his wife. These cases were reviewed by Karminski J., who gave the first judgment of the Divisional Court in *Cooper* v. *Cooper*.[30] He began with *Thompson* v. *Thompson*,[31] where the husband debauched the servants in the matrimonial home. He then referred to *Bosworthick* v. *Bosworthick* [32] (a case of indecent assault on little girls), and *Boyd* v. *Boyd*,[33] where Bucknill J. held that an indecent assault on a young girl had not amounted to constructive desertion, but granted a decree nisi for cruelty arising from the same offence.

In *Cooper* v. *Cooper* [34] the husband had been convicted of indecently assaulting a child of the marriage not in the presence of the wife. The wife's summons alleging persistent cruelty to her was dismissed by the justices upon the ground that there was no evidence to show that the assault was committed in the presence of the wife and with the intention of causing his wife pain. The court held that the justices had misdirected themselves on the issue of cruelty and sent the case back to them for a rehearing. The court held that an actual intent to injure is not an essential averment in cruelty, although in a doubtful case it may be of decisive importance. Conduct which is the consequence of mere obtuseness or indifference may nonetheless be cruelty.

[24] [1955] P. 99, 125.
[25] [1949] P. 51.
[26] [1951] P. 320.
[27] [1949] P. 51.
[28] [1952] A.C. 525, 550.
[29] 1951 S.C. 286, 299, 300.
[30] [1955] P. 99.
[31] (1901) 17 T.L.R. 572.
[32] (1901) 18 T.L.R. 104.
[33] [1955] P. 126n.; 55 T.L.R. 3; [1938] 4 All E.R. 181.
[34] [1955] P. 99.

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This case was followed by the Court of Appeal in *Ivens* v. *Ivens*,[35] where a husband had committed indecent assaults on the wife's daughter by a previous marriage. It was held that a criminal and indecent assault by a husband on a child might amount to cruelty to the child's mother, although no intention to injure the mother was shown. In this case the husband must have known what the effect of his conduct would be on his wife and on her state of health and yet, careless and indifferent to what the effect would be, he continued with his indecent conduct. The facts proved were held to constitute a strong case of cruelty. In his judgment Lord Goddard C.J. referred[36] to *Daniell* v. *Daniell*,[37] where the husband corrected his children by whipping, though his wife objected to any corporal punishment being inflicted upon them. Lord Goddard explained that the reason why the court refused to hold that what was done in that case amounted to cruelty to the wife was because it took the view that the husband was justified in chastising children so long as he did not do it in an unreasonable or brutal fashion.

In our view there is no difference in principle between the cases of indecent assault upon a child of the marriage and cases of ill-treatment of a child by beating. The distinction between them is that no evidence is required to establish that an indecent assault (which, in the words of Lord Merriman, is[38] " directly " relevant to the husband's conjugal relations ") is an unjustifiable act; whereas, on the other hand, the petitioner must show, when she is relying upon the beating of a child, that what was done was more than reasonable chastisement and was unjustifiable. Where the act relied upon is an indecent assault upon a child of the marriage, little if any evidence is required to persuade the court that the husband knew or must have known that his conduct would or would be likely to affect her health. On the other hand, where the wife is relying upon ill-treatment of the child by beating, she must prove facts from which the court should infer that the husband knew or must have known that his conduct would or would be likely to injure his wife's health, but it cannot be necessary to prove that the purpose was expressed in words if that is what is meant by " express purpose " in the judgment of Sir James Hannen which we have cited.[39]

We do not think it is possible to reconcile *Birch* v. *Birch*[40] and the passage in the judgment of Bucknill L.J. in *Kaslefsky* v. *Kaslefsky*[41] to which we have referred with *Squire* v. *Squire*,[42] unless Bucknill L.J. was referring to conduct which was innocent in the sense that it is justifiable in the circumstances.

If the conduct of a husband towards a child of the marriage is unjustifiable, as we find it to have been in this case, it is not

[35] [1955] P. 129; [1954] 3 W.L.R. 887; [1954] 3 All E.R. 446, C.A.
[36] [1955] P. 129, 130.
[37] The Times, Feb. 2, 1954, C.A.
[38] [1955] P. 99, 123.
[39] 28 L.T. 540, 541.
[40] Ibid. 540.
[41] [1951] P. 38, 43.
[42] [1949] P. 51.

necessary to aver or prove an express intention by the husband to injure the health of the wife. The husband knew that the wife was averse to his conduct, neurotic and anaemic as she was, and must have known that it was likely to cause injury to her health, as it did. We agree with the judge in finding that cruelty was established.

The answer of the husband contained a bare denial of cruelty. There was no plea of condonation. The judge, however, had the duty of satisfying himself that the cruelty had not been condoned, and found that the wife had not condoned the cruelty.

In our judgment this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Warmingtons & Trevor Jones; Barnett & Barnett.*

I. G. R. M.

[CHANCERY DIVISION.]

TAYLOR *v.* ELLIS AND ANOTHER.

1960
Feb. 9, 10.

[1959 T. No. 1004.]

Cross J.

Mortgage—Leasing, power of—Express provision—Statutory power of leasing excluded except with written consent of mortgagee—Grant of tenancy—No evidence of consent—Onus of proof of consent—Knowledge of lease by mortgagee—Non-payment of mortgage interest—Whether lease binding on mortgagee.

A mortgage dated October 27, 1924, excluded the mortgagor's statutory power of leasing unless the mortgagee should consent in writing to the lease. By an agreement dated September 19, 1940, the surviving mortgagor purported to grant a monthly tenancy to W. H. The surviving mortgagor, who granted the tenancy, died on July 11, 1943, and the original mortgagee died on July 21, 1957. There was no evidence that the mortgagee did give written consent to the grant of the tenancy, but there was no positive evidence that he did not, and it was possible that he had: it was admitted that the mortgagee knew of the tenancy. No mortgage interest was paid after October, 1950, and, on August 5, 1959, the mortgagee's personal representative issued an originating summons claiming possession of the property subject to the mortgage:—

Held, (1) that the onus was on the tenant to prove that the mortgagee gave written consent to the grant of the tenancy and, therefore, in the absence of any evidence of such consent, the tenancy was not, to begin with, binding on the mortgagee.

(2) That the tenancy had not become binding on the mortgagee by reason of the events subsequent to the grant of the tenancy, for it would be wrong to infer merely from the facts that the mortgagee,

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[Reported by Miss V. A. MOXON, Barrister-at-Law.]

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having knowledge of the tenancy, allowed the tenant to remain in possession, and that no interest had been paid for nine years, that the mortgagee had consented to take the tenant as his tenant. The plaintiff, accordingly, was entitled to possession against the tenant.

In re O'Rourke's Estate (1889) 23 L.R.Ir. 497 applied.

Hepworth v. *Pickles* [1900] 1 Ch. 108 distinguished.

Originating summons.

By a mortgage dated October 27, 1924, William John Ellis and Albert Edward Ellis, the legal personal representatives of William Ellis, deceased, granted a mortgage on a property known as "Killarney," at Etchingham, Sussex, to Thomas Taylor, to secure the repayment of a sum of £250 with interest. The mortgage provided, inter alia, that it was expressly agreed and declared that no lease made by the borrowers of any of the property or any part thereof during the continuance of the security should have effect by force or virtue of the Conveyancing and Law of Property Act, 1881, unless the lender should consent thereto in writing.

On April 15, 1936, William John Ellis died. On September 19, 1940, Albert Edward Ellis, the surviving mortgagor, granted a tenancy of the whole of the property to William Thomas Hayler who, since about 1928, had been in possession of part of the property as a sub-tenant of Barclays Bank Ltd., it appearing that Barclays Bank Ltd. held the whole of the property under a lease which came to an end in 1940. The tenancy was determinable by a month's notice on either side; and there was nothing in its terms to prevent it from being an exercise of the statutory power of leasing.

On July 11, 1943, Albert Edward Ellis died. His legal personal representatives were Edith Miriam Jeffery and Lionel Charles Ellis. Edith Miriam Jeffery died on June 6, 1947, leaving Lionel Charles Ellis the legal personal representative by representation of the surviving mortgagor.

No interest under the mortgage was paid to the mortgagee after October 5, 1950. On July 21, 1957, the mortgagee died and on August 5, 1959, the plaintiff, his legal personal representative, issued an originating summons against Lionel Charles Ellis, as the person entitled to redeem the mortgage, and the tenant, as the person in possession of the property, claiming possession of the property.

N. Browne-Wilkinson for the plaintiff.

Bryan Clauson for the tenant.

The first defendant, Lionel Charles Ellis, did not appear and was not represented.

The following case, in addition to those referred to in the judgment, was cited in argument: *Iron Trades Employers Insurance Association Ltd.* v. *Union Land and House Investors Ltd.*[1]

[1] [1937] Ch. 313; 53 T.L.R. 341; [1937] 1 All E.R. 481.

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TAYLOR v. ELLIS.

CROSS J. On October 27, 1924, the legal personal representatives of one William Ellis, who were, as such, the owners of a house known as "Killarney" at Etchingham in Sussex, granted a mortgage on that property to Thomas Taylor to secure the repayment of a sum of £250 with interest. Of course, at that date, the mortgage took effect as a conveyance of the fee simple of the property, and there was only an equitable interest left in the mortgagors. By the operation of the Law of Property Act, 1925, from January 1, 1926, the interest of the mortgagee was converted into a long term of years with an ultimate reversion in the mortgagors, but it is common ground between the parties that nothing in this case turns on that change.

There is only one provision of the mortgage which it is important to bear in mind, and that is, that it was expressly agreed and declared by and between the parties that no lease made of the property or any part of it by the borrowers during the continuance of the security "shall have effect by force or "virtue of section 18 of the Conveyancing and Law of Property "Act, 1881," which is now replaced by section 99 of the Law of Property Act, 1925—"unless the lender shall consent thereto in "writing."

[His Lordship stated the facts and continued:] The first point which arises is whether or not the grant of the tenancy was an exercise of the statutory power of leasing; whether or not, that is to say, the mortgagee gave his consent to it in writing. Normally, in cases of this sort there is not the least difficulty in saying whether or not the consent in writing was given, because normally the mortgagee is alive, and can say whether or not he consented; and, again, when the mortgagee is a company, such as a building society, the difficulty can hardly arise. The difficulty which has arisen in this case is that both the mortgagee and the mortgagor who created the tenancy are dead.

The way the matter stood on the affidavit evidence was that a Mr. Serres, an assistant solicitor with a firm of solicitors, Andrews and Bennett, who are acting for the plaintiff in these proceedings, said in his affidavit that neither the mortgagee nor any person on his behalf ever gave his consent to the grant of such a tenancy. It has emerged, and it is common ground between the parties, that there really is no positive evidence that the mortgagee never consented in writing to the tenancy as, for example, there would have been had the deceased mortgagor told Mr. Serres that he had never asked for or taken any consent from the mortgagee. Had that been proved, there would have been positive evidence that there was no consent. The matter simply rests in this way, that the firm of Andrews and Bennett were acting in 1940, when the tenancy was granted, both for the mortgagee and for the mortgagor, and that there is no record in the firm's papers of any written consent by the mortgagee to the creation of the tenancy. As I said, there is no positive evidence that he did not give his consent and it remains possible that he may have done so.

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On those facts the point that has been argued is on whom does the onus lie to establish that the mortgagee either gave or did not give his consent in writing.

I think the matter can best be decided by asking how the point would be pleaded in an action of ejectment. It seems to me that the mortgagee in his statement of claim against anybody in possession of the land would have to do no more than set out the mortgage, which showed that he had the immediate legal estate, and claim possession. It would not be necessary for him to allege that the defendant claimed to be in possession as a tenant, but that the tenancy was not binding on him: it would be sufficient for him to say that he had the legal estate as mortgagee, and that he claimed possession. I did not understand Mr. Clauson really to dispute that.

Then there comes the question of defence. Mr. Clauson suggests that it would be sufficient for the defendant to set up the tenancy by way of defence without asserting that the mortgagee had consented in writing to its creation, and that that would raise (as it were) a prima facie case on his side which would force the plaintiff by way of reply to make a negative allegation that the mortgagee had never consented in writing to granting a tenancy. If that is the case, of course, the plaintiff in his case would not be able to establish that proposition.

In my judgment, that is not the right way of looking at the matter. I think that it can be tested in this way: suppose there had been, as there might well have been, in the mortgage deed an absolute prohibition on the granting of any leases. Had that been so, it is always possible that the mortgagee might have so conducted himself as not to be able to rely on that absolute prohibition. He might, notwithstanding the prohibition, have waived his rights or consented in some way to the lease. But if a tenant were going to allege that in the face of an absolute prohibition, he would have to set it out in his defence. It seems to me that in the same way here, where the provision in the mortgage is that a lease will only be binding on the mortgagee if he consents thereto in writing the defendant would have to show that there had been a consent in writing. It is an additional argument in favour of that way of looking at the matter that the courts lean somewhat against imposing on any party to litigation the burden of proving a negative. That appears from various obiter dicta in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[1] I would refer particularly to the dictum of Lord Russell of Killowen[2]: "In coming to this conclusion I am influenced by three considerations. First, the proving of a negative, a task always difficult and often impossible, would be a most exceptional burden to impose on a litigant."

In my judgment, therefore, on the first point, the plaintiff is right, and in the absence of any evidence that the mortgagee did

[1] [1942] A.C. 154, 177, 194, 202; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[2] [1942] A.C. 154, 177.

consent in writing—and, indeed, the evidence as far as it goes strongly suggests that he did not, because if he had consented in writing one would have expected the document to be available—I think that it must be taken that to begin with this tenancy was not binding on the plaintiff.

Then the question arises: did the mortgagee become bound by the tenancy by reason of subsequent events? It is, of course, quite common for a mortgagee who is not previously bound by a tenancy to consent to take the mortgagor's tenant, whom he could have treated as a trespasser, as his own tenant. The commonest way in which that happens is when a mortgagor fails to pay the mortgage interest and the mortgagee serves a notice on the tenant to pay the rent to him. Then a new tenancy is created between the mortgagee and the mortgagor's tenant. But all that happened in this case was that for a great many years the tenant was allowed to remain in occupation of the property, and then there is the very curious circumstance that from October 5, 1950, onwards no mortgage interest was paid.

Apart from that second point, it does not seem to me that the fact that the tenant of the mortgagor, who could have been treated by the mortgagee as a trespasser, was allowed to remain in possession for a long period could itself in any way preclude the mortgagee from treating him as a trespasser if and when he desired to do so. After all, as long as the mortgage interest is being paid, the mortgagee may perfectly well be content to allow the tenant to remain in possession. The only way in which he can turn him out of possession is by going into possession himself, which is a thing a mortgagee is generally very unwilling to do. I think that it would be quite wrong to infer merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy—there is no doubt in this case, and it is accepted, that Thomas Taylor knew of the tenancy—that the mortgagee consented to take the tenant as his tenant.

In that connection I entirely agree with the passage in the judgment of Monroe J. in *In re O'Rourke's Estate*,[3] quoted by Danckwerts J. in *Parker* v. *Braithwaite*.[4] Monroe J. said[5]: "I certainly cannot infer the creation of a new tenancy "between the tenant and the mortgagee merely because the "mortgagee takes no active steps to disavow a tenancy created "by the mortgagor. The mortgagor, while in possession, and "bound to keep down the interest on his mortgage, is at liberty "to manage the lands as he pleases. It is not for the mortgagee "to interfere with that management unless he choose to go into "possession. He treats the tenancy as one binding on the mort-"gagor, but in no way binding upon himself if he find it "afterwards for his interest to repudiate it."

On this part of the case Mr. Clauson referred me to *Hepworth*

[3] (1889) 23 L.R.Ir. 497, 501.

[4] [1952] 2 T.L.R. 731, 735; [1952] 2 All E.R. 837.

[5] 23 I.R. 497, 501.

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v. *Pickles* [6] which turned on the question of waiver of a right to enforce restrictive covenants. The facts are set out in the headnote [7]: "By a conveyance dated in 1874, a certain plot of land "was conveyed subject to a covenant that no dwelling-house, "shop, or other building to be erected on the land should at any "time thereafter be used as an inn, tavern, or beerhouse. "Shortly after the date of the conveyance beer and spirits were "sold in one of the houses erected on the land, and continued "to be openly sold for upwards of twenty-four years." It was held that by reason of his knowledge of that course of dealing the person entitled to enforce the restrictive covenant had waived or released his rights.

That case does not seem to me to have any relation at all to a case of this sort. There is not here a covenant by the mortgagor that he will not part with possession of the mortgaged premises, or purport to create any tenancy binding between himself and the tenant. There is no covenant which the mortgagee can enforce; his only way of protecting himself or preventing the creation of a tenancy binding as between the mortgagor and the tenant is to go into possession himself. As I have said, I do not think you can for one moment infer from the fact he does not go into possession that he is in any way waiving his right to treat the tenant as a trespasser.

Then one comes to what is certainly a very curious feature of this case, namely, the fact that from October, 1950, onwards no interest has been paid under the mortgage. Of course it is when interest ceases to be paid under the mortgage that one looks with an expectant eye to see if there has not been some recognition by the mortgagee of the mortgagor's tenant as his tenant, because you would expect him then to serve a notice saying: "I want the rents." But there is absolutely no evidence here that anything happened at all. Thomas Taylor was apparently content to go without his interest until he died in 1957 and his executrix has gone without the interest down to the issue of this summons. If they had gone on going without the interest for 12 years they would have lost all rights altogether; but only nine years have elapsed. I do not think that I can infer, simply from the fact that no interest was paid, anything against the original mortgagee or the plaintiff as his executrix. It does not seem to me to carry the matter any further. It is a curious circumstance but again I do not think anything can be made of it.

So, in my judgment, the plaintiff is right on the second point also. The result is that the plaintiff is entitled to an order for possession.

Order accordingly. No order as to costs.

Solicitors: *Gouldens for Andrews & Bennett, Burwash; Spenser Limbrey & Co.*

[6] [1900] 1 Ch. 108.

[7] [1900] 1 Ch. 108.

[CHANCERY DIVISION.]

WILKINS (INSPECTOR OF TAXES) *v.* ROGERSON.

1960
Feb. 16.

Danckwerts J.

Revenue — Income tax — Employment — Perquisite — Valuation — Cost or value in hands of recipient—Gift from employer of new suit of clothes—Whether employee taxable on second-hand value only of suit—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *r.* 1.

In 1955 the directors of a company decided to give to each of their employees a suit, overcoat or raincoat made by a named tailor as a Christmas present. They requested the tailor to give each employee a fitting and requested each employee to call at a branch of the tailor and order a suit, overcoat or raincoat as he chose. The bills were to be sent to the company. One of the employees called at a branch of the tailor, ordered a suit and in due course received it. His suit cost £14 15s., which sum the company paid. A sum of £14 15s. in respect of the suit was included in an assessment made on the employee under Schedule E of the Income Tax Act, 1952,[1] for the year 1955 to 1956, as part of the "perquisites or profits" arising from his employment. The employee appealed to the special commissioners, who held that the amount to be included was not £14 15s., but the value of the suit in his hands on the footing that he could immediately have sold it only as second-hand, which value was agreed at £5. On appeal by the Crown:—

Held, that "perquisites and profits" in rule 1 of Schedule 9 to the Income Tax Act, 1952,[1] meant the perquisites or profits which had been received by the employee whom it was desired to tax; that where a taxpayer received something and it was in his hands as the result of the transaction which had been carried out, the amount of the profit which he had received was the value in his hands of what he had got; and that, accordingly, the benefit which the employee had received was the value of the suit in his hands, and that value, £5, was the amount which should be included in his taxable income for the purposes of Schedule E.

Weight v. *Salmon* (1934) 19 T.C. 174 and *Ede* v. *Wilson* (1942) 26 T.C. 381 applied.

Nicoll v. *Austin* (1935) 19 T.C. 531 distinguished.

Dictum of Lord M'Naghten in *Tennant* v. *Smith* (1892) 3 T.C. 158, 161 applied.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent taxpayer, S. A. Rogerson, appealed to the special commissioners against an assessment made on him under Schedule E of the Income Tax Act, 1952, for the year 1955–56 in the sum of £1,036 on the ground that a sum of £14 15s. paid by his employers for a suit bought by them as a present to him and supplied to him by Montague Burton Ltd. was wrongly included

[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E, or to whom any annuity, pension or stipend chargeable under that schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . ."

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in computing the amount of his salary, fees, wages, perquisites or profits within the meaning of rule 1 of Schedule 9 to the Act.

The following were among the facts found by the special commissioners: The taxpayer was for the whole of the material year an employee of a company, the Anglo-Oriental and General Investment Trust Ltd. His duties were almost exclusively secretarial and were performed solely at the head office of the company at 55–61, Moorgate, E.C.2, and he was remunerated for his employment by a salary and, at the discretion of the directors, bonuses based on salary. The bonuses were usually paid to him in June and before Christmas in each year. In the material year, 1955–56, he received his usual bonuses and there was no issue before the special commissioners as to his liability to be assessed under rule 1 of Schedule 9 to the Act in respect of that salary and those bonuses.

In 1955 the board of directors of Anglo-Oriental decided to give to all its male staff other than executives a Christmas present up to the value of £15 of clothes, suitable for wear at the office, drawn from a choice from or combination of a suit, overcoat or raincoat; the clothes to be purchased by Anglo-Oriental from Montague Burton Ltd. (hereinafter called "the tailors"). A letter to this effect was sent by Anglo-Oriental to the tailors on November 7, 1955, and the taxpayer's name was on a list of 22 employees whose names were supplied to the tailors. The letter constituted a formal order to the tailors to supply the goods on behalf of the individuals named in the list and contained the following instructions: "Please supply these with suits, overcoats "or raincoats as above and send us your account in due course. "We stress that the bill will be paid by this company and no cash "payment either way can be made between £15 and the actual "cost of the clothes. We have advised the staff to call on you "on or after Thursday, November 10, 1955, to choose a cloth and "to be measured etc., and trust that this will be convenient to "you." On the same date, namely, November 7, 1955, a letter was sent to the taxpayer in similar terms to the letter sent to the tailors. The last paragraph was as follows: "Messrs. Montague "Burton will provide a fitting if this is required and asked for. "They will also make alterations if required. Both fittings and "alterations will take additional time." The tailors' account for goods supplied to 21 employees of Anglo-Oriental (one name having been removed after November 7, 1955), was rendered to Anglo-Oriental on February 29, 1956, and included goods supplied to the taxpayer to an amount of £14 15s. The account was paid by Anglo-Oriental on the same date. On receipt of the letter from Anglo-Oriental the taxpayer called at the tailors' Cheapside premises and was in due course supplied with a suit. This was his own choice and he could have selected an overcoat or raincoat instead of a suit. Thereafter, he continued as previously to buy suits for himself from another tailor and paid more than £14 15s. for them. On average, he wore the suit made by the tailors once

or twice a week at the office on ordinary working days. It was his usual custom when he returned home to change his suit, whether supplied by the tailors or otherwise, and to wear less formal clothing. He anticipated, however, that the suit supplied to him by the tailors would be discarded sooner than his other suits because, owing to its lower quality and cut, it would become shabby more quickly. There was no condition in writing or orally as to a refund to Anglo-Oriental if he left their employment before the suit was worn out. There was no evidence that Anglo-Oriental had forbidden the taxpayer to sell the suit, but he entertained no doubt that they would have been displeased if he had done so: in any event he had made no such attempt. Shortly after the suits were supplied by the tailors to the taxpayer and his other colleagues, one of the directors or other officials of Anglo-Oriental made a point of inspecting them.

It was contended for the Crown that the taxpayer received in the year 1955–56, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was money's worth, namely, a suit of clothes; that, on the evidence, that advantage of money's worth fell to be measured by the price paid by Anglo-Oriental to the tailors for the suit, that was, the sum of £14 15s.; that that sum was correctly included in computing the amount of the salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning of rule 1, Schedule 9 to the Income Tax Act, 1952; and that the assessment for the year 1955–56 ought to be confirmed.

It was contended for the taxpayer that, on the evidence, the value of the suit was not salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning of rule 1 of Schedule 9 to the Income Tax Act, 1952; that the suit was not an advantage received by him by virtue of his employment which was capable of being turned into money, because his employers would have been displeased if he had sold it; alternatively that, if the value of the suit was an advantage received by him by virtue of his employment which was capable of being turned into money, the value was not the price paid by Anglo-Oriental to the tailors, namely, £14 15s., but the sum which he could have raised by the sale of the suit in November, 1955, and that that sum was very small; and that no sum, or, in the alternative, a very small sum, should be included in respect of the sum in computing the amount of his emoluments from his employment for the year 1955–56.

The special commissioners considered that in the year 1955–56 the taxpayer received, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was capable of being turned into money, but were, however, unable to accept the Crown's contention that that advantage was the price paid to Montague Burton for the suit, and they held that the money's worth of the suit must be valued by reference to the market value when it became the appellant's property, such value being the second-hand value in November, 1955. No

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evidence was before the commissioners as to the second-hand value of the suit and the case was set down for a further hearing.

Subsequently it was reported to the special commissioners that it had been agreed between the Crown and the taxpayer that the taxpayer could have sold the suit unworn in November, 1955, for the sum of £5, and, accordingly, the special commissioners reduced the assessment to £1,027.

The Crown appealed.

Hilary Magnus Q.C. and *Alan S. Orr* for the Crown.

C. N. Beattie for the taxpayer.

The following cases, in addition to the cases referred to in the judgment, were cited in argument: *Hartland* v. *Diggines* [2]; *Reade* v. *Cattermole* [3]; *Cunard's Trustees* v. *Inland Revenue Commissioners*.[4]

Danckwerts J. This is an appeal from the specal commissioners. The facts are extremly simple. In the year 1955 a company decided to make a present to 22 (or, as it turned out, 21) of its employees of a suit of clothes or an overcoat or a raincoat which were to be obtained by the employees from Montague Burton Ltd. They, accordingly, wrote to Montague Burton Ltd. and asked them to fit out the employees in question with the necessary clothing. At the same time they wrote to the employees, authorising them to go and order a suit or an overcoat or a raincoat at a branch of Montague Burton Ltd. as they desired. No money was to pass on either side, and the bills for the clothing had to be sent to the company. They were, in fact, sent to the company, and were duly paid.

The respondent taxpayer in this case is one of the 21 employees. He went to the branch of Montague Burton Ltd. and ordered a suit which was priced £14 15s. He paid no money, of course, and he got his suit. He was assessed by the Inland Revenue Commissioners on the amount of £14 15s. as an addition to his salary which he got from the company. His duties were secretarial, and he worked at the head office of the company. On that assessment he appealed to the special commissioners, contending that the payment in respect of the suit did not form part of his taxable salary at all; or, alternatively, that the amount on which he was taxable was not the amount paid by the company.

The first question was decided against him by the special commissioners, and from that there is no appeal: but the special commissioners decided that the amount to be brought into account for the purpose of the employee's tax was not the sum of £14 15s., but was whatever the value of the suit was in the hands of the employee, on the footing that he could sell it as a second-hand suit as soon as he got it. By agreement, the amount

[2] [1926] A.C. 289; 42 T.L.R. 262, H.L.

[3] (1936) 21 T.C. 35.

[4] (1945) 27 T.C. 122.

of that value was fixed at £5. Accordingly, the amount of £5 was the sum which the special commissioners held should be added to his taxable income, and it is from that decision that the Inland Revenue appeal. It seems to me that the decision of the special commissioners was perfectly correct.

Reliance has been placed by the Inland Revenue on such cases as *Nicoll* v. *Austin*,[1] where a director was asked by his company to continue to reside at the house which he had, the company promising to pay all the expenses which he incurred or which were required to be discharged in respect of the house, because they seemed to think that it would increase the prestige of the company. Accordingly, a number of payments were made for that purpose. The amounts actually spent by the company in pursuance of the agreement were the sum of £58 12s. 2d. for rates, water, etc.; £51 8s. 9d. for light, heat, and so on; telephone, etc., £8 0s. 3d.; and the upkeep of gardens, amounting to £196 4s. 11d. That made a total of £314 6s. 1d. That was the sum which was to be added, it was held, to the director's income assessable under Schedule E. Of course, in that case the amount was the actual amount which had been expended by the company.

It seems to me that the circumstances of that case are distinguishable from the facts of the present case; and it is necessary that I should refer to rule 1 of Schedule 9 to the Act of 1952, which contains the rules applicable to Schedule E. That provides: "Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E, or to whom any annuity, pension or "stipend chargeable under that schedule is payable, in respect "of all salaries, fees, wages, perquisites or profits whatever there-"from for the year of assessment, after deducting the amount of "duties or other sums payable or chargeable on the same by virtue "of any Act of Parliament, where the same have been really and "bona fide paid and borne by the party to be charged." I draw attention to the fact that it is attached on the "perquisites or "profits," and, to my mind, that means the perquisites or profits which have been received by the employee whom it is desired to tax. Before the commissioners reliance was placed by the Crown on that case of *Nicoll* v. *Austin*.[2]

The commissioners based their decision upon such cases as *Weight* v. *Salmon*[3] and *Ede* v. *Wilson*,[4] both of which were cases where the claim by the Inland Revenue was made in respect of certain shares which the company allowed an employee to acquire at par value when the shares were of considerably greater value. The employee there had to pay the sum required, which was charged at par value; and it was held in those cases that he was taxable on the difference as between that and the actual value of the shares. In other words, he was taxed on the value of that which he received.

[1] (1935) 19 T.C. 531.
[2] Ibid.
[3] 19 T.C. 174.
[4] 26 T.C. 381.

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It may be perfectly true that in certain cases, of which *Nicoll* v. *Austin* [2] is an example, it is not possible to measure the value of what the employee has received except by taking the amount of the payment which has been made for the purpose of conferring the advantages which he has received; accepting that those cases are perfectly correctly decided, it may be that is because that is the only standard which can be applied in those cases. But when you have got a case where you can see that the employee has received something, and that that something is in his hands as a result of the transaction which has been carried out, then it seems to me that the amount of the profit which the employee has received, the emolument in question, is the value of what he has got. It seems to me that, having due regard to the very proper observations as to statements by judges being considered with respect to the facts of the case with which they are dealing, nonetheless the observation of Lord M'Naghten in *Tennant* v. *Smith* [5] is applicable to the present case; that is to say, that the employee is to be taxed "not on what saves his pocket, but on "what goes into his pocket."

It is true that if the employee in the present case had been told to go to Montague Burton Ltd. and order the suit and pay for it, and had been promised that the company would then reimburse him the amount which he had paid, the benefit which he would have got would have been the amount paid by the company to him as reimbursement of his expenditure. It is quite true that a different result is produced according to the way in which the transaction is carried out, but certainly, having regard to one's tax experience, nothing is more common than to find such a situation. It seems to me that in the present case the benefit which the taxpayer received was the value of the suit in his hands, which he received as a result of the generosity of the company which employed him.

Accordingly, the decision of the special commissioners was correct, and the amount to be added to the taxable income for Schedule E is the sum of £5. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Slaughter & May.*

K. R. A. H.

[5] (1892) 3 T.C. 158, 161.

[QUEEN'S BENCH DIVISION.]

PHRANTZES *v.* ARGENTI.

[1958 P. No. 2526.]

1960
Feb. 23, 24, 25, 26; *March* 4.

Lord Parker C.J.

Conflict of Laws—Jurisdiction—Right depending on status—Enforceability outside country of domicile—Right in personam—Right to dowry under Greek legislation.

Conflict of Laws—Jurisdiction—Right depending on discretion of foreign court—Right to dowry under Greek law.

Conflict of Laws—Jurisdiction—Remedy peculiar to foreign law—Right to order condemning father to enter into dowry contract with son-in-law.

A daughter, a Greek national, who had recently married in England, claimed a declaration that under Greek law she was entitled on her marriage to be provided by her father, also a Greek national, with a dowry. Both father and daughter were residing in England and the father, inter alia, denied the fact, on which the daughter relied, that he was at any material time domiciled in Greece. By Greek law a father was obliged to constitute on behalf of his daughter entering on marriage a dowry in accordance with his fortune, the number of the children, and his social position and that of the son-in-law. The dowry was property granted to the husband and was constituted by a contract entered into with the husband by notarial deed: it might consist of present or future property, which had to be specified, and could be land or movables. Should the father fail to provide a dowry the daughter had a cause of action in the Greek courts to obtain an order condemning him to conclude a dowry contract with her husband; if abroad, the father could be condemned to enter into the contract before the Greek consul or a foreign notary public. In such proceedings the Greek court would decide what in all the circumstances was the appropriate amount of the dowry and might specify the assets to be handed over. No dowry was constituted until the father had entered into the contract so ordered, and if he did not, the only courses open to the daughter were to secure his imprisonment or bring an action for damages.

The father objected that the statements of claim disclosed no cause of action. On the trial of the preliminary issue whether, assuming that the father was at all material times domiciled in Greece, the daughter was entitled to the relief claimed:—

Held, that a father's obligation to constitute a dowry under Greek law and the reciprocal right of a daughter to have a dowry constituted, were of a nature which the English courts would recognise, and that the daughter's right, notwithstanding that it was a right in personam, and that it did not come within the definite categories of foreign rights which the courts had enforced, was one which, in principle, could be enforced in the English courts (post, p. 528).

Loucks v. *Standard Oil Co. of New York* (1918) 224 N.Y. 99 applied.

In re Macartney [1921] 1 Ch. 522 and *De Brimont* v. *Penniman* (1873) 10 Blatchford's Circuit Court Reports 436 distinguished.

But that (i), since the daughter's right was not a right to the payment of a sum of money but to an order condemning the father to enter into a contract with the son-in-law which required inquiries

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and decisions involving a large measure of discretion as to matters which were essentially matters for the domestic courts and their discretion, it would be wrong for our courts to claim jurisdiction (post, p. 529).

Kornatzki v. *Oppenheimer* [1937] 4 All E.R. 133 applied.

(ii) Although a claim would not be defeated merely because English remedies were greater or less than those in the foreign country, if the machinery by way of remedies was so different as to make the right sought to be enforced a different right, it would not be enforced in this country; that there was no power in the court to give relief consistent with the daughter's claim, for even if the court granted a declaration and embarked on the necessary inquiry as to the extent of the dowry, it could do no more than order payment of the amount found to be appropriate to the daughter, which would be to enforce a right which she did not possess under Greek law, and, therefore, English law did not provide a cause of action and relief appropriate to the enforcement of her claim. The daughter, accordingly, was not entitled to the relief sought (post, p. 530).

Baschet v. *London Illustrated Standard* [1900] 1 Ch. 73 distinguished.

Weidman v. *Weidman* (1931) 174 N.E. 206 and *Howard Undertaking Co. Ltd.* v. *Fidelity Life Association* (1933) 59 S.W. (2nd) 746 applied.

ACTION.

The plaintiff, Sybil Phrantzes, a Greek national, who was married in this country on December 4, 1957, brought an action against the defendant, her father, Philip Pandely Argenti, also a Greek national, claiming a declaration that she was entitled by virtue of article 1495 of the Greek Civil Code to be provided by him with a dowry as set out in that article, an account of the defendant's property and (by amendments to the writ and statement of claim delivered on February 12, 1960) an inquiry as to the amount of dowry properly payable by the defendant and such further inquiry, judgment or order as might be required to give effect to the declaration sought. Both parties were residing in this country but the plaintiff alleged that the defendant was at all material times domiciled in Greece, and that her rights in respect of his property arising from the relationship exisiting between them were governed by Greek law.

The defendant, inter alia, denied that he was at any material time domiciled in Greece, and objected that the statement of claim disclosed no cause of action. On April 16, 1959, Master Lawrence ordered the trial of the preliminary issue whether, on the assumption that the defendant was at all material times domiciled in Greece, the plaintiff was entitled to the relief claimed in the action.

The facts are fully stated in the judgment.

Gilbert Beyfus Q.C. and *R. I. Threlfall* for the plaintiff.
John Foster Q.C. and *Mark Littman* for the defendant.

The following cases were cited in argument: *De Nichols* v.

Curlier [1]; *De Serre* v. *Clarke* [2]; *In re Bettinson's Question* [3]; *British South African Co.* v. *Companhia de Moçambique* [4]; *Phillips* v. *Eyre* [5]; *Worms* v. *De Valdor* [6]; *In re Selot's Trust* [7]; *In re Visser* [8]; *Sydney Municipal Council* v. *Bull* [9]; *Loucks* v. *Standard Oil Co. of New York* [10]; *In re Macartney* [11]; *In re De Nichols* [12]; *Weidman* v. *Weidman* [13]; *Howard Undertaking Co. Ltd.* v. *Fidelity Life Association* [14]; *Baindail* v. *Baindail* [15]; *De Brimont* v. *Penniman* [16]; *Mandell* v. *Fogg* [17]; *In re Leigh* [18]; *Guaranty Trust of New York* v. *Hannay & Co.* [19]; *Dysart (Earl)* v. *Hammerton & Co.* [20]; *Nixon* v. *Attorney-General* [21]; *Kornatzki* v. *Oppenheimer* [22]; *Baschet* v. *London Illustrated Standard* [23]; *Ascherson* v. *Tredegar Dry Dock and Wharf Co. Ltd.* [24]; *Selkrig* v. *Davies* [25] and *Coldingham Parish Council* v. *Smith.* [26]

Cur. adv. vult.

March 4. LORD PARKER C.J. read the following judgment: The plaintiff is the daughter of the defendant. Both are nationals of the Kingdom of Greece at present residing in this country. The plaintiff on December 4, 1957, married in this country according to the rites and ceremonies of the Eastern Orthodox Greek Church and thereupon, so it is alleged, the defendant under Greek law became by virtue of his relationship to the plaintiff obliged to provide a dowry for her. He has failed to do so and in these proceedings she seeks to enforce that obligation, relying on the fact, as it is alleged, that the defendant is domiciled in Greece. By his defence the defendant alleges that he is not domiciled in Greece and, in any event, contends that the statement of claim discloses no cause of action and that the plaintiff is not entitled to the relief claimed.

The matter comes before me on a preliminary issue ordered by Master Lawrence on April 16, 1959, namely, "whether on the "assumption that the defendant was at all material times "domiciled in Greece the plaintiff is entitled to the relief "claimed." By a further defence delivered by leave of the master after that order the defendant alleged that in any event

[1] [1900] A.C. 21; 16 T.L.R. 101.
[2] (1874) 18 Eq. 587.
[3] [1956] 1 Ch. 67; [1955] 3 W.L.R. 510; [1955] 3 All E.R. 296.
[4] [1893] A.C. 602; 10 T.L.R. 7.
[5] (1870) L.R. 6 Q.B. 1.
[6] (1880) 49 L.J.Ch. 261.
[7] [1902] 1 Ch. 488.
[8] [1928] 1 Ch. 877; 44 T.L.R. 692.
[9] [1909] 1 K.B. 7; 25 T.L.R. 6.
[10] (1918) 224 N.Y. 99.
[11] [1921] 1 Ch. 522.
[12] [1900] 2 Ch. 410; 16 T.L.R. 461.
[13] (1931) 174 N.E. 206.
[14] (1933) 59 S.W. (2nd) 746.
[15] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342.
[16] (1873) 10 Blatchford's Circuit Court Reports, 436.
[17] (1903) 94 Am. State R. 667; 66 N.E. 198.
[18] (1888) 40 Ch.D. 290; 5 T.L.R. 138, C.A.
[19] [1915] 2 K.B. 536, C.A.
[20] [1914] 1 Ch. 822; 30 T.L.R. 379, C.A.
[21] [1930] 1 Ch. 566; 46 T.L.R. 246.
[22] [1937] 4 All E.R. 133.
[23] [1900] 1 Ch. 73.
[24] [1909] 2 Ch. 401.
[25] (1814) 2 Rose, 97, H.L.
[26] [1918] 2 K.B. 90.

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he had since the issue of the writ provided for the plaintiff under a deed made under the laws of Liechtenstein, and that such provision was under Greek law of a character and an extent sufficient to discharge him from providing a dowry. In allowing this further defence to be delivered the master made no alteration in the terms of the preliminary issue even though it was brought to his attention. Accordingly, I ruled that the only matter with which I would deal was the issue as ordered which arose under the original pleadings.

The first question which arises is as to the position under Greek law which is, of course, a question of fact. One Greek lawyer was called on each side and while at one time there appeared to be a complete divergence of opinion on certain points, there was in the end little, if any, difference between them. I find the position to be as follows:

For many centuries it has been the custom and, indeed, the law in Greece for a father to provide a dowry for his daughter on her marriage. The law was codified in 1940 and the Code came into force in 1946. Under that Code the relations between parents and children are governed by the law of the last common nationality of the father and child, and failing this, by the law of the nationality of the father at the time of the birth of the child (see article 18). The father is obliged to constitute on behalf of his daughter entering upon marriage a dowry in accordance with his fortune, the number of his children and his social position, and in accordance with the social position of the daughter's husband. The only exceptions are: (1) if, in the light of his other obligations, the father is not in a position to constitute a dowry without endangering his own proper maintenance; (2) if and so long as the daughter possesses a sufficient fortune of her own to constitute a suitable dowry; (3) if the daughter, being a minor, marries without the father's consent; (4) if the daughter has committed such a "fault" as would justify disinheritance (see articles 1495 and 1497).

If the father is dead or not in a position to constitute a dowry the obligation devolves upon the mother (article 1496). The husband is the head of the family and decides on all matters relating to the marital life (article 1387). He further bears the burdens of the matrimony (article 1398).

The dowry is the property granted to the husband either by the wife, if she is possessed of a sufficient fortune, or by the parent on the wife's behalf, to lighten the burdens of matrimony. It is constituted by a contract entered into with the husband, which contract must be entered into by a notarial deed (articles 1406 and 1402), that is a deed prepared by and entered into before a notary public who is a public servant, after which the assets comprised in it are handed over.

The subject of the dowry may either consist of present or of future property, which must, however, be specified (article 1410). It can consist of land or movables. As regards movables these will

become the property of the husband, unless the dowry contract otherwise provides (article 1412). The husband can, with the consent of the wife, alienate that property (article 1416). On the other hand, immovable property, unless the dowry contract otherwise provides, becomes and remains the property of the wife, but the husband will, during the marriage, have the management and usufruct thereof (articles 1412 and 1414). The husband can only alienate immovable property with the permission of the court (article 1417). This permission will only be given in the case of great need or where a profit will result. The produce of the sale will then become the dowry.

A dowry may also include by assignment the usufruct to which the father is entitled arising from property not in his ownership. It may include usufruct arising for a lesser time than the marriage. It may also include the right of habitation in particular premises without paying rent. A daughter also has a right to share in her father's estate. If she has had a dowry, that will be taken into account in deciding the amount of her inheritance.

Should the father fail to comply with his obligation in regard to the provision of a dowry, the daughter, and the daughter alone, has a cause of action in the Greek courts to obtain an order condemning her father to conclude a dowry contract with her husband before a notary public who may or may not be named. If the father is abroad he may be condemned to enter into the contract before the Greek consul or a foreign notary public. In such proceedings the court will decide what in all the circumstances indicated above is the appropriate amount of the dowry and may specify the assets to be handed over. In these proceedings the husband may or may not intervene as he thinks fit. No dowry is constituted until the father has entered into the dowry contract so ordered. This is unlikely to occur, but the experts on Greek law were of opinion that the only courses open were either to secure his imprisonment or to bring an action for damages.

The only possible exception to the principle that no dowry is constituted until the dowry contract has been entered into arises when the dowry or part of it is to consist of land and the husband has intervened in the proceedings. In such a case, if the father refuses to enter into the dowry contract it may be that the husband could make a unilateral declaration of acceptance and then register that in the Land Registry as a document of title.

That being the state of the Greek law, the contentions put forward on behalf of the plaintiff can be simply stated as follows: (1) That the issue to be determined assumes that the defendant is domiciled in Greece. (2) That by reason of the relationship or status of the parties, there arose on the plaintiff's birth or on her marriage an obligation under Greek law on the defendant to constitute a dowry on her behalf. (3) That the right to have such a dowry constituted is a proprietary right. (4) That prima facie the courts of this country will entertain an action to

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enforce proprietary rights arising out of status which accrue according to the law of the father's domicile. (5) That the case does not come within any of the well-known exceptions, e.g., as being contrary to public policy, penal in character, etc. Granted that no such action has ever been brought in this country before there is nothing in principle, so it is said, to prevent our courts from entertaining such an action.

Points (1) and (2) above cannot be controverted. Further, it must be, I think, conceded that whether or not the father's obligation to constitute a dowry and the reciprocal right of the daughter to have one constituted on her behalf can be enforced in this country, the obligation and the right are of such a nature as these courts will recognise. But on all other points there is little, if any, agreement.

In the first place, it is said on behalf of the defendant that even if what is sought to be enforced here is a proprietary right, which is denied, it will not be enforced unless it comes within one or other of the definite rules enumerated by Dicey, e.g., in regard to infants, marriage, succession or bankruptcy. To go outside those rules would lay the way open to the enforcement of a number of rights which it is said these courts have never enforced. For example, the English courts will not enforce the duty under a foreign system of law of a parent to maintain his child or vice versa, cf. Dicey's Conflict of Laws, 7th ed. (1958), p. 403. Again, in *In re Macartney*,[1] the court was asked to enforce the judgment of a Maltese court condemning the testator's estate to provide maintenance for his illegitimate daughter. Astbury J., while refusing to enforce the judgment on the ground that the recognition of an illegitimate child's right under Maltese law to be permanently maintained was contrary to public policy, went on to hold that the action could not be entertained on the ground that the judgment obtained was of such a character that it would not have supported an action in England. In advancing this second ground the judge followed the New York case of *De Brimont* v. *Penniman*.[2] In that case a French citizen had married in France the daughter of two United States citizens. The wife died, leaving a child. Under French law the father-in-law and mother-in-law were bound to provide an allowance to the father for the support of the child. The father obtained the judgment of a French court against them while they were in France requiring them to provide an annual allowance. On their return to the United States of America the father sued them in the American courts to recover arrears. Woodruff J. refused to entertain the action. He held that the French law and the decree made under it were local in their nature and operation, were designed to guard against pauperism and were not of universal

[1] [1921] 1 Ch. 522.

[2] (1873) 10 Blatchford's Circuit Court Reports 436.

acceptance like judgments founded upon contract or other recognised rights. He said [3]: "The decree in question proceeds upon "the declaration of an obligation not in conformity with our laws, "not known to the common law, and upon the continuance of the "obligation itself after the relationship out of which it is deemed "to have arisen has ceased by the death of the person through "whom the affinity was traced." He went on to say [4]: "Whatever obligation or duty lies at the foundation of the claim . . . "is the creature of positive statute, framed for the people of "France, to regulate their domestic concerns, protect the public, "and guard against pauperism and its evils. Statutes in some "respects similar are found in England, and in most, if not all, "of the States in this country. The duty of parents . . . to "provide for the necessary support of those relatives, and prevent "their becoming a charge to the public, is declared and enforced. "Such regulations are local in their nature, and in their application, and so are the orders for their enforcement. . . . Orders "of filiation are of a similar character. . . . The principle "upon which foreign judgments receive any recognition in our "courts, is one of comity. It does not require, but rather forbids "it, when such a recognition works a direct violation of the policy "of our own laws, and does violence to what we deem the rights "of our own citizens. The courts . . . will be slow to hold, that, "whenever an American citizen shall visit France, and reside "there temporarily, with his family, his son or his daughter, by "a rash or imprudent marriage, can cast upon the parents, "mother as well as father, the perpetual burthen of an annuity, "for the support of the wife or husband. So long as such "residence continues, no doubt, the parents must submit to the "laws of France. The orders of her courts may be enforced "against them, as those laws may prescribe; but in a matter "of this kind, those laws must be executed there, and such "decrees can have, and ought to have, no extra-territorial "significance. They rest upon no principles of universal acceptation, like the obligation of contracts, or the protection of "generally recognised, private, personal rights. No disposition to "deal with foreign judgments, so as to promote the ends of "justice, demands that such decrees should be arbitrarily enforced "in our courts."

Some criticism has been made of the decision in *In re Macartney*, cf. Wolff's Private International Law, 2nd ed. (1950), pp. 266 and 267, in so far as the second ground of the decision is concerned. Be that as it may, I think that the present case is quite different from *In re Macartney* [5] and *De Brimont* v. *Penniman*.[6] There is no question here of the foreign law being a law against pauperism. It is, moreover, intended to have extra-territorial effect since the Greek courts will, as I have said,

[3] 10 Blatchford's Circuit Court Reports 436, 440.
[4] Ibid. 440, 441.
[5] [1921] 1 Ch. 522.
[6] 10 Blatchford's Circuit Court Reports 436.

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condemn a father resident abroad to enter into a contract before the Greek consul or a foreign notary public.

Indeed, if this were the only point in the case I would hold that this was a right which could be enforced here. As Cardoza J. said in *Loucks* v. *Standard Oil Co. of New York*[7]: "If aid is to "be withheld here, it must be because the cause of action in its "nature offends our sense of justice or menaces the public "welfare. . . . Our own scheme of legislation may be different. "We may even have no legislation on the subject. That is not "enough to show that public policy forbids us to enforce the "foreign right. A right of action is property. If a foreign statute "gives the right, the mere fact that we do not give a like right "is no reason for refusing to help the plaintiff in getting what "belongs to him. We are not so provincial as to say that "every solution of a problem is wrong because we deal with it "otherwise at home. Similarity of legislation has indeed this "importance: its presence shows beyond question that the "foreign statute does not offend the local policy. But its absence "does not prove the contrary. It is not to be exalted into an "indispensable condition. The misleading word 'comity' has "been responsible for much of the trouble. It has been fertile in "suggesting a discretion unregulated by general principles (Beale, "Conflict of Laws, para. 71). The sovereign in its discretion "may refuse its aid to the foreign right. . . . From this it has "been an easy step to the conclusion that a like freedom of "choice has been confided to the courts. But that, of course, is a "false view. . . . The courts are not free to refuse to enforce "a foreign right at the pleasure of the judges, to suit the "individual notion of expediency or fairness. They do not close "their doors unless help would violate some fundamental prin-"ciple of justice, some prevalent conception of good morals, some "deep-rooted tradition of the common weal."

The next point taken on behalf of the defence is that the right under Greek law is not a proprietary right at all. It is, so it is said, only a right in personam; a right to get the court to condemn the father to enter into a dowry contract. This, as it seems to me, must be the correct position. True it is connected with succession, being on account of the daughter's inheritance, but the action is an action in personam. However, in my judgment, it matters not what label is given to the right. It is, I think, a right which could be enforced here if, for instance, it was a right to payment of a fixed sum of money or a definite proportion of the father's fortune simpliciter.

It is, however, at this point that the plaintiff's difficulties occur. The right is not the right to the payment of a sum of money. It is the right to an order condemning the father to instruct a notary public to draw up a dowry contract in accordance with the directions of the court, and to enter into that

[7] (1918) 224 N.Y.Reps. 99, 110, 111.

contract with the son-in-law who may not even be a party to the proceedings. Before the order can be made the court must inquire into the extent of the father's fortune and that of his daughter. The court must further consider the respective social position of the father and son-in-law, that is their positions in the Greek or other community where each is living, and decide what is the appropriate amount of dowry. It must decide, if the point is raised, whether the daughter has committed a fault within article 1497. It will often have to decide in all the circumstances what the dowry is to consist of, how much of it shall be land, how much movables, whether any part of it is to consist of the usufruct from property and, if so, for how long it is to be granted, whether the use of a house free of rent is to be provided, and, in addition, what are to be the terms as to ownership of the dowry whether movable or land (article 1412). Specimen contracts were put in evidence. All these inquiries and decisions are essentially matters for the domestic courts, and matters largely for the discretion of those courts and not our courts. It is true that in *Kornatzki* v. *Oppenheimer* [8] Farwell J. held that he was able to evaluate the sum which a German court in all the circumstances of the case would award as payable in discharge of a pre-war debt based on a provision of the German Civil Code, which provided that the debtor was bound to effect the performance of his obligations according to the requirements of good faith, ordinary usage being taken into consideration. He came to the conclusion in that case that the evaluation was really a question of fact which could be determined by the court in England, and that it was not a matter of discretion at all. He, however, clearly took the view that if discretion had entered into the matter it would have been a matter for the German courts alone, and that he would not have had any jurisdiction in the matter. Here it seems to me that the considerations which I have enumerated above, taken as a whole, must involve a very large measure of discretion, and that it would be quite wrong for our courts to claim jurisdiction in the matter.

The matter does not end there since, in my judgment, the lex fori, English law, does not provide a cause of action and relief appropriate to the enforcement of the foreign right, namely, a right to obtain an order condemning someone to enter into a contract in a particular form with a person not even a party to the proceedings. It is true, of course, that a plaintiff seeking to enforce a foreign right here can demand only those remedies recognised by English law, and that the claim will not be defeated merely because those remedies are greater or less than those in the courts of the forign country: cf. Dicey's Conflict of Laws, 7th ed., p. 1089, and *Baschet* v. *London Illustrated Standard*.[9] But the remedies available must harmonise with the right according to its nature and extent as fixed by the foreign law: cf.

[8] [1937] 4 All E.R. 133.

[9] [1900] 1 Ch. 73.

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Cheshire, Private International Law, 5th ed. (1957), pp. 667 and 668. Put another way, if the machinery by way of remedies here is so different to that in Greece as to make the right sought to be enforced a different right, that right would not, in my judgment, be enforced in this country. This matter has been considered in the United States of America. Thus the Restatement of the Law of Conflict of Laws [American Law Institute, 1934], para. 608, states: "If no form of action is provided by the law of a state "for the enforcement of a particular foreign right, no action "to enforce that right can be maintained in the state. *Comment*: "(*a*) The form of action is a matter of procedure. A court will "not invent a new form of action, unknown to the law of the "forum, in order to give a remedy on a foreign cause of action."

Again, in Beale's Treatise on the Conflict of Laws (1935), vol. 3, p. 1631, it is stated: "If the law of the forum does not "provide a form of action appropriate for the enforcement of the "foreign right the action may not be maintained." See also *Weidman* v. *Weidman* [10] and *Howard Undertaking Co.* v. *Fidelity Life Association.* [11]

In the present case, even if the court granted a declaration and embarked on the necessary inquiry as to the extent of the dowry, it could do no more than order payment of the amount found to be appropriate and payment thereof to the plaintiff. That, however, would be to enforce a right which the plaintiff does not possess under Greek law. True, the courts here have power to order a deed to be entered into by a husband to secure payment of maintenance or to order a settlement of a wife's property, but that is a jurisdiction given by statute: cf. sections 23 and 24 of the Matrimonial Causes Act, 1950. Reference was also made to section 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, dealing with the execution of instruments which a person fails when directed to enter into. But that section does not itself give any right to direct a person to enter into a contract, and I know of no power in the court, inherent or otherwise, which would enable the court to give relief which was consistent with the plaintiff's right under Greek law.

For these reasons I have come to the conclusion that the answer to the question raised in the preliminary issue is "No." Since it is admitted that the claim fails if, contrary to the assumption in the issue, the defendant is not domiciled in Greece, it follows that the claim must be dismissed.

Judgment for the defendant with costs.

Solicitors: *Trower, Still & Keeling; Stoneham & Sons.*

J. F. L.

[10] (1931) 174 N.E. 206; 274 Mass. 118.

[11] (1933) 59 S.W. (2nd) 746.

[CHANCERY DIVISION.]

GROSVENOR PLACE ESTATES LTD. *v.* ROBERTS (INSPECTOR OF TAXES).

1960 *Feb.* 11.

Danckwerts J.

Revenue—Income tax—Deduction at source—Failure of payer to deduct tax—Whether recipient of payment chargeable—Rent—Schedule D—Long lease—Statutory duty of tenant to deduct tax—Payment of rents without deduction—Whether landlord properly assessed to tax—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 148, 170 (1) (2); 177 (1) (2).

The tenant of premises under a "long lease" within section 177 of the Income Tax Act, 1952, made to the landlords, without deduction of tax, payments of rent chargeable to tax in accordance with section 177 under Case VI of Schedule D to the Act and subject to deduction of tax under section 170.[1] On an appeal by the landlords from a decision of the special commissioners affirming an assessment on them in respect of the payments of rent:—

Held, that the assessments had been properly made on the landlords as the recipients of the rents. Although an assessment should have been made on the tenants and not on the landlords, sections 169 and 170 of the Act of 1952 were part of the administrative and not of the charging provisions, while under section 148 the owner of a sum of untaxed income was directly assessable to tax thereon so that the tax might be recovered from the landlords as recipients of payments, notwithstanding that the maker of them might be liable for it.

[1] Income Tax Act, 1952, s. 148: "Tax under Schedule D shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under that Schedule is in this Act directed to be charged."

S. 169: "(1) Where any yearly interest of money, annuity or other annual payment is payable wholly out of profits or gains brought into charge to tax—(*a*) no assessment shall be made on the person entitled to the interest, annuity or annual payment . . . (3) Where—(*a*) any royalty or other sum paid in respect of the user of a patent; or (*b*) any rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction of tax under this Chapter as if it were a royalty or other sum paid in respect of the user of a patent, is paid wholly out of profits or gains brought into charge to tax, the person making the payment shall be entitled on making the payment to deduct and retain out of it a sum representing the amount of the tax thereon at the standard rate for the year in which the amount payable becomes due."

S. 170: "(1) Where—(*a*) any interest of money, annuity or other annual payment charged with tax under Schedule D; or (*b*) any royalty or other sum paid in respect of the user of a patent; or (*c*) any rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction of tax under this Chapter as if it were a royalty or other sum paid in respect of the user of a patent is not payable or not wholly payable out of profits or gains brought into charge, the person by or through whom any payment thereof is made shall, on making the payment, deduct out of it a sum representing the amount of the tax thereon at the standard rate in force at the time of the payment. (2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment for which an account is so delivered on that person."

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Glamorgan Quarter Sessions v. *Wilson* [1910] 1 K.B. 725; 26 T.L.R. 351; and dicta of Upjohn J. in *Stokes* v. *Bennett* [1953] Ch. 566; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313 applied.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

A company, Grosvenor Place Estates Ltd., appealed to the special commissioners against assessments for the years 1955–56 and 1956–57 under Schedule D of the Income Tax Act, 1952, in respect of payments of rent received under an underlease granted by the company of premises known as Hobart House.

The following facts were proved or admitted before the commissioners:

The National Coal Board were tenants of Hobart House under an underlease for 81 years less four days granted from March 25, 1955, by the company at an annual rent of £96,177. That underlease was a "long lease" within section 177 of the Income Tax Act, 1952. The board made the following payments of rent without deduction of tax to the company: quarter ended June 25, 1955, £24,044 5s.; quarter ended September 29, 1955, £24,044 5s.; quarter ended December 25, 1955, £24,044 5s.; quarter ended March 29, 1956, £24,044 5s.; total, £96,177. Quarter ended June 24, 1956, £24,044 5s.; quarter ended September 29, 1956, £24,044 5s.; total £48,088 10s. Those payments of rent were chargeable to tax in accordance with section 177 under Case VI of Schedule D to the Income Tax Act, 1952, and were subject to deduction of tax under either section 169 or section 170 of that Act.

That rent was not paid out of profits and gains of the National Coal Board brought into charge to tax and, accordingly, section 169 of the Act of 1952 did not apply to them. The payments of rent did fall under the provisions of section 170, under which the board should have deducted tax on payment and delivered an account of the payments to the Inland Revenue Commissioners for the use of the special commissioners, who, in the words of the section, "shall assess and charge the payment for which an "account is so delivered on that person," i.e., the person making the payment. The board, as stated above, omitted to deduct tax on payment.

It was admitted by the Crown that the Inland Revenue Commissioners were informed of the payments made, but in what form that information was given was not proved or admitted. There was no evidence that an assessment had been made on the board as the person paying the rents in accordance with the provisions of section 170 and much evidence to the contrary, and the special commissioners drew the inference that none had been made. The special commissioners were informed by counsel for the Crown, in reply to an inquiry by them, that it was not considered obligatory on the assessing special commissioners to make an

assessment on the person making the payment, where that payment had been received by the payees in full without deduction of tax: it was considered open to the Revenue, in the existing state of the law, to make an assessment on the recipient in such circumstances, which had been done, and to make an assessment also on the board would create a double assessment of the same sum.

It was contended on behalf of the company that it was obligatory on the assessing special commissioners under the provisions of section 170 to assess the persons making the payment, that it must be assumed that such an assessment either had been or would be made by the commissioners in pursuance of their statutory duty and that, accordingly, an assessment could not be made on the company as payee.

It was contended on behalf of the Crown that the company, having received the rents in full without deduction of tax, was directly assessable.

The special commissioners held that they were bound by the decision in *Glamorgan Quarter Sessions* v. *Wilson*,[2] and they, accordingly, dismissed the appeal and confirmed the assessments. They did not feel it incumbent on them, in the view that they took of the matter, to express any opinion on the apparent failure of the assessing special commissioners to assess the board, although they were glad to have had an explanation of the attitude adopted by them in such cases.

The company appealed, the question of law for the decision of the court being whether, on the facts admitted or proved, the commissioners' decision was correct in law.

F. Heyworth Talbot Q.C. and *C. N. Beattie* for the company.
F. N. Bucher Q.C. and *Alan S. Orr* for the Crown.

The cases cited in argument are referred to in the judgment.

DANCKWERTS J. This is an appeal from a decision of the Special Commissioners of Income Tax which raises a point of considerable interest, as it seems to me. The facts of the case are comparatively simple. The National Coal Board hold a lease from the company for a term of 81 years from March 25, 1955, at an annual rent of £96,177; the rent is paid quarterly, each quarter's instalment amounting to £24,044 5s., and it has been paid by the National Coal Board in the period to which the assessments relate without any deduction of income tax.

It is necessary, first of all, to refer to the provisions of the Acts which appear to be relevant before the point which arises can be appreciated. The first is section 177 of the Income Tax Act, 1952, which provides: "(1) this section applies to the "following payments, that is to say—(*a*) rents under long

[2] [1910] 1 K.B. 725; 26 T.L.R. 351.

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" leases. . . ." It is unnecessary to read (*b*) because this is plainly a case of a rent under a long lease as defined in the Act, that is to say, putting it shortly, a lease for more than 50 years. Then subsection (2) provides: " Any payment to which this section " applies shall, so far as it does not fall under any other Case of " Schedule D, be charged with tax under Case VI of Schedule D " and be subject to deduction of tax under Chapter I of this Part " of this Act as if it were a royalty or other sum paid in respect " of the user of a patent." It is an extraordinarily roundabout way of saying it when dealing with simple things like the payment of rent, but there it is.

The sections, which really are the administrative sections which relate to this matter, are sections 169 and 170. Section 169, which actually does not apply, provides: " (1) Where any yearly " interest of money, annuity or other annual payment is payable " wholly out of profits or gains brought into charge to tax—(*a*) no " assessment shall be made on the person entitled to the interest, " annuity or annual payment. . . ." Then there are some further provisions which I need not read, because the material subsection is subsection (3), which provides: " Where—(*a*) any royalty or " other sum paid in respect of the user of a patent; or (*b*) any " rent, royalty or other payment which, under any of the pro- " visions of this Act, is declared to be subject to deduction of tax " under this Chapter as if it were a royalty or other sum paid in " respect of the user of a patent, is paid wholly out of profits or " gains brought into charge to tax, the person making the pay- " ment shall be entitled on making the payment to deduct and " retain out of it a sum representing the amount of the tax " thereon at the standard rate for the year in which the amount " payable becomes due." It is necessary to read that, because that is the provision which is brought in by reference by virtue of section 177; but, in fact, in the present case the tax is not paid " out of profits or gains brought into charge to tax," so that the whole of this provision is not in fact applicable.

Section 170 is the section which does apply, and it provides: " (1) Where—(*a*) any interest of money, annuity or other annual " payment charged with tax under Schedule D; or (*b*) any royalty " or other sum paid in respect of the user of a patent; or (*c*) any " rent, royalty or other payment which, under any of the provi- " sions of this Act, is declared to be subject to deduction " of tax under this Chapter as if it were a royalty or other sum " paid in respect of the user of a patent "—and, that, of course, brings in the provision in section 177 again—" is not payable or " not wholly payable out of profits or gains brought into charge, " the person by or through whom any payment thereof is made " shall on making the payment, deduct out of it a sum represent- " ing the amount of the tax thereon at the standard rate in force " at the time of the payment." Then comes the important sub- section (2): " Where any such payment as aforesaid is made by " or through any person, that person shall forthwith deliver to the

" Commissioners of Inland Revenue, for the use of the Special " Commissioners, an account of the payment, or of so much " thereof as is not made out of profits or gains brought into " charge, and of the tax deducted out of the payment or out of " that part thereof, and the Special Commissioners shall assess " and charge the payment for which an account is so delivered " on that person."

In this case the National Coal Board, for some reason (I do not know why), omitted to deduct the amount of tax in making the payments of rent under its lease to the company and, though they may have informed the commissioners of the payments, which had been made, they did not so far as I can tell from the case, deliver any account; and it is plain, as is now admitted, that the special commissioners did not assess or charge the payments in any way on the board. No assessment in respect of the present matters has been made on the National Coal Board. Instead of that, the additional commissioners, who, of course, are a different body from the special commissioners in the administration of these complicated Acts, have made assessments in respect of the rent on the recipients, that is to say, on the company, and it is claimed on behalf of the company that the assessments were not properly made, that there was no power to assess them under the provisions of the Income Tax Acts in respect of these rents at all. That contention has been rejected by the special commissioners and, accordingly, the appeal has been brought.

Mr. Heyworth Talbot, in his interesting and instructive argument, has pointed out that this provision for the payment of tax by deduction and accounting to the Inland Revenue dates back to the Customs and Inland Revenue Act, 1888, s. 24 (3). That subsection provides: " Upon payment of any interest of money " or annuities charged with income tax under Schedule D, and " not payable, or not wholly payable, out of profits or gains " brought into charge to such tax, the person by or through whom " such interest or annuities shall be paid shall deduct thereout " the rate of income tax in force at the time of such payment, and " shall forthwith render an account to the Commissioners of " Inland Revenue of the amount so deducted, or of the amount " deducted out of so much of the interest or annuities as is not " paid out of profits or gains brought into charge, as the case " may be; and such amount shall be a debt from such person to " Her Majesty, and recoverable as such accordingly." That was the provision contained in the Act of 1888, and it was not until many years afterwards that it was discovered that there was a defect in it from the point of view of the Inland Revenue because it was discovered, in the case of a company which went into liquidation, that, as the tax was merely a debt to Her Majesty and not an assessed tax, it did not gain the advantage of priority which is given under the provisions of Company Acts and the Bankruptcy Act to assessed taxes. Accordingly, this law was altered by section 26 of the Finance Act, 1927, which is in the

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form in which section 170 of the Income Tax Act, 1952, is at the present day.

It is contended on behalf of the company that there is no power to make any assessments on the recipients of the rents in the present case, because subsection (2) of section 170 of the Act of 1952 is in peremptory and mandatory form: where the payment is made as described in section 170, first of all the person by or through whom the payment is made is under a mandatory obligation, it is said, to deduct the tax; and secondly—and this is more important for the purpose of the present case—there is a mandatory requirement to render an account; and further, it is mandatory that the special commissioners "shall assess and "charge the payment for which an account is so delivered on "that person." Therefore it is said that the only provision for assessment is one on the person who pays; and, of course, if the person who pays does not deduct, he still has to pay the tax. After all, it is his own fault that he has not carried out what the section peremptorily directed him to do. That argument is one which appeals to me very much, if I am not required by authority to take a different view. There may be a possible answer to it on the terms of the statute, but I will refer to that presently.

It is clear from *Lord Advocate* v. *Magistrates of Edinburgh*,[1] decided long before the Finance Act, 1927, that a taxpayer who makes payments may be liable to the Crown for tax, although he had failed to deduct the amount from the interest which was payable by him—in that case it was the Corporation of Edinburgh. On the other hand, in *Glamorgan Quarter Sessions* v. *Wilson*,[2] Bray J., in spite of the points which have been raised in this case being strenuously argued before him, decided that, although the persons who paid might be liable, the recipients might still be charged and the tax recovered from the recipients. He said[3]: "The other ground is that, inasmuch as section 24 (3) of the "Customs and Inland Revenue Act, 1888, makes it the duty of "the person who pays the interest to deduct the amount of the "income tax from the interest which he pays and to account for "it to the Commissioners of Inland Revenue, and inasmuch as "the section makes him a debtor to the Crown in respect thereof, "whether he deducts it or not, that enactment must be considered "as impliedly repealing the provision of the Income Tax Acts "which makes the person who receives the interest chargeable. "In my opinion there is no such repeal at all. There is no incon-"sistency between the two enactments. Section 24 (3) of the Act "of 1888 simply gives the Crown a remedy against the person "paying as well as against the person receiving the interest. It "is an additional remedy; and where, as in this case, the person "paying the interest has not deducted the income tax and the

[1] 1905 S.C. 972.

[2] [1910] 1 K.B. 725; 26 T.L.R. 351.

[3] [1910] 1 K.B. 725, 735.

" persons receiving it have received it in full without any deduc- " tion, I have no doubt that these latter persons, that is, in this " case the quarter sessions, are chargeable and have been properly " assessed." The matter came before Finlay J. in *Rye and Eyre* v. *Inland Revenue Commissioners*,[4] who said that the change in the law—this was after the Act of 1927—was a change in the machinery of collection and no more. By this time, as I have pointed out, the law had been altered from there being a mere debt to the Crown to a provision for assessment on the person who paid. Finlay J. said[5]: " It appears to me to be " abundantly clear what is the object of those provisions. The " liability to tax was in existence previously, but it is perfectly " obvious that until that amendment of the law there was a " serious difficulty of collection. The recipient could be effectively " assessed only if he or an agent of his could be found in this " country. That, obviously, might be difficult. That position " was dealt with by an alteration and improvement of machinery " of the collection of the tax, and it is an alteration and improve- " ment of machinery and nothing else. It is an improvement in " the method of collection. It does not, which I suppose is the " test, increase the ambit of the tax. It makes it more easy to " collect the tax within the ambit already laid down."

Finally, the matter came before Upjohn J. in *Stokes* v. *Bennett*.[6] The point in that case was that the appellant, who had obtained a divorce and had obtained an order of the High Court that her husband should pay her maintenance at the rate of £22 per month, free of tax, was receiving that sum from her husband who was out of the United Kingdom, and the main question was, whether it was paid out of income from which tax had been deducted, and it was held that the appellant should be treated as having received sums from which tax had been deducted and so no further assessments in respect of those sums should be made on her. But in the course of his judgment Upjohn J. says[7]: " The Finance Act, 1927, improved the " machinery of collection by enabling the Crown to make an " assessment upon the person who deducted the tax and giving " them ancillary rights to enforce collection against him. But, " said Mr. Pennycuick, the power to make an assessment directly " upon the recipient remained. He relied on *Glamorgan Quarter* " *Sessions* v. *Wilson*,[8] in support of that view. Mr. Heyworth " Talbot for the appellant challenged the binding authority of that " case having regard to the passage in Lord Simon's opinion in " *Allchin* v. *Coulthard*,[9] which I have read, and to the alteration " of the law in 1927. In my judgment, the Finance Act, 1927, " only improved the machinery but was not intended to alter any

[4] (1935) 19 T.C. 164; 51 T.L.R. 318.
[5] 19 T.C. 164, 168, 169.
[6] [1953] Ch. 566; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313.
[7] [1953] Ch. 566, 573.
[8] [1910] 1 K.B. 725.
[9] [1943] A.C. 607.

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" principle of collection, and *Glamorgan Quarter Sessions* v. " *Wilson* [10] is a direct decision upon the point, not directly over- " ruled by anything in *Allchin* v. *Coulthard*,[11] and is binding upon " me. I would point out, however, that Bray J., in the last " paragraph of his judgment in *Glamorgan Quarter Sessions* v. " *Wilson* [12] made it clear that he was only deciding that a gross " sum is chargeable by direct assessment upon the recipient. If, " therefore, upon the true view of the facts of this case and of the " law applicable thereto, the appellant is to be treated as having " a sum of untaxed income in her hands she is, in my view, " directly assessable to tax." Therefore, on the hypothesis which is put in that paragraph, it was the opinion of Upjohn J. that the recipient of the payment was liable to be directly assessed. Of course, in the event he decided that payment was not made out of untaxed income, and therefore the observations which he made were not part of the grounds of his decision and may be regarded as obiter dicta.

Mr. Heyworth Talbot, therefore, in his argument submitted that I should not regard myself as bound by *Stokes* v. *Bennett* [13] and the observations of Upjohn J. in that case, because they were purely obiter dicta, and that I should not feel myself bound by the decision of Bray J. in *Glamorgan Quarter Sessions* v. *Wilson*,[14] because that decision must be treated as obsolete in view of the alteration of the law which has been made by the Finance Act, 1927, subsequently to the decision in that case.

Therefore it becomes necessary to examine the provisions of the Income Tax Act which should be regarded as supporting the view which was reached by Upjohn J. in the later case. The provisions of sections 169 and 170 of the Act of 1952 are plainly part of the administrative provisions of the Income Tax Act, and the charging provisions are to be found elsewhere in the Act. One begins with section 1, which provides: " Where any Act " enacts that income tax shall be charged for any year at any " rates, then, subject to the provisions of this Act, the tax at " those rates shall be charged for that year in respect of all " property, profits or gains respectively described or comprised in " the Schedules contained in the sections of this Act enumerated " below, that is to say "—and then the material one is " Schedule " D—section one hundred and twenty-two "; section 122 is en- titled " Charge to Tax and General," and is as follows: " The " schedule referred to in this Act as Schedule D is as follows— " Schedule D. 1. Tax under this Schedule shall be charged in " respect of—(*a*) the annual profits or gains arising or accruing " —from various things which are mentioned thereafter, which undoubtedly would include the payments in the present case. Section 148, which is probably the most important section on

[10] [1910] 1 K.B. 725.
[11] [1943] A.C. 607.
[12] [1910] 1 K.B. 725.
[13] [1953] Ch. 566.
[14] [1910] 1 K.B. 725.

this part of the matter, is in these terms: "Miscellaneous Pro- "visions as to Schedule D. 148. Tax under Schedule D shall "be charged on and paid by the persons receiving or entitled to "the income in respect of which tax under that Schedule is in "this Act directed to be charged." That is plainly the material charging section and one of the most important with regard to the present case, and if it may be said that section 170 (2) is mandatory on the special commissioners in that it directs them to make assessments on the person who pays, then this also may be said to be mandatory in a sense, because again you have the word "shall"—". . . shall be charged on and paid by the "persons receiving or entitled to the income in respect of which "tax under that Schedule is in this Act directed to be charged."

It was contended, I think with considerable force and reason, by Mr. Heyworth Talbot that the special commissioners have failed to carry out the duty which is laid on them by section 170 (2), which says quite definitely that they "shall assess and "charge the payment for which an account is so delivered on that "person"; and subsection (3) provides: "The special commis- "sioners may, where any person has made default in delivering "an account required by this section, or where they are not "satisfied with the account so delivered, make an assessment "according to the best of their judgment." In the present case, apparently, there was no difficulty in deciding what was the proper amount to be charged, although no proper account seems to have been rendered by the National Coal Board. Therefore it seems to me that primarily the duty of the special commissioners was to make an assessment on the National Coal Board and not on the company. I am not intending to impute any moral blame to them in that respect, because if I think that they ought to have made such an assessment, according to the state of the law as they saw it, they believed that they were not under any neces- sary duty to do so. But it does seem to me that it was no reason for saying that they should refrain from assessing the persons who paid by virtue of the fact that the payees received their rents without any deduction of tax. It seems to me that it is not the duty of the special commissioners to try to assess the moral liability of people who are concerned with tax, but to carry out the provisions of the Acts which direct them to do something or not to do something, and that therefore primarily, quite plainly according to the provisions of section 170 (2), an assessment ought to have been made on the National Coal Board.

Mr. Heyworth Talbot went further than that, because he referred me to section 36, which provides: "(1) Statements of "profits or gains under Schedule D shall, unless an assessment "thereon is required to be made by the special commissioners, "be laid before the additional commissioners, and the additional "commissioners shall appoint meetings for the consideration of all "such statements as are from time to time delivered to them."

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It will have been observed that under section 170 (2) the assessment is required to be made not by the additional commissioners under that provision, but by the special commissioners. Consequently it seemed, at first sight, that Mr. Heyworth Talbot had a very convincing argument in favour of the view that the additional commissioners, it may be said in the present case, had no power whatever to make any such assessments on anybody. But my attention was called also by Mr. Bucher to section 38, which provides: "A person chargeable under Schedule D may require "that all proceedings in order to an assessment upon him "under that schedule shall be taken before the special commis- "sioners, instead of before the additional commissioners, and in "that case shall deliver a notice of his request, together with "the statement of his profits or gains, to the surveyor of the "district." It is certainly a possible construction of section 36 that the words "unless an assessment thereon is required to be "made by the special commissioners" may be a reference to the power to elect in the taxpayer to have the proceedings brought before the special commissioners contained in section 38. There is an additional point which also emerged finally in the course of the argument in this case: it is possible that the provision to which I have referred in section 170 (2) does not exclude an assessment by the additional commissioners on the recipient of payments by virtue of section 36. It is quite a possible view that section 170 (2) is saying: "If you assess the person who "pays, the assessment shall be made by the special commis- "sioners." That may be so, but it does not necessarily follow from that that an assessment on the recipient cannot be made by the additional commissioners, as has been made in the present case.

The matter is obviously one of considerable complication and difficulty. I have gone through the various sections and considerations that apply, and I think, in the situation which has emerged, that I am bound to apply the decision of Bray J. in *Glamorgan Quarter Sessions* v. *Wilson*,[15] although it was before the Act of 1927, and that I must follow the observations and the view which was reached by Upjohn J. in *Stokes* v. *Bennett*[16] and hold that in this case the assessments have been properly made on the recipients of the rents. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Stanley Attenborough & Co.; Solicitor of Inland Revenue.*

K. R. A. H.

[15] [1910] 1 K.B. 725.

[16] [1953] Ch. 566.

[PROBATE, ETC., DIVISION.]

STEAMSHIP ENTERPRISES OF PANAMA INC., LIVERPOOL (OWNERS) *v.* OUSEL (OWNERS) AND OTHERS.

1959
Nov. 17, 18, 19;
Dec. 7, 8, 9, 10, 11, 21.

Lord Merriman P.

THE LIVERPOOL (No. 2).

Shipping—Limitation of liability—Double proof—Claim of harbour authority for expenses of wreck-raising—Claim of owner of sunk vessel in respect of contingent claim by harbour authority for wreck-raising expenses under powers contained in private Act—Duty of harbour authority to mitigate damage by enforcing claim against sunk vessel—Mersey Docks and Harbour Board Act, 1954 (2 *& 3 Eliz.* 2, *c. xlv*), *s.* 3.

Ships' Names—The Liverpool.

Double proof, rule against—Applicability—Debts arising out of tort or under statute—Limitation action—Claims by harbour board under statute against wreck and by wreck in tort against colliding vessel.

Damages—Mitigation—Statutory right against third party—Whether failure to exercise it unreasonable—Rights of harbour board against wreck and colliding vessel.

On January 8, 1957, the *Ousel* was sunk in the Port of Liverpool as a result of a collision with the *Liverpool,* whose owners admitted liability for the collision. On the same day the Mersey Docks and Harbour Board gave notice to the owners of the *Ousel* that the board had taken possession of the *Ousel* under powers contained in the Mersey Docks and Harbour Board Act, 1954, and that after raising, removing or destroying her they would sell any property recovered for the purposes of defraying their expenses. They also gave notice that if their expenses exceeded the proceeds of sale they would claim the difference from the owners of the *Ousel* up to the limit of her liability under the Merchant Shipping Acts, 1894–1954.

The *Liverpool* obtained a decree under the Merchant Shipping Acts, 1894–1954, limiting her liability in respect of the collision. Among the claims made against the fund were a claim by the owners of certain cargo in the *Ousel,* a claim by the Mersey Docks and Harbour Board for expenses incurred and damage sustained in clearing the River Mersey of the wreck of the *Ousel,* and a claim by the owners of the *Ousel,* which included an item (itme 22) in respect of "Mersey Docks and Harbour Board. Contingent claim of board in "respect of wreck raising expenses, viz., statutory limit of *Ousel.*" It was not disputed that the board's claim against the fund covered to some extent the same ground as the subject-matter of the board's statutory claim against the *Ousel,* which in turn was the subject of item 22 of the *Ousel's* claim against the fund.

Held, (1) that the inclusion of the same subject-matter both in the board's claim and in item 22 of the *Ousel's* claim amounted to a double proof.

(2) That the rule against double proof applied as well to limitation actions as to bankruptcy and winding up and as well to debts arising out of torts or statutory provisions as to debts arising out of contract (post, pp. 549, 551).

(3) That in applying the rule in limitation actions, there was no obligation to reject one claimant rather than the other: the

[Reported by B. D. J. WALSH, Esq., Barrister-at-Law.]

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reality of the situation dictated the choice to be made. Here item 22 of the claim of the owners of the *Ousel* must be allowed, as they had no escape from their liability to the board, and the board must give credit in their claim for an amount equivalent to that in item 22 (post, p. 551).

In re Oriental Commercial Bank (1871) 7 Ch.App. 99; *In re Moss* [1905] 2 K.B. 307; *Morrison Steamship Co. Ltd.* v. *Greystoke Castle* (*Cargo Owners*) [1947] A.C. 265; 63 T.L.R. 11; [1946] 2 All E.R. 696 applied.

Ellis v. *Emmanuel* (1876) 1 Ex.D. 157; *The Stoomvaart Maatschappij Nederland* v. *P. & O. Steam Navigation Co.* (1882) 7 App.Cas. 795 considered.

Morris Ltd. v. *Perrott and Boulton* [1945] W.N. 148; [1945] 1 All E.R. 567; *Mersey Docks & Harbour Board* v. *Hay; The Countess* [1923] A.C. 345; 39 T.L.R. 302 distinguished.

(4) That the Mersey Docks and Harbour Board having taken steps to enforce their statutory rights against the *Ousel* were under a duty to mitigate their damage as against the *Liverpool* by collecting the money due to them from the *Ousel* and their refusal to do so was unreasonable (post, p. 554).

British Westinghouse Electric and Manufacturing Co. Ltd. v. *Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673; *Payzu Ltd.* v. *Saunders* [1919] 2 K.B. 581; 35 T.L.R. 657 applied.

PRELIMINARY POINTS OF LAW.

On January 8, 1957, the Panamanian tanker *Liverpool* and the British coaster *Ousel* were in collision in the Port of Liverpool. As a result of the collision the *Ousel* was beached, and on the same day the Mersey Docks and Harbour Board gave notice to the owners of the *Ousel* that the *Ousel*, her cargo, furniture, tackle or apparel were, or were likely to become, an obstruction or impediment or danger to the safe and convenient navigation or use of the Port of Liverpool or the sea channels leading thereto, and that pursuant to section 3 of the Mersey Docks and Harbour Board Act, 1954,[1] and all other powers in that behalf, the Board

[1] Mersey Docks and Harbour Board Act, 1954, s. 3: "(1) . . . the Board "may take possession of and raise "remove blow up or destroy any vessel "which may have been or shall here- "after be sunk stranded or abandoned "in any of the docks or elsewhere "within the port of Liverpool or any "of the sea channels leading thereto "or the wreck of any such vessel and "the whole or any part of the cargo "furniture tackle or apparel of any "such vessel or wreck . . . if in the "judgment of the marine surveyor for "the time being of the Board . . . the "same shall be or be likely to become "an obstruction or impediment or "danger to the safe and convenient "navigation or use of the dock port or "sea channel. (2) The Board may "sell in such manner as they may "think fit any vessel wreck cargo "matter article or thing which may "be raised or removed or any cargo "matter article or thing which may "be saved from any vessel or wreck "which may be blown up or destroyed "and out of the proceeds of such sale "(which when arising from any vessel "or wreck . . . shall be regarded as a "common fund for the purpose) shall "pay any duties and purchase tax pay- "able to Her Majesty and may retain "the expenses incurred by them in the "exercise of their powers under this "section and also any expenses in- "curred by them in marking buoying "watching lighting or otherwise con- "trolling the vessel wreck cargo "matter article or thing or giving "warning to shipping of the presence "thereof and shall render the overplus "(if any) to the person or persons "entitled to the same. (3) If the "proceeds of sale of the vessel or of "the wreck of the vessel and the cargo

had taken possession thereof and would proceed to raise, remove, blow up or destroy the same as might be deemed necessary. The notice also stated that any property recovered would be sold by the board and the proceeds applied as a common fund for the payment of the expenses incurred in connection with raising, removing, blowing up or destroying the obstruction, impediment or danger and with the detainer and sale of any such property, the surplus, if any, being returned to the persons entitled thereto. The notice provided further that if the expenses so incurred exceeded any proceeds of sale or other sum payable to the board, the difference, up to but not exceeding the amount prescribed by the Merchant Shipping Acts, 1894–1954, as the limit of liability to damages of an owner of a ship in respect of loss or damage to vessels, goods, merchandise or other things, was recoverable by the board from the owners of the *Ousel*.

Liability for the collision was admitted by the owners of the *Liverpool*, who, on May 17, 1957, commenced proceedings in the Liverpool District Registry by which they claimed to limit their liability in accordance with the provisions of the Merchant Shipping Acts, 1894–1954, and on May 28, 1958, a decree of limitation was made limiting the liability of the owners of the *Liverpool* in respect of the collision to a sum of £106,226 12s. 10d. with interest thereon at 4 per cent. from the date of the collision.

A number of claims were made against the limitation fund, including a claim by the owners of certain cargo in the *Ousel* for £142,903 11s. 3d., a claim by the owners of the *Ousel* for £70,765 5s. 1d. and a claim by the Mersey Docks and Harbour Board for £128,382 11s. 7d. for expenses incurred and damage sustained in connection with clearing the Mersey of the wreck of the *Ousel*. The board's claim against the limitation fund, which was a common law claim in tort founded on the admitted negligence of the *Liverpool* in causing the wreck of the *Ousel*, consisted of a sum of £188,742 5s. 10d., representing the whole of the expenses incurred in removing the *Ousel* and her cargo, from which was deducted the sum of £60,359 14s. 3d. which had been realised by the board by the sale of part of the *Ousel's* cargo and equipment. The board made no deduction in their claim in respect of the sum of £10,835 12s. 0d., which was agreed to be

" furniture tackle and apparel thereof " so raised removed blown up or " destroyed are insufficient after pay- " ing the said duties and purchase tax " to reimburse the Board for the said " expenses the Board may recover the " deficiency from the person who was " the owner of the vessel at the time " of the sinking stranding or abandon- " ment thereof . . . as a debt in any " court of competent jurisdiction: Pro- " vided that if the owner of the vessel " so raised removed blown up or " destroyed is not under the provisions " of the Merchant Shipping Acts 1894 " to 1952 as amended by any enact- " ment for the time being in force " entitled to limit his liability in " respect of the said deficiency that " owner shall not be liable to pay to " the Board in respect thereof a sum " exceeding the amount prescribed in " section 503 (1) (iii) . . . of the Mer- ' chant Shipping Act 1894 as amended " by any enactment for the time being " in force as the limit of liability to " damages of the owner of a ship in " respect of loss or damage to vessels " goods merchandise or other things. " . . ."

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the statutory limit of the liability of the *Ousel* prescribed by section 503 (1) (ii) of the Merchant Shipping Act, 1894, and which the board were entitled to claim under the Mersey Docks and Harbour Board Act, 1954, as stated in the board's notice of January 8, 1957. It was not disputed that the board's claim to some extent covered the same ground as the subject-matter of the board's claim against the *Ousel* under the Mersey Docks and Harbour Board Act, 1954. This sum of £10,835 12s. 0d. was included in the claim of the owners of the *Ousel* against the *Liverpool* limitation fund as item 22 thereof, and was described therein as "Mersey Docks and Harbour Board. Contingent "claim of board in respect of wreck raising expenses, viz., "statutory limit of *Ousel*."

On December 4, 1958, the part cargo-owners filed objections to the claim of the Mersey Docks and Harbour Board, and on December 29, 1958, the part cargo-owners filed objections to the claim of the owners of the *Ousel*, including an objection to item 22 on the ground that there was no evidence in support thereof. On February 10, 1959, the part cargo-owners, in a letter addressed to the solicitors both for the owners of the *Ousel* and for the Mersey Docks and Harbour Board, stated that their contentions relating to item 22 would be: "(a) That the owners "of the *Ousel* are not entitled to include this item in their claim "against the fund unless—(i) it has actually been paid by them "to the board, or alternatively (ii) there is a reasonable certainty "that it will be so paid. (b) That, if the owners of the *Ousel* "are entitled to include this item in their claim . . . then the "board's claim against the fund must be reduced by the corre-"sponding amount."

Accordingly on May 28, 1959, the part cargo-owners applied to the Liverpool District Registrar for directions that they should be at liberty to raise as against the owners of the *Ousel* and the Mersey Docks and Harbour Board by way of further objections the points of law set out in the letter of February 10, 1959, but the registrar dismissed the application as against the Mersey Docks and Harbour Board. On appeal to Karminski J. on June 22, 1959, the registrar's order was varied to permit the part cargo-owners to raise the points of law set out in the letter of February 10, 1959, against the Mersey Docks and Harbour Board as well as against the owners of the *Ousel*, and it was ordered that the following two questions (which had been agreed by counsel for the three parties) should be tried as separate issues by a judge alone:

"1. Whether item 22 of the claim of the owners of the *Ousel* "should be allowed notwithstanding that the liability to the "Mersey Docks and Harbour Board to which such item relates "is contingent only.

"2. Whether, if the said item 22 of the claim of the owners "of the *Ousel* is allowed, the Mersey Docks and Harbour Board "must give credit in their claim for an amount equivalent to the

"amount of the said item on the ground that otherwise there "will not be a rateable distribution of the limitation fund among "the several claimants."

During the course of the hearing Lord Merriman P. allowed question 1 to be amended in the manner stated in his judgment.

Eustace Roskill Q.C. and *H. V. Brandon* for the part cargo-owners.

Roland Adams Q.C. and *R. F. Stone* for the owners of the *Ousel*.

J. V. Naisby Q.C. and *G. N. W. Boyes* for the Mersey Docks and Harbour Board.

The following authorities and cases were cited in argument in addition to those referred to in the judgment: Williams on Bankruptcy, 17th ed., pp. 151 and 183; Temperley's Merchant Shipping Acts, 5th ed., pp. 331, 333, 335, 339, 557 and 558; Scrutton on Charterparties and Bills of Lading, 14th ed., pp. 456, 461; Rowlatt's Law of Principal and Surety, 3rd ed., p. 309; Halsbury's Laws of England, 3rd ed., vol. 2, pp. 472–474; *In re Fenton* [2]; *The Disperser* [3]; *The Kronprinz Olav* [4]; *The American Jurist and Claycarrier* [5]; *Pilkington* v. *Wood* [6]; *The Byzantion* [7]; *The Victoria* [8]; *Prehn* v. *Bailey*, *The Ettrick* [9]; *The Emilie Millon* [10]; *Stonedale No. 1 (Owners)* v. *Manchester Ship Canal Co.* [11]; *Ex parte Rushforth* [12]; *Ex parte Cotton* [13]; *Dee Conservancy Board* v. *McConnell* [14]; *Midland Banking Co.* v. *Chambers* [15]; *In re Reis, Ex parte Clough* [16]; *In re Rissik* [17]; *In re Rowe, Ex parte Derenburg & Co.* [18]; *Morris* v. *Robinson* [19]; *Ex parte Kendall* [20]; *In the matter of John Plummer and William Wilson* [21]; *Ex parte West Riding Union Banking Co., In re Turner* [22]; *In re Melton, Milk* v. *Towers* [23]; *Commercial Bank of Australia Ltd.* v. *Official Assignee of the Estate of John Wilson & Co.* [24]; *Castellain* v. *Preston* [25]; *Cargo Ships El-Yam Ltd.* v. *Invoer-en-Transportonderneming Invotra N.V.* [26]; *C. A. Van Eijck and Zoon* v. *Somerville* [27]; *London Rangoon Trading Co. Ltd.* v. *Ellerman*

[2] [1931] 1 Ch. 85.
[3] [1920] P. 228; 36 T.L.R. 578.
[4] [1921] P. 52.
[5] [1958] 1 Lloyd's Rep. 423; [1958] 2 All E.R. 659.
[6] [1953] Ch. 770; [1953] 3 W.L.R. 522; [1953] 2 All E.R. 810.
[7] (1922) 38 T.L.R. 744; 16 Asp. M.L.C. 19.
[8] (1888) 13 P.D. 125.
[9] (1881) 6 P.D. 127.
[10] [1905] 2 K.B. 817.
[11] [1956] A.C. 1; [1955] 3 W.L.R. 203; [1955] 2 All E.R. 689.
[12] (1805) 10 Ves. 409.
[13] (1883) 11 Q.B.D. 301.
[14] [1928] 2 K.B. 159.
[15] (1869) 4 Ch.App. 398.
[16] [1904] 2 K.B. 769; 20 T.L.R. 547; affirmed sub nom. *Clough* v. *Samuel* [1905] A.C. 442; 21 T.L.R. 702.
[17] [1936] Ch. 68.
[18] [1904] 2 K.B. 483.
[19] (1824) 3 B. & C. 196.
[20] (1811) 17 Ves. 514.
[21] (1841) 1 Ph. 56.
[22] (1881) 19 Ch.D. 105.
[23] [1918] 1 Ch. 37; 34 T.L.R. 20.
[24] [1893] A.C. 181; 9 T.L.R. 307.
[25] (1883) 11 Q.B.D. 380.
[26] Unreported, 1955 C. No. 3722, December 2, 1958.
[27] [1906] A.C. 489; 22 T.L.R. 715.

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Lines Ltd.[28]; *Ex parte Tayler, In the matter of Henry Houghton*[29]; *Standard Oil Co. of New York* v. *Clan Line Steamers Ltd.*[30]; *Hobson* v. *Bass*[31]; *In re Blackburne, Ex parte Strouts*[32]; *The Corchester.*[33]

Cur. adv. vult.

Lord Merriman P. read the following judgment, in which he stated the facts and continued: The owners of the *Ousel* claim £10,835 12s. 0d. under the heading "Mersey Docks and Harbour "Board contingent claim of Board in respect of wreck-raising "expenses; namely, statutory limit of 'Ousel.'" It is this claim, hereinafter called item 22, which is the subject of the present reference.

The part cargo-owners attack the inclusion of this item, both in the *Ousel's* claim and, in substance, also in the board's claim. On behalf of the *Ousel* it is contended that though the money has not actually been paid, in circumstances which I will discuss later, they have no escape from their liability to pay this sum to the board as being the deficiency referred to in section 3 (3) of the Mersey Docks and Harbour Board Act, 1954, reduced to the amount of the limitation under the Merchant Shipping Acts.

The board, on the other hand, claim that they are entitled to recover in full the amount due under their private Act, if and when it suits them to do so, and also to claim a dividend, if I may so call it, from the fund on the full amount of their claim, with the proviso that the sum recovered from these two sources does not exceed the total amount of the board's claim against the *Liverpool.*

At the outset of his argument Mr. Naisby stated emphatically that he stood by this contention, and the board have never receded from this position.

It was ordered that this dispute should be tried as an issue in the reference, and two questions were agreed before Karminski J., in chambers for submission to the court, as follows: "It is "ordered that the following two agreed questions be tried as "separate issues by a judge alone: 1. Whether item 22 of the "claim of the owners of the *Ousel* should be allowed notwithstanding that the liability to the Mersey Docks and Harbour "Board to which such item relates is contingent only. 2. "Whether, if the said item 22 of the claim of the owners of the "*Ousel* is allowed, the Mersey Docks and Harbour Board must "give credit in their claim for an amount equivalent to the "amount of the said item on the ground that otherwise there "will not be a rateable distribution of the limitation fund among "the several claimants."

During the hearing, as there appeared to be some doubt

[28] (1923) 39 T.L.R. 284; 14 Ll.L. Rep. 497.
[29] (1857) 1 De G. & J. 302.
[30] [1924] A.C. 100; 40 T.L.R. 148.
[31] (1871) 6 Ch.App. 792.
[32] (1892) 9 Morr. 249.
[33] [1957] P. 84; [1956] 3 W.L.R. 1090; [1956] 3 All E.R. 878.

whether question 1 was wide enough to ensure that the question of double proof was raised, I allowed that question to be amended in the following terms: "1. Whether item 22 of the claim of "the claimants the owners of the *Ousel* should be disallowed on "the grounds: (a) that in substance it forms part of or is the "same as part of the claim of the Mersey Docks and Harbour "Board; (b) that the sum to which the said item relates has not "yet been paid to the board by the claimants the owners of the "*Ousel*; and (c) that accordingly, unless such item is disallowed, "there will not be a rateable distribution of the limitation fund "among the several claimants."

I allowed this amendment by virtue of R.S.C., Ord. 28, r. 12, so as to ensure the determination of the real issue raised by this proceeding.

Mr. Adams stated that he was specifically instructed not to raise question 2 as against the board. Mr. Naisby also disclaimed any intention of arguing question 1 against the *Ousel* unless he was driven to do so, if question 2 was answered against the board. This mutual abstention from attack on each other by the rival claimants to the fund seemed to me to justify Mr. Roskill's observation that this looked like an agreement that the *Ousel* should be treated as having paid the board the amount of item 22, but that the board should be treated as not having received that amount. It is only fair to say, however, that the rigidity of this attitude was somewhat modified in the answers to Mr. Roskill's cogent reply, and after question 1 was amended.

On behalf of the part cargo-owners it was argued by Mr. Roskill that the inclusion of item 22, both in the *Ousel's* claim and in substance in the board's claim, gave rise to the issue of double proof, so that either the contingent claim of the *Ousel* should be disallowed, or, if allowed, that the board should be compelled to give credit against their claim for the same amount.

Alternatively, it was contended that the board should deduct item 22 from their claim against the *Liverpool*, on the principle that they ought, as reasonable persons, to mitigate their loss; or, alternatively, on the ground that their failure to take the reasonable step of recovering the amount of item 22 prevented that part of their loss from flowing from the wrongdoing of the *Liverpool*.

The rule against double proof is very clearly stated in *In re Oriental Commercial Bank* [1] by Mellish L.J.: after saying that the rule applies in the Court of Chancery as well as in the Court of Bankruptcy, and therefore would apply equally where companies are being wound up, he said [2]: "It seems to me that the "principle is a perfectly sound one." Then, after an immaterial reference to the application of the rule to joint and separate estates, he continues: "But the principle itself—that an insol-"vent estate, whether wound up in Chancery or in Bankruptcy, "ought not to pay two dividends in respect of the same debt—

[1] (1871) 7 Ch.App. 99. [2] Ibid. 103.

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"appears to me to be a perfectly sound principle. If it were "not so, a creditor could always manage, by getting his debtor "to enter into several distinct contracts with different people "for the same debt, to obtain higher dividends than the other "creditors, and perhaps get his debt paid in full. I apprehend "that is what the law does not allow; the true principle is, that "there is only to be one dividend in respect of what is in sub-"stance the same debt, although there may be two separate "contracts."

This statement of the principle was followed by Horridge and Roche JJ. in *In re Hoey*,[3] a case in which the bankrupt had charged his property direct to mortgagees and had conveyed to his wife and another the equity of redemption of the property, with a covenant that he would discharge the mortgage liability within a certain period. This was held to raise the principle of double proof on the ground that he had entered into covenants both with the mortgagee and with his wife, but that they were both covenants to pay the same debt, and if they were both allowed to prove in respect of that debt higher dividends would be paid in respect of that debt than in respect of the debts of other creditors.

There has been a very full and exhaustive examination by Mr. Naisby of the bankruptcy law relating to contracts of guarantee, the suggestion being that as several of the cases relating to double proof were cases dealing with suretyship, the law relating to such cases could conveniently be applied to any case in which the question of double proof arises.

One such rule is that where the surety guarantees the whole debt with a limit of the amount for which he is to be liable under his guarantee, the principal creditor, even though the surety has already paid the limited amount due from him, can prove in the bankruptcy of the debtor for the whole of his debt without taking into account that which he has received from the surety: see, for example, *In re Sass*[4] and *In re Houlder*.[5] On the other hand, if the surety guarantees part of the debt only, the creditor must give credit, in proving against the bankrupt's estate, for that which he has received from the surety; or, if he is able to prove for the whole amount because he has not yet recovered from the surety, he must account for the proportionate part of the dividend to the surety on payment being made subsequently by the latter.

From this it was argued by analogy that the effect of the Mersey Docks and Harbour Board Act, 1954, in the present case is that the deficiency mentioned in section 3 (3) is the whole debt, while a limit is imposed on the recovery by the proviso; thus leading to the conclusion that the board, as creditor, can prove in full against the limitation fund, without giving credit for the amount of item 22.

It is true that some of the cases of double proof arise out of contracts of guarantee; but it does not seem to me to follow from

[3] (1918) 88 L.J.K.B. 273.
[4] [1896] 2 Q.B. 12; 12 T.L.R. 333.
[5] [1929] 1 Ch. 205.

this that all cases of double proof are governed by the law relating to cases of guarantee.

In *Ellis* v. *Emmanuel* [6] Blackburn J., delivering the judgment of Cairns L.C., Brett J. and himself, after a full review of all the cases on the subject, said [7]: "I think in such a case it is a "question of construction on which the court is to say whether "the intention was to guarantee the whole debt with a limitation "on the liability of the surety, or to guarantee a part of the debt "only."

The present case is not one of suretyship at all, but if it is to be treated as such by analogy, and if the construction of the Mersey Docks and Harbour Board Act, 1954, is to decide whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only, my opinion is that the latter is the correct view.

The debt which the *Ousel* in the supposed capacity of surety is to pay under the Mersey Docks and Harbour Board Act, 1954, is, in my opinion, the debt constituted by section 3 (3) and the proviso combined; that is to say, the portion of the deficiency calculated with reference to section 503 (1) (ii) of the Merchant Shipping Act, 1894.

In my opinion the suggestion that the *Ousel* as the supposed surety guarantees the whole deficiency under section 3 (3) subject to a limit by the proviso arises from the failure to distribute the two senses in which the word "limitation" is used in connection with the principle of limitation of liability in Admiralty and in the analysis of the suretyship cases by Blackburn J. to which I have referred.

On behalf of the board it was argued that nearly all the reported cases of double proof were cases in which what was held to be in substance the same debt arose out of contract, though not necessarily out of the same contract.

Nevertheless, the object of the principle being to avoid the payment of two dividends in respect of what is in substance the same debt, I do not see why the principle should not apply to a debt arising out of a tort—see Professor Glanville Williams on Joint Torts and Contributory Negligence, p. 173, s. 49.

Nor, on the other hand, does it seem to me to matter that the subject of the rival proof arises out of the Mersey Docks and Harbour Board Act. The point, as it seems to me, is that item 22 is in effect co-extensive with part of the board's claim against the fund, and that both arise directly out of the same subject-matter; namely, the wreck of the *Ousel* in the Mersey, and the expense incurred by the board in clearing the Mersey of obstruction by the wreck.

The fact that the board's claim against the *Liverpool* is a common law claim in tort, while the board's claim against the

[6] (1876) 1 Ex.D. 157.

[7] Ibid. 169.

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Ousel results from their private Act, seems to me to be immaterial. It is true that in *In re Oriental Commercial Bank*,[8] Mellish L.J. used the words "although there may be two separate contracts" in respect of what he held to be in substance the same debt. But that was a case of two separate contracts. On the other hand, in *In re Moss*,[9] Bigham J., quoting with approval the judgment of the county court judge whose decision was under appeal, said[10]: "there clearly would be a double proof in respect of the same sum in substance although the nature of the liability in each case assumes a different form." These words are wide enough to cover the present case.

In my opinion, there is no obligation to reject one claimant rather than the other in applying the rule of double proof.

I think that as Lord Uthwatt said in *Morrison Steamship Co. Ltd.* v. *Greystoke Castle* (*Cargo Owners*),[11] when considering the rival claims of cargo and the carrying ship against the colliding ship in respect of general average expenses, "the reality of the situation dictates the choice to be made."[12]

Here the owners of the *Ousel*, once the board had served the notice and taken possession under their private Act, had no escape from the obligation to pay the board the amount of item 22. To debar them, therefore, from proving against the limitation fund the item of loss which plainly results from the *Liverpool's* wrongdoing would be harsh indeed. On the other hand, the board, quite rightly and properly, have decided to put in train the enforcement of their rights under the private Act, and can at any moment receive the fruits of doing so.

In *Morris Ltd.* v. *Perrott and Boulton*[13] Lord Goddard, delivering the judgment of the Court of Appeal, said[14]: "If the causes of action are different, judgment without satisfaction against one is no bar to an action against the other, and this is so even if the plaintiff deliberately refrains from proceeding to execution on the first judgment."

But, in my opinion, this is not a case of deliberately refraining from proceeding to execution. On the contrary, it is a case of avowed intention to collect item 22, the fruits of the steps that the board have taken under their private Act, but to postpone collection, if possible, until the limitation fund has been distributed.

I can see no reason why the principle of double proof should not apply to a limitation action, as well as to bankruptcy and winding up.

The desirability of avoiding the payment of two dividends in respect of what is, in substance, the same debt, applies equally to a limitation fund. In this context it is, perhaps, worth noting

[8] 7 Ch.App. 99, 103, 104.
[9] [1905] 2 K.B. 307.
[10] Ibid. 312.
[11] [1947] A.C. 265; 63 T.L.R. 11; [1946] 2 All E.R. 696.
[12] [1947] A.C. 265, 309.
[13] [1945] 1 All E.R. 567; [1945] W.N. 148.
[14] [1945] 1 All E.R. 567, 569.

that in *The Stoomvaart Maatschappij Nederland* v. *P. & O. Steam Navigation Co.*,[15] Lord Selborne L.C. treated bankruptcy and the statutory limitation of liability in Admiralty as being on the same footing in equity.[16]

If the rule against double proof applies at all, it seems to me that the reality of the situation indicates that the board should be debarred from proving for a dividend for that part of their loss in respect of which they can recover in full from the *Ousel*; that is to say, the answer to question 1, both in its original and its amended form, is that item 22 of the claim of the *Ousel* should be allowed; and the answer to question 2 is that the board must give credit in their claim for an amount equivalent to the amount of item 22.

At one stage of the argument it was suggested that to make this order would be to confiscate the sum legitimately due to the board as the result of their private Act. This suggestion of confiscation is taken from the opinion of Lord Finlay in *Mersey Docks and Harbour Board* v. *Hay, The Countess.*[17] But that was a case where the particular claimant had a possessory lien, notwithstanding which it was argued that he must prove as an unsecured claimant. Seeing that it was decided that rateable distribution does not affect priorities and that the respective rights must be considered qualitatively as well as quantitatively (*per* Lord Birkenhead L.C.[18]), to deprive the claimant of his priority and reduce him to the level of an unsecured claimant against the fund would truly have been to confiscate his priority.

Reduced from rhetoric to hard fact, it now appears that the so-called confiscation means that the board will get about £1,200 less than the full amount, after taking into account that the amount of item 22 is deducted from the board's claim on the basis that the board has received, or must be taken to have received, that amount, and that the *Ousel* is entitled to prove for the amount of item 22.

This, no doubt, is very unfortunate, but so is the fact that there are other innocent victims of the *Liverpool's* ability to limit her liability for her admitted wrongdoing. I do not think that I can decide this case solely on an assessment of the comparative merits of innocent victims.

However the matter may stand in connection with the rule against double proof, there is, in my opinion, a simpler solution to the problem; namely, the obligation which rests upon the board to mitigate the loss which they have sustained by the wrongful act of the *Liverpool*; I was myself responsible for introducing this aspect of the matter into the discussion, but Mr. Roskill adopted it, and the topic has been fully argued.

Let me say at once that this is not a question of one tort-feasor making the hopeless attempt to insist that another

[15] (1882) 7 App.Cas. 795.
[16] Ibid. 801.
[17] [1923] A.C. 345, 363; 39 T.L.R. 302.
[18] Ibid. 356.

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tortfeasor shall be sued first, or at all, as a condition of determining his own liability; or, indeed, of the tortfeasor dictating to the board whom else they shall sue, or in what order.

In this case notice under the Mersey Docks and Harbour Board Act was served by the board on the owners of the *Ousel* on the very day on which, as the result of the collision for which the *Liverpool* has accepted the sole blame, the *Ousel* was driven ashore in such a way as to block the Mersey Channel, for the upkeep of which the board are responsible.

This notice was given in pursuance of the rights of the board under their private Act. It has been suggested, indeed it has almost been assumed in the course of the argument, that the Act not merely gives the board the right but imposes the duty to act as they have done. I am not so sure about that; nor, in my opinion, does it matter. Plainly they have the right, and whether there is also the duty or not the board must at least have an option about the time when the steps laid down in the Act are taken.

In this case they acted at once, and in doing so they plainly acted of their own volition. From the giving of the notice everything proceeded through the prescribed stages; from the board taking possession of the *Ousel*, the sale of the cargo, the blowing up of the ship, down to the calculation of the "deficiency," and, finally, to the reduction of the amount of the "deficiency," to the amount for which alone the *Ousel* was liable under the limitation provided by section 3 (3) and the proviso combined.

On January 26, 1959, the board stated explicitly that it was their intention to enforce liability under their private Act against the *Ousel*. About the amount there has been complete certainty since the exchange of letters between the parties respectively in June, 1959.

So far, I repeat, the actions of the board were at their own volition and were in no way dictated by any third party. All that is lacking, therefore, is the actual payment of the money.

I find as a fact that from the moment when the amount was ascertained the owners of the *Ousel* have been ready and willing to pay the money due, but the board have persistently maintained what I regard as the farce of refraining from taking the money. This action also is entirely of their own volition, and the refusal was emphatically repeated in the course of the argument, when Mr. Adams, on behalf of his clients, was instructed to offer immediate payment, or to pay the money into court.

Accordingly, as I was advised that there was no machinery for payment into court by a defendant in the course of a reference arising out of a limitation action, it was arranged that Messrs. Walton would act as stake-holders of the amount of item 22 for whom it might concern.

In these circumstances, the question how the matter stands is one of law.

It has been common ground in this case that the classic

statement about mitigation of loss by Viscount Haldane L.C. in his speech in the *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Company of London Ltd.*,[19] although made in an action arising out of a breach of contract, applies equally, mutatis mutandis, to tort. I will preface the citation from the *Westinghouse* case by a short passage from the judgment of Scrutton L.J. in *Payzu Ltd.* v. *Saunders*,[20] when he said[21]: "Whether it be more correct to "say that a plaintiff must minimise his damages, or to say that "he can recover no more than he would have suffered if he had "acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. "The plaintiff must take [quoting Lord Haldane L.C. in the "*Westinghouse* case[22]] 'all reasonable steps to mitigate the loss "'consequent on the breach,' and this principle 'debars him from "'claiming any part of the damage which is due to his neglect "'to take such steps.'"

After this passage, Lord Haldane L.C.[22] quoted James L.J. in *Dunkirk Colliery Co.* v. *Lever*[23] as follows: "'The person who "'has broken the contract is not to be exposed to additional cost "'by reason of the plaintiffs not doing what they ought to have "'done as reasonable men, and the plaintiffs not being under any "'obligation to do anything otherwise than in the ordinary course "'of business.'"

Lord Haldane continued[24]: "As James L.J. indicates, this "second principle does not impose on the plaintiff an obligation "to take any step which a reasonable and prudent man would "not ordinarily take in the course of his business. But when "in the course of his business he has taken action arising out of "the transaction, which action has diminished his loss, the effect "in actual diminution of the loss he has suffered may be taken "into account even though there was no duty on him to act."

Then, after citing *Staniforth* v. *Lyall*[25] as an illustration of this rule, Lord Haldane continued[26]: "I think that this decision "illustrates a principle which has been recognised in other cases, "that, provided the course taken to protect himself by the plaintiff "in such an action was one which a reasonable and prudent "person might in the ordinary conduct of business properly have "taken, and, in fact did take whether bound to or not, a jury "or an arbitrator may properly look at the whole of the facts and "ascertain the result in estimating the quantum of damage."

Both Bankes and Scrutton L.JJ. in *Payzu Ltd.* v. *Saunders*[27] emphasised that the duty imposed on the plaintiff involved a conclusion of fact, to be arrived at on a consideration of all the circumstances of the case.[28]

[19] [1912] A.C. 673, 688–690.
[20] [1919] 2 K.B. 581; 35 T.L.R. 657.
[21] [1919] 2 K.B. 581, 589.
[22] [1912] A.C. 673, 689.
[23] (1878) 9 Ch.D. 20, 25.
[24] [1912] A.C. 673, 689.
[25] (1830) 7 Bing. 169.
[26] [1912] A.C. 673, 690.
[27] [1919] 2 K.B. 581; 35 T.L.R. 657.
[28] [1919] 2 K.B. 581, 589.

1959

THE LIVERPOOL (No. 2).

Lord Merriman P.

Applying these observations, the " transaction " is the grounding of the *Ousel* in the Mersey Channel. The action taken by the board, whether they were bound to take it or not, under their private Act was reasonable and prudent, and one which they would ordinarily take in the course of their business. This action has diminished their loss, inasmuch as item 22 is receivable by the board in full, and is not the subject of proof on which a mere dividend out of the fund is recoverable. If the fact that the board have chosen not to receive the amount of item 22 makes any difference, and they are not to be treated as having received it, or are not estopped from saying that they have not received it, I regard their refusal to receive payment as unreasonable. They are deliberately refraining from accepting the money so as not to be prevented from alleging, for what it is worth, that they have not received it.

Accordingly, to the extent that the amount of item 22 is included in the board's claim against the fund, I do not consider that the fact that they have not actually received it follows reasonably from the wrongdoing of the *Liverpool*. On the contrary, it flows in my opinion, from the unreasonable refusal of the board to receive the amount of item 22 from the *Ousel*. Putting it the other way, they have been able to minimise the damage in that respect at any moment since the precise amount was ascertained and agreed.

For these reasons, also, as well as on the issue of double proof, I think that question 2 must be answered against the board.

Judgment for the part cargo-owners. Costs of part cargo-owners and owners of the " Ousel " to be paid by the Mersey Docks and Harbour Board. Leave to appeal granted to Mersey Docks and Harbour Board.

Solicitors: *Waltons & Co.; Weightman, Pedder & Co., Liverpool; R. H. Bransbury, Liverpool.*

[CHANCERY DIVISION.]

1960
Feb. 15.

Danckwerts J.

INLAND REVENUE COMMISSIONERS *v.* BERNSTEIN.

Trusts—Power of advancement—Contrary intention—Direction to accumulate income—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2).

Trusts—Power of advancement—" Prior " interests—Contingent interests of unborn children—Trustee Act, 1925, *s.* 32 (1) (*c*).

Trusts—Distribution of fund—Woman incapable of child-bearing—Power of court to dispense with consents—Whether Inland Revenue may invoke power.

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INLAND REVENUE COMRS. v. BERNSTEIN.

Revenue—Income tax—Settlement—Trust for accumulation during life of settlor—Contingent interest of settlor's wife—Whether statutory power of advancement applicable—Whether income to be treated as income of settlor—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2); *Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 405 (1), (2).

By a settlement dated October 16, 1947, a fund was settled on trust to accumulate the income therefrom during the life of the settlor, and after his death on trust as to one-third for the children then living of the settlor by the beneficiary, his present wife, and as to two-thirds for the beneficiary absolutely; if the beneficiary died during the lifetime of the settlor the fund was to be held on trust for her children living at his death, but if at the death of the settlor there were living no children of his by the beneficiary, then on trust for the beneficiary absolutely, and if she should die during the settlor's lifetime without leaving any children on trust for her sister absolutely. The settlor appealed to the special commissioners against assessments to surtax for the years 1950 to 1954 in respect of income arising under the settlement, and the Crown contended that by virtue of the statutory power of advancement under section 32 of the Trustee Act, 1925,[1] one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act, 1952, and that, accordingly, one half of the income under section 405 (1) was to be treated as his income. The special commissioners discharged the assessments, and the Crown appealed:—

[1] Trustee Act, 1925, s. 32: "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advance- "ment or benefit, in such manner as "they may, in their absolute dis- "cretion, think fit, of any person "entitled to the capital of the trust "property or of any share thereof . . . "Provided that—(*a*) the money so "paid or applied for the advancement "or benefit of any person shall not "exceed altogether in amount one-half "of the presumptive or vested share "or interest of that person in the "trust property; . . . (*c*) no such "payment or application shall be "made so as to prejudice any per- "son entitled to any prior life or "other interest, whether vested or "contingent, in the money paid or "applied unless such person is in "existence and of full age and con- "sents in writing to such payment or "application."

S. 69 (2): "The powers conferred "by this Act on trustees are in addi- "tion to the powers conferred by the "instrument, if any, creating the "trust, but those powers, unless "otherwise stated, apply if and so far "only as a contrary intention is not "expressed in the instrument, if any, "creating the trust, and have effect "subject to the terms of that instru- "ment."

Income Tax Act, 1952, s. 405: "(1) If and so long as the settlor has "an interest in any income arising "under or property comprised in a "settlement, any income so arising "during the life of the settlor in any "year of assessment shall, to the "extent to which it is not distributed, "be treated for all the purposes of "this Act as the income of the settlor "for that year and not as the income "of any other person: Provided that "—(*a*) if and so long as that interest "is an interest neither in the whole "of the income arising under the "settlement nor in the whole of the "property comprised in the settle- "ment, the amount of income to be "treated as the income of the settlor "by virtue of this subsection shall be "such part of the income which, but "for this proviso, would be so treated "as is proportionate to the extent of "that interest. . . .

"(2) For the purpose of subsection "(1) of this section, the settlor shall "be deemed to have an interest in "income arising under or property "comprised in a settlement if any "income or property which may at "any time arise under or be com- "prised in that settlement is, or will "or may become, payable to or applic- "able for the benefit of the settlor or "the wife or husband of the settlor in "any circumstances whatsoever: . . ."

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Held, that the trust for accumulation during the lifetime of the settlor showed an intention that no income should be distributed during that period and was an expression of a "contrary intention" within section 69 (2) of the Trustee Act, 1925, negativing the power of advancement in section 32 (1); and that, therefore, the statutory power of advancement did not apply and no advance could be made of either capital or income during the lifetime of the settlor. Accordingly, that contention of the Crown failed and the appeal must be dismissed.

In re Turner's Will Trusts [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A. applied.

Held, further, (1) that the interests of unborn children during the lifetime of the beneficiary were contingent and subject to her interests and were not, therefore, "prior interests" within the meaning of section 32 (1) (*c*) of the Trustee Act, 1925.

(2) That the practice of the Chancery Division in dispensing with consents and allowing the distribution of a trust fund where the court was satisfied that a woman was incapable of child-bearing was a rule of practical administration which could not be invoked to aid the Inland Revenue to claim payment of tax in circumstances which were still hypothetical.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

A settlor, William Bernstein, appealed against assessments made on him to surtax for the years 1950 to 1951, 1951 to 1952, 1952 to 1953 and 1953 to 1954 in the sums of £6,102 (additional), £6,659, £1,338 (additional) and £4,630 (additional), respectively, on the basis that under section 405 of the Income Tax Act, 1952, one-half the income arising under a settlement made by him on October 16, 1947, was to be treated as his income.

The commissioners found, inter alia, that the settlement, dated October 16, 1947, after reciting that a certain sum of money had been paid by the settlor to the trustees thereof, and after making provision for the investment of the trust fund, provided as follows:

"2. The trustees shall during the life of the settlor accumulate "the income of the trust fund at compound interest by investing "the same and the resulting income thereof in any of the invest- "ments hereby authorised in augmentation of the capital of the "trust fund and for the benefit of the person or persons who "shall eventually become entitled thereto.

"3. After the death of the settlor the trustees shall hold the "trust fund as to one equal third part thereof in trust for all or "any of the children or child then living of the settlor by the "beneficiary [the settlor's present wife] (if more than one in "equal shares) and as to two equal third parts thereof in trust "for the beneficiary absolutely but if the beneficiary dies in the "lifetime of the settlor leaving children or a child her surviving "then the trustees shall hold the trust fund in trust for all or any "of such children or child who shall be living at the death of the "settlor if more than one in equal shares absolutely.

"4. If at the death of the settlor there shall be living no child "of the settlor by the beneficiary the trustees shall hold the trust

" fund in trust for the beneficiary absolutely but if the beneficiary " dies in the lifetime of the settlor without laving any children or " a child by the settlor or her surviving then the trustees shall " hold the trust fund in trust for Muriel Clara Selina Thoms " sister of the beneficiary absolutely."

The settlor and his wife were both living, they had had no children, and all income of the trust fund had been accumulated in accordance with clause 2 of the settlement.

It was contended on behalf of the Crown that the trustees of the settlement had, under section 32 of the Trustee Act, 1925, power at any time or times to pay or apply for the advancement or benefit of the settlor's wife one-half of the trust fund; that by virtue of such power one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act, 1952; that by section 405 (1) and proviso (*a*) one-half of the income arising under the settlement in the relevant years was accordingly to be treated as the income of the settlor; and that the assessments were correct in principle and (subject to adjustment of the figures) should be confirmed.

It was contended on behalf of the settlor that the power of advancement contained in section 32 of the Act of 1925 was not applicable to the settlement, inasmuch as on the true construction of the deed of settlement it contained an indication of a contrary intention (Trustee Act, 1925, s. 69 (2)); that if, contrary to his contention, the statutory power of advancement was to be read into the settlement, such power could not be exercised in favour of the settlor's wife without the prior consent of the persons (born or unborn) who had " prior interests " within section 32 (1) (*c*) of the Trustee Act, 1925; that possible children of the settlor by his wife had such " prior interests," and their consent being unobtainable at any time during the period of accumulation, the statutory power of advancement could never be exercised in respect of the money in which such children had such prior interests, and that those interests extended to the income of the whole of the trust fund and the accumulations of the income and, alternatively, in one-third of the trust fund; that the settlor could not be deemed to have an interest in the income arising from the settlement within section 405, and that the assessments under appeal should be discharged.

The commissioners considered that the statutory power of advancement in section 32 of the Trustee Act, 1925, was not inconsistent with any express provision of the settlement and should be read into it, but that unborn children had interests in the whole of the capital of the trust fund which were " prior " interests " within proviso (*c*) to section 32 (1). Since the Crown did not dispute that if that were right no advancement could be made owing to the impossibility of obtaining consents, the commissioners accordingly allowed the appeal and discharged the assessments.

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The Crown appealed.

John Pennycuick Q.C., *E. Blanshard Stamp* and *Alan S. Orr* for the appellants.

Sir Lynn Ungoed-Thomas Q.C. and *C. N. Beattie* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Becket's Settlement* [2]; *In re Rees* [3]; *In re White*.[4]

Danckwerts J. This is an appeal by the Commissioners of Inland Revenue from the special commissioners in respect of certain claims to assess a settlor in respect of surtax by virtue of a settlement which he made dated October 16, 1947.

The settlement recites that the settlor is desirous of making provision for a lady—called in the settlement the beneficiary—who afterwards became his wife. The material provisions of the settlement for the purposes of this case are contained in paragraphs 2 and 3. Clause 2 provides: "The trustees shall during "the life of the settlor accumulate the income of the trust "fund at compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised "in augmentation of the capital of the trust fund and for the "benefit of the person or persons who shall eventually become "entitled thereto." Therefore, there is to be an accumulation during the life of the settlor, and the settlement contemplates that no income will be distributed before his death. Clause 3 provides: "After the death of the settlor the trustees shall hold "the trust fund as to one equal third part thereof in trust for all "or any of the children or child then living of the settlor by the "beneficiary (if more than one in equal shares) and as to two "equal third parts thereof in trust for the beneficiary absolutely "but if the beneficiary dies in the lifetime of the settlor leaving "children or a child her surviving then the trustees shall hold "the trust fund in trust for all or any of such children or child "who shall be living at the death of the settlor if more than one "in equal shares absolutely."

I should also refer to clause 4 which reads: "If at the death "of the settlor there shall be living no child of the settlor by the "beneficiary the trustees shall hold the trust fund in trust for "the beneficiary absolutely but if the beneficiary dies in the lifetime of the settlor without leaving any children or a child by "the settlor or her surviving then the trustees shall hold the trust "fund in trust for Muriel Clara Selina Thoms sister of the "beneficiary absolutely." Consequently, the trusts are in effect these: as regards an equal one-third part the beneficiaries in

[2] [1940] Ch. 279; 56 T.L.R. 342.
[3] [1954] Ch. 202; [1954] 2 W.L.R. 59; [1954] 1 All E.R. 7.
[4] [1901] 1 Ch. 570.

order are the children or child living at the death of the settlor by the beneficiary; as regards two equal third parts thereof the first trust is for the beneficiary absolutely with a trust for the children if the beneficiary dies within the lifetime of the settlor leaving children or a child surviving her; finally, if the beneficiary outlives the settlor and there are no children living of the settlor by her she takes an absolute interest, and if she does not—that is to say, if she dies within the settlor's lifetime—her sister comes in instead.

Those are the trusts and they are comparatively simple in outline. The claim is made by virtue of section 405 of the Income Tax Act, 1952. Section 405 (1) provides: "If and so long as the "settlor has an interest in any income arising under or property "comprised in a settlement, any income so arising during the life "of the settlor in any year of assessment shall, to the extent to "which it is not distributed, be treated for all the purposes of this "Act as the income of the settlor for that year and not as the income of any other person." I need not read the provisos which are not applicable here. Turning to subsection (2) it provides that "For the purpose of subsection (1) of this section, the settlor "shall be deemed to have an interest in income arising under or "property comprised in a settlement if any income or property "which may at any time arise under or be comprised in that "settlement is, or will or may become, payable to or applicable "for the benefit of the settlor or the wife or husband of the settlor "in any circumstances whatsoever."

There is no question of any income becoming payable to or applicable for the benefit of the settlor, but it is contended that in certain circumstances the income of this trust fund might become payable to or applicable for the benefit of the settlor's wife by virtue of the power of advancement contained in section 32 of the Trustee Act, 1925. I described this as a very long shot and I still think that as a statutory provision it is a remarkable effort at bringing in things which are looked at from a very long range.

Section 32, which is the material section of the Trustee Act, 1925, provides: "(1) Trustees may at any time or times pay or "apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute "discretion, think fit, of any person entitled to the capital of the "trust property or of any share thereof, whether absolutely or "contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death "under any specified age or on the occurrence of any other event, "and whether in possession or in remainder or reversion, and "such payment or application may be made notwithstanding that "the interest of such person is liable to be defeated by the "exercise of a power of appointment or revocation, or to be "diminished by the increase of the class to which he belongs." In the present case, of course, Mrs. Bernstein is entitled contingently on surviving the settlor to two-thirds of the capital of

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the property and there will be added to that two-thirds the appropriate part of the income which was accumulated during the settlor's lifetime.

The first proviso limits the amount of the advancement to one-half of the presumptive or vested share. The important proviso is (*c*) which provides that "no such payment or application shall "be made so as to prejudice any person entitled to any prior life "or other interest, whether vested or contingent, in the money "paid or applied unless such person is in existence and of full "age and consents in writing to such payment or application." It is plain that the settlor takes no interest in the income of the trust fund, and that his wife takes no interest in the income of the trust fund except contingently on it being added to the capital and her surviving the settlor. The claim of the Revenue depends entirely on section 32 of the Trustee Act, 1925, being available in such a way that during the lifetime of the settlor income comes to his wife in some way or other. Consequently, the application of section 32 is vital to the contentions of the Inland Revenue.

There is another section, section 69 (2) of the Trustee Act, 1925, which is applicable and this is one of the first points in the case.

[His Lordship read section 69 (2) and continued:] The first point which was argued before the commissioners on behalf of the taxpayer was that there is a contrary intention within the meaning of section 69 (2) of the Trustee Act, 1925, which is found to be expressed in this settlement. I have been referred to certain cases which are not directly in point upon this section, but were concerned with section 31 (1) (ii) of the same Act which provides for maintenance and more particularly provides that after the beneficiary reaches the age of 21 but is still not entitled to a vested interest in the income the trustees are to pay the income of the trust fund to him until he attains a vested interest, or dies, or his interest fails. In regard to that section there are three cases: *In re Spencer*,[1] *In re Ricarde-Seaver's Will Trusts*[2] and *In re Turner's Will Trusts*,[3] the last, a decision of the Court of Appeal, being the only case which seems to me to be of any real assistance in the present matter. Although the provision in section 31 (1) (ii) is expressed in an imperative form, it was held in *In re Turner's Will Trusts*[4] that it was not imperative as it was merely a power. Consequently, as it was merely a power and there was a provision for accumulation in the relevant will, that provision for accumulation was an expression of a contrary intention for the purposes of section 69 (2) of the Trustee Act, 1925, and therefore negatived the provision contained in section 31 (1) (ii).

Although that was a decision on a different section it may be applicable in the present case for this reason: from the way this settlement is drawn, and in particular from the fact that clause 2

[1] [1935] Ch. 533.
[2] [1936] W.N. 146; 52 T.L.R. 508; [1936] 1 All E.R. 580.
[3] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A.
[4] [1937] Ch. 15.

is an entirely separate provision from clause 3 and in the plainest possible terms provides for accumulation during the lifetime of the settlor, it seems to me that there is an intention that no income shall be distributed before the death of the settlor. It is true that section 31 deals directly with income, but this case is very closely allied, for if the power of advancement be exercised, the effect is to cut off the appropriate portion of the income after that advancement, and of necessity the operation must put an end to the trust for accumulation to that extent. This trust for accumulation is thus inconsistent with the trust for advancement contained in section 32 of the Trustee Act, 1925. Section 32, therefore, is not applicable in the present case and, accordingly, no advances can be made of either capital or income to the beneficiary during the settlor's lifetime. That, of course, is the end of the claim of the Inland Revenue under this particular section, if it is correct.

I will now deal with the other two points. The second point was that it was claimed on behalf of the settlor—and this argument succeeded before the commissioners although the first argument to which I have referred did not—that the children of the marriage represent the class whose interest comes within the terms of section 32 of the Trustee Act, 1925. Section 32 (1) (*c*) provides that where there is a prior life or other interest which would be prejudiced if the advancement were made no such advance payment shall be made. That argument cannot succeed because, as I indicated in my analysis of the trusts in clauses 3 and 4 of the settlement, as regards two-thirds of the capital and the accompanying income the first interest is the interest of the beneficiary. Therefore, I cannot see, as regards her share, how the interest of the possible children—there are none at present—can be regarded as a prior interest at all. They only have a contingent interest which is subject to her first interest, and to that extent it seems to me that it would be impossible for the argument to succeed.

I will deal with the third point, which was taken here and not before the special commissioners, and only briefly. The argument was based on the theory that from a given time—which I gather is still in the future—the beneficiary might be past the age of child-bearing, but that if she had children they would be the only ascertainable persons, other than her sister, who could give their consent, and that if they and her sister did so a situation would arise in which in certain circumstances (relying of course on the wide words of section 405 (2) of the Income Tax Act, 1952), section 32 would operate, assuming, of course, that it applied to the present settlement. That argument cannot succeed because for the purposes of the rule against perpetuities—and it would appear also from the law relating to accumulations—a woman is not treated as being no longer able to bear children, whatever her age. It is quite true that the Chancery Division as a matter of practical administration, upon being satisfied that by reason of

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age or for medical reasons a woman is incapable of child-bearing, will allow the distribution of a fund, thus exonerating the trustees of a will or settlement from what otherwise might be a breach of trust. But in a technical matter such as this, it would not be right to invoke such a rule of administration in order to aid the Inland Revenue to claim payment of tax in circumstances which are still highly hypothetical. That view seems to me to be supported by *In re Dawson*,[5] *In re Deloitte* [6] and *In re Hocking*.[7] It is perfectly true that doubts may have been cast on the decision in *In re Deloitte* [8] but from *Berry* v. *Geen*,[9] at any rate, it is quite plain that *In re Dawson* [10] and *In re Deloitte* [11] are binding on me. Consequently, this appeal fails, though not for the reason upon which the commissioners relied.

Appeal dismissed with costs.

Solicitors: *Solicitor, Inland Revenue; Gouldens.*

M. G. T.

[5] (1888) 39 Ch.D. 155.
[6] [1926] Ch. 56, 65.
[7] [1898] 2 Ch. 567, C.A.
[8] [1926] Ch. 56.
[9] [1938] A.C. 575, 584; [1938] 2 All E.R. 362; 54 T.L.R. 703, H.L.
[10] 39 Ch.D. 155.
[11] [1926] 1 Ch. 56.

[QUEEN'S BENCH DIVISION.]

1960
Feb. 25.

Glyn-Jones J.

AUTEN *v.* RAYNER and Others (No. 2).
AUTEN *v.* BAKER TODMAN & CO. (sued as a firm) and Another.
SAME *v.* SAME.

[1956 A. No. 1699.]
[1956 A. No. 1698.]

Crown—Privilege—Evidence—Police reports, etc.—Entries in detective's diary—Sealed by order of Home Secretary after personal examination—Minister's certificate—Whether conclusive—Documents privileged when in possession of detective—Whether privileged when in possession of Director of Public Prosecutions—Attorney-General—Right to claim privilege in face of court.

Practice — Discovery — Privilege — Professional privilege — Director of Public Prosecutions—Documents relating to criminal prosecution.

Practice—Subpoena duces tecum—Late service—Whether ground for setting aside.

Certain entries in the diaries of a detective in the fraud department of the Criminal Investigation Department, the third defendant in an action in which all three defendants were charged, inter alia, with conspiracy, false imprisonment and malicious prosecution, had been sealed by order of the Home Secretary, who claimed Crown privilege on the ground that their disclosure would be injurious to the public because they indicated or tended to identify sources of police information. During the hearing of the action application

was made on behalf of the plaintiff for the unsealing of the entries, on the ground that there was evidence to show that they were not within the class of documents to which Crown privilege applied. A subpoena was also served on a member of the staff of the Director of Public Prosecutions requiring him to produce all documents in his possession relevant to the issues in the action, and naming five specific classes of documents, namely, police reports, memoranda or notes of interviews, relevant entries in his official diaries, notes of conferences, briefs and instructions to prosecuting counsel in the trial of the plaintiff at the Central Criminal Court, and proofs of witnesses accompanying the briefs.

Objection was taken by the Crown, Crown privilege being claimed in respect of the entries in the diaries, the police reports and other classes of documents covered by the subpoena. In respect of the last two classes of documents professional privilege was claimed:—

Held, (1) that the claim for Crown privilege in respect of the entries in the diaries was not one made in respect of a class of documents but in respect of each and every sealed entry, and the court had no power to go behind the certificate of the Home Secretary in respect thereof.

Dictum in *Auten* v. *Rayner* [1958] 1 W.L.R. 1300, 1310; [1958] 3 All E.R. 566, C.A. considered.

(2) That a claim for Crown privilege in respect of the police reports, upheld while the reports were in the possession of the detective, still applied although the reports were now in the possession of the Director of Public Prosecutions.

(3) That, in so far as memoranda and notes of interviews and entries in official diaries were concerned, a claim for Crown privilege could be made in face of the court, and it was unnecessary for that claim to be supported by an affidavit by the Attorney-General; and as the claim had been made the court could not go behind it and order the production of the documents.

(4) That, whether or not there was a precise analogy between the position of the Director of Public Prosecutions and a solicitor, the rules of public policy which had resulted in the establishment of a right of a client and a solicitor to claim privilege as to documents and statements in the possession of the solicitor applied with equal, if not greater, force to the position of the Director of Public Prosecutions.

(5) That, accordingly, the subpoena would be set aside in so far as it required the production of specific classes of documents, and also in respect of the other documents called for which must fall within one or other of the specified classes. In the result the whole subpoena would be set aside.

The fact that a subpoena is served late is not sufficient ground for saying that its service is an abuse of the process of the court.

APPLICATION to set aside subpoena duces tecum.

On September 1, 1956, the plaintiff, Harold William Auten, issued a writ against Colonel Gordon W. G. Rayner, his wife, Eileen Mowbray Rayner, and Patrick Bolongaro, a detective-constable (afterwards detective-sergeant) stationed at Scotland Yard and employed in the company fraud department of the Criminal Investigation Department. Damages were claimed for conspiracy, malicious arrest and prosecution, abuse of process, false imprisonment and injurious falsehood. There was also a second action, consolidated with the first, by the plaintiff against a firm of accountants and a clerk in that firm.

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On November 4, 1958, the Court of Appeal,[1] on an appeal by the plaintiff, upheld an order made on April 23, 1958, by Master Harwood (which had been affirmed by an order of Ashworth J. in chambers) refusing to order that the detective should produce for inspection his reports to senior officers and communications between the Metropolitan Police Force and other forces, objection to their production having been made by the Home Secretary (the Rt. Hon. R. A. Butler, Esq., M.P.) on the ground that they belonged to a class which it was necessary in the public interest for the proper functioning of the public service to withhold from production. At the hearing of the appeal a further appeal against a refusal to order the production of the detective's diaries was dismissed, as it was agreed between the parties that, without prejudice to their contentions or those of the Commissioner of the Metropolitan Police, certain of the diaries, then in the detective's possession or in the possession of the Commissioner of the Metropolitan Police, should be treated for all purposes as having been disclosed subject to any claims for privilege relating thereto. Certain passages in the diaries were sealed by brown paper, the Home Secretary stating, in an affidavit sworn on October 21, 1958: "I have carefully considered the "contents of the remaining entries in the diaries and I have "formed the opinion that it would be injurious to the public "interest if those entries which I have caused to be covered with "brown paper were to be disclosed, because they indicate or tend "to identify the sources of information given in confidence for "the purposes of a criminal investigation . . . I object to the "disclosure of the entries covered up with brown paper."

The trial of the action began on January 18, 1960. On January 22, counsel for the plaintiff informed the judge that in due course he would invite him to unseal certain of the entries in the diaries for which Crown privilege had been claimed, on the ground that it appeared from other evidence that they were not within the category for which Crown privilege was claimed. He relied on observations in the judgment of the Court of Appeal in 1958.[2]

On February 25, the day fixed for the hearing of the plaintiff's application, a subpoena duces tecum was served on one Hugh MacDermott, a member of the staff of the Director of Public Prosecutions, requiring him to produce the following documents:

"(1) All correspondence and other documents in your posses-"sion relating to the matters in issue in this suit and in particular "to the investigations, the preliminary proceedings, the seeking "and interviewing of potential witnesses, and the trial in the "prosecution *Regina* v. *Auten*.[3]

"(2) Reports of the defendant Bolongaro and of other officers "of the Metropolitan and other police forces.

[1] [1958] 1 W.L.R. 1300; [1958] 3 All E.R. 566, C.A.

[2] [1958] 1 W.L.R. 1300, 1310.

[3] Unreported, C.C.C., April 23, 1956.

" (3) Memoranda or notes of interviews.

" (4) Relevant entries in your official diaries for the material " period.

" (5) Notes of conferences, your briefs and instructions to " prosecuting counsel at the Central Criminal Court, and any " opinions from them.

" (6) Proofs of witnesses and all other material accompanying " your briefs."

Objection was made on behalf of the Crown, a claim for Crown privilege being made in respect of the first four classes of documents and a claim for professional privilege in respect of the last two classes.

Neil Lawson Q.C., *John Platts-Mills* and *David Turner-Samuels* for the plaintiff.

Sir Reginald Manningham-Buller Q.C., *A.-G.* and *J. R. Cumming-Bruce* for the Crown.

Christmas Humphreys Q.C. and *H. K. Woolf* for the first and second defendants.

Geoffrey Veale Q.C. and *W. W. Stabb* for the third defendant, the detective.

Maurice Lyell Q.C. and *S. H. Noakes* for the fourth defendants.

The following cases were cited in argument: *Auten* v. *Rayner* [4]; *Hobbs* v. *Hobbs and Cousens* [5]; *Duncan* v. *Cammell Laird & Co. Ltd.* [6]

GLYN-JONES J. Two matters are raised. The first concerns certain entries in diaries kept by the defendant Bolongaro. Some of the entries in those diaries are covered up with blue paper. Those are entries which do not contain any matter relevant to this trial. Others have been sealed and covered up with brown paper. The remainder are left exposed and are open to me or to the parties to read. In respect of entries covered up with brown paper I have an affidavit from the Home Secretary in which he says he has personally examined the entries. He says: " I have carefully " considered the contents of the remaining entries in the said " diaries and I have formed the opinion that it would be injurious " to the public interest if those entries which I have caused to be " covered up with brown paper were to be disclosed." Then he gives his reasons—" because they indicate or tend to identify the " sources of information given in confidence for the purpose of a " criminal investigation." The Home Secretary says: " I object " to the disclosure of the entries covered up with brown paper."

Mr. Lawson refers me to a sentence in the judgment of the

[4] [1958] 1 W.L.R. 1300; [1958] 3 All E.R. 566, C.A.

[5] [1959] 3 W.L.R. 942; [1959] 3 All E.R. 827, P.

[6] [1942] A.C. 624; 58 T.L.R. 242; [1942] 1 All E.R. 587, H.L.

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Court of Appeal upon an interlocutory appeal in this very case,[1] and the sentence to which he refers is as follows[2]: "In particular, "we express now no view on the question (which in our judg- "ment does not arise on this appeal) what the result might be "in a case where the Secretary of State's certificate or conclusion "were on the face of it expressly based on the premise that the "document or documents which he had determined to withhold "was or were of a particular character or class and it were then "shown aliunde that in fact he had been mistaken in the "premise."

Mr. Lawson says that evidence has been given in this case which appears to suggest that a particular entry which he takes as illustrating his point in all probability does not contain anything which would indicate or tend to identify the sources of information, and so on, spoken of by the Home Secretary in his affidavit. I think the Attorney-General is quite right in saying that this is not a case in which privilege is claimed for a class of documents which are described so that if aliunde I were to discover that a particular document fell outside that class and had been mistakenly included, I might look at it. It is a case in which the Home Secretary by his affidavit says that he has looked at these particular entries, and what he has said in his affidavit applies to each and every entry.

In my view, I have no power to go behind the Home Secretary's certificate and look at any of the entries in respect of which and each of which Crown privilege is claimed.

A second question has arisen on which I have had the assistance of the Attorney-General. The writs in these actions were issued on September 1, 1956. The pleadings amount to a bundle of 334 pages, excluding all the affidavits, interrogatories and the like. The bundle consists solely of pleadings and the interlocutory orders on such questions as discovery of documents. There has been the most prolonged and searching inquiry as to what documents should or should not be disclosed that I have ever seen in a case in my experience. There is case after case in which the master has been asked to decide about documents; case after case in which the master's decision has been taken on appeal to the judge; and two cases in which the decision of the judge in chambers has gone to the Court of Appeal. The parties have obviously given profound study to the question of what documents ought to be available before the court in this case. It has been manifest, I think, since the case started that a question would arise here as to the reports made by the defendant Bolongaro and other documents in the possession of the Director of Public Prosecutions; and yet not until today, in the sixth week of the trial, is there served upon the representative of the Director who conducted the prosecution out of which the claim for malicious prosecution arises, or, at any rate, the proceedings before the

[1] [1958] 1 W.L.R. 1300; [1958] 3 All E.R. 566, C.A.

[2] [1958] 1 W.L.R. 1300, 1310.

examining magistrate, a subpoena duces tecum, which was issued as long ago as January 20, and it is only as he was on his way to court to give me the benefit of his help in respect of and in answer to Mr. Lawson's claim to unseal some of the brown entries in the diaries, that the Attorney-General learns for the first time of the issue of such a subpoena. If I felt free, in the exercise of my discretion, to set aside this subpoena on the ground that it has not been served until today, I would do so, but I doubt whether I have discretion so to do. I do not think, within the authorities, the fact that a subpoena is served late is sufficient ground for saying that the service of it is an abuse of the process of the court. But I am asked to set aside the subpoena for other reasons, and it is said that the rules of law compel me to do so. [His Lordship read the subpoena and continued:]

So far as the "reports of the defendant Bolongaro and of "other officers of the Metropolitan or other police forces" are concerned, these are the very reports in respect of which Crown privilege has already been claimed, and in so far as they were at one time, or in so far as any of them were at one time, in possession of the defendant Bolongaro, the Court of Appeal decided that Bolongaro could not be called upon to produce them. They are the same documents still: police reports by Bolongaro to his superiors, by any officer of the Metropolitan Police Force to the Director, and by any member of any other police force to the Metropolitan Police Force; and the Attorney-General says that in so far as it is necessary for him to do so, he would here and now claim Crown privilege, or, alternatively, that the claim to Crown privilege already made in respect of these documents so far as they were in the possession of Bolongaro still applies to prevent their production. I am quite sure that is right.

If it should be necessary—I do not think it is—for any formal claim in respect of the production of these documents by Mr. MacDermott, to be made by any other Minister of the Crown, I should undoubtedly have refused to order the production of the documents for a sufficient time to enable the claim to be made.

So far as the documents in paragraphs 3 and 4 of the subpoena are concerned—"Memoranda or notes of interviews. "Relevant entries in your official diaries"—that is, in Mr. MacDermott's official diaries—they are documents in respect of which the Attorney-General himself here and now claims Crown privilege in front of me, and I cannot go behind that claim. It is quite unnecessary to put the Attorney-General to the trouble of swearing an affidavit. He is obviously entitled to come into court and make his claim to Crown privilege in face of the court, and he has done so. Those documents are not to be produced.

So far as documents in classes 5 and 6 are concerned, the Attorney-General submits that the Director of Public Prosecutions is entitled to claim a professional privilege analogous to the privilege claimed in respect of documents in the possession of a

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solicitor. There is, perhaps, a little difficulty there, because the right to claim privilege is that of the client rather than the solicitor. The Attorney-General says that for the purpose of such a claim to privilege, the Director is his own client. I am not sure that there is a precise analogy between the position of the Director and the position of a solicitor; but those rules of public policy which have resulted in there being established a right of a client and solicitor to claim privilege as to documents and statements in the possession of the solicitor appear to me to apply with equal, if not greater, force to the position of the Director of Public Prosecutions. I regret having to make such a ruling on the spur of the moment, as it were, and without having had the benefit of that fuller argument which I am sure I should have had if the Attorney-General had not been confronted with this subpoena almost on his way to the court, but I think, however full the argument, I should arrive at the same conclusion, and I should much prefer to give my judgment straight away rather than cause any further delay in this case, which has already lasted long enough.

I am going to order this subpoena to be set aside so far as all documents mentioned in paragraphs 2, 3, 4, 5 and 6 are concerned. So far as the documents in paragraph 1 are concerned, it seems to me that almost all of those must fall within one or other of the classes in 2, 3, 4, 5 and 6, and I think the simplest thing for me to do is to set aside the subpoena in respect of that paragraph. I can hardly conceive that there can be any documents which fall outside the classes I have expressly excluded, and I shall take the risk if there are any. I shall set aside the subpoena.

Application refused.
Subpoena set aside.

Solicitors: *W. H. Thompson; Treasury Solicitor; Herbert Baron & Co.; Solicitor, Metropolitan Police; Chamberlain & Co.*

E. M. W.

[CHANCERY DIVISION.]

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Jan. 19, 20, 21, 22, 26, 27; *Feb.* 4.

DIAMOND *v.* CAMPBELL-JONES and Others.

[1957 D. No. 482.]

Buckley J.

Damages—Sale of land—Loss of profit—Intention of purchaser to develop land—Land ripe for development—Breach of contract of sale—Whether knowledge of purchaser's intention imputed to vendor.

Damages—Tax element—Loss of profits—Contract for sale of land—Purchaser carrying on business as dealer in real property—Breach of contract—Whether damages gross amounts of profits which would have been made.

[Reported by Miss Philippa Price, Barrister-at-Law.]

By an agreement dated July 11, 1956, the defendants agreed to sell to the plaintiff a leasehold house in Mayfair for £6,000. The agreement provided that the property was sold subject to a contract made in September, 1955, between the reversioners and the defendants which provided that the defendants should carry out extensive works on the property, including complete interior and exterior decoration; and the appropriate works for the conversion of the ground floor and basement into self-contained office accommodation, and the remainder of the premises into one self-contained maisonette. The property was also expressed to be sold on the footing that the permitted use thereof for the purposes of the Town and Country Planning Act, 1947, was indicated in a letter from the Minister of Housing and Local Government to the defendants' solicitors, dated February 15, 1954, the result of an application made by the defendants for planning consent to convert the whole of the property for use as business premises, which, issued as the Minister's formal decision, granted permission for the use of the ground floor as offices and the remainder "for multiple residential "use."

The plaintiff, who had for a number of years carried on business as a dealer in real estate, and had bought and converted a number of houses in central London, stated in his affidavit that his purpose in acquiring the property "as the defendants at all material times "well knew, was to obtain vacant possession so that I could develop "the same by sub-division thereof." But at the time of the agreement neither party knew whether the plaintiff himself would convert the house or sell it unconverted. The court having held that the defendants had wrongfully repudiated the agreement, the plaintiff contended that the proper measure of damages was the profit which it was reasonable to suppose he would have made had he converted the property into two maisonettes and ground-floor offices, and the defendants that the proper measure was the difference between the sale price and the market value of the property at the date of the breach.

On a finding by the court that at the date of the contract the defendants had no knowledge as to how the plaintiff proposed to deal with the property:—

Held, (1) that special circumstances were necessary to justify imputing to a vendor of land a knowledge that the purchaser intended to use the land in any particular manner, and that neither the fact that the premises in question were ripe for conversion, nor the fact that everyone concerned recognised that, was sufficient to impute to the defendants knowledge that the plaintiff was a person whose business it was to carry out such conversion or that he intended or was likely to convert it for profit. The plaintiff was not, therefore, entitled to damages measured by reference to the profit obtainable by converting the property, and the proper measure of damages was the difference between the purchase price and the market value of the property at the date of the breach of contract (post, p. 579).

Hadley v. *Baxendale* (1854) 9 Exch. 341; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528; [1949] 1 All E.R. 997; 65 T.L.R. 274, C.A.; and dicta of Lord Wright and Lord du Parcq in *A/B Karlshamns Oljefabriker* v. *Monarch Steamship Co. Ltd.* [1949] A.C. 196 at pp. 222, 224, 232; 65 T.L.R. 217; [1949] 1 All E.R. 1 considered.

(2) That since any damages recovered by the plaintiff were liable to attract tax as part of the profits or gains of his business, he was entitled to a sum in damages equal to the gross amount of the profit, the difference between the purchase price and the market value of the

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property, which he was likely to have made if there had been no breach of contract (post, p. 580).

Adjourned summons.

By a judgment, dated April 24, 1958, in the action *Diamond* v. *Campbell-Jones*, Harman J. declared that the defendants, Mervyn Campbell-Jones, Michael Campbell-Jones and Frank Sewell Bray, had wrongfully repudiated an agreement, dated July 11, 1956, for the sale by the defendants to the plaintiff, Hyman Richard Diamond, of leasehold property known as No. 44, Green Street, Mayfair, for £6,000, and directed an inquiry as to what damages (if any) the plaintiff had suffered as a result of the repudiation. The plaintiff duly took out this summons to proceed under the judgment.

The following facts are taken substantially from the judgment of Buckley J.:

The premises were held under a lease from the Grosvenor Estate, for a term expiring on September 29, 2003, and comprised a basement, ground floor and four upper floors, and there was access through a ground-floor room to a large garden.

By paragraph G of the contract the property was expressed to be sold "subject to and with the benefit of:—(a) a contract "dated September 21, 1955, and made between the reversioners "and the vendors for the grant of a new lease. (b) An agreement "for an underlease dated September 21, 1955, and made between "the vendors of the one part and Anthony Victor Deane of the "other part. (c) A surrender of the lease dated December 1, "1916, referred to in the particulars which will be completed "immediately before the completion of the said new lease referred "to in clause G (a) hereof." The contract also provided, by paragraph J: "The property is sold on the footing that the "permitted use thereof for the purposes of the Town and Country "Planning Act, 1947, is indicated in the letter from the Minister "of Housing and Local Government to the vendor's solicitors "dated February 15, 1954."

The contract referred to in paragraph G (a) of the contract for sale was, in fact, held by Harman J. at the trial to be unenforceable and Buckley J. found that it was now irrelevant except in so far as it tended to show what was in the contemplation of the parties at the time that they entered into the contract for sale. His Lordship also found that the agreement for an underlease mentioned in paragraph G (b) was also now only relevant in the same way.

The contract referred to in paragraph G (a) was contained in a letter dated June 29, 1955, from the solicitors for the Grosvenor Estate, addressed to the defendants, which contained an offer which was accepted on behalf of the defendants on September 20 or 21, 1955. The letter said: "In answer to your "application we beg on behalf of the special executors of the late "Duke of Westminster to make the following offer, namely, you

" to show a title to the term of years granted by the existing head " lease, including the reversion on any existing underleases and/or " agreements for tenancy of No. 44, Green Street, London—and " duly surrender such head lease to the special executors subject " to any existing underleases and/or agreements for tenancy, and " to carry out the works set out overleaf and other matters " mentioned below (all to their satisfaction) and thereupon a new " lease to be granted to you of the same premises upon the follow- " ing terms . . ." The terms were for the grant of a new lease for a term of years to determine on Michaelmas Day, 2003, at a rental until September 29, 1975, of £280 a year, and thereafter £150 a year. The letter again expressly stated: " You [the defendants] " to carry out the works mentioned in the schedule hereto to the " satisfaction of the lessors or their estate surveyor."

The works referred to were as follows: " 1. Clean down the " external brickwork and repair and redecorate the whole of the " premises internally and externally. 2. Carry out the appro- " priate works for the conversion of the ground floor and basement " into self-contained office accommodation and the remainder of " the premises into one self-contained maisonette in accordance " with the plans to be first submitted to and approved in writing " by the Grosvenor estate surveyor. 3. Carry out such sanitary " works as may be necessary having regard in particular to such " male and female staff as may be employed in the ground floor " office." That arrangement was relied upon as showing that it was clear, at the time that the parties entered into the contract for sale, that the property was one which could be appropriately exploited by converting it from a single unit of domestic occupation to more than one unit of occupation.

The agreement for an underlease entered into between the defendants and Anthony Deane on September 21, 1955, provided, by clause 4, that " the lessee should at his expense prior to the " commencement of the said underlease execute the works " required by the superior landlord as set out in the second " schedule hereto," those works being the same as those set out in the letter of June 29, 1955. The letter from the Minister of Housing and Local Government, referred to in the contract for sale, was dated February 15, 1954, and was the outcome of an application made by the defendants for town planning consent to convert the whole of the house to use as business premises. That letter said: " I am directed by the Minister of Housing and " Local Government to say that he has considered the report of " his inspector, Mr. R. A. Hudson, M.T.P.I., following the local " inquiry into the appeal by the trustees of the marriage settle- " ment of Mervyn Campbell-Jones against the London County " Council's refusal to permit the use of No. 44, Green Street, " Westminster, for office purposes on the grounds that such use " does not accord with the council's planning proposals for the " area which are for residential user and that the premises are " capable of occupation in their existing state and are reasonably

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" capable of conversion into satisfactory self-contained residential " lettings.

" At the inquiry it was stated on behalf of your client, that " the property is no longer suitable for use as a single family " dwelling and that it could not be converted into self-contained " flats without a major alteration and reconstruction of the stair- " case. It was contended that the return to be expected from " such conversion would not justify the heavy expenditure which " would be incurred.

" For the council it was stated that the appeal premises are " situated in an area which is intended solely for residential user " under the provisions of the Administrative County of London " Development Plan, 1951. While it was agreed that the build- " ing is no longer suitable for use as a single family dwelling, " it was considered that its conversion into self-contained flats " could be carried out as a reasonable proposition. Although the " use of the ground floor for residential purposes might produce " some difficulties, it was stated that no objection would be raised " to the use of this floor as consulting rooms.

" The Minister has carefully considered the facts of this case " and the representations made at the inquiry, and he is not " satisfied that, with the exception of the ground floor, the " premises cannot be reasonably converted for multiple " residential use. The Minister agrees, however, that the ground " floor could not readily form part of such use, and he thinks, " therefore, that he would not be justified in withholding permis- " sion for its use as an office for a limited period subject to a " condition designed to protect the residential amenities of the " area.

" Accordingly, the Minister has decided to allow the appeal " to the extent that he hereby grants permission for the use of " the ground floor of No. 44, Green Street, Westminster, as " offices, subject to the following conditions:—(i) The windows of " the premises shall be kept curtained and shall not be used for " the purposes of display. (ii) The said use hereby permitted shall " cease on December 31, 1970.

" The Minister hereby refuses permission for the use of the " basement, first, second, third and fourth floors of the building " for office purposes.

" This letter is issued as the Minister's formal decision."

His Lordship found that, although the only effect of that letter was to grant permission to use the ground floor for office purposes for a limited period, it clearly indicated that the application for permission to use the property for " multiple residential use " would be likely to be acceded to. It was common ground that there would be no difficulty in obtaining the consent of the Grosvenor Estate to a modification of the covenant contained in the lease which required the property to be used as a single private dwelling-house, so as to permit the four top floors to be used as two self-contained maisonettes and, subject to the

business user permitted until the end of 1970, by the Minister, the ground floor and basement to be used as a self-contained maisonette. It was also common ground that if the Grosvenor Estate were asked to agree to a modification of the covenant, they would require an increase in the rent to a figure of the order of £400 a year, at any rate while the business user of the ground floor continued.

The plaintiff carried on, and had for some years carried on, business as a dealer in real estate, and in the course of that business had bought and converted a number of houses in the centre of London. In his affidavit he said: "I am a fellow of "the Real Estate Institute and have had many years of experi- "ence of dealing in and the management of real estate in all its "forms. For some years prior to the last war, I was actively "engaged in dealing in real estate including both the building "of new premises, the development of estates and the conversion "of old houses into flats. During the war I served in the Royal "Navy, and immediately after the cessation of hostilities, I again "became active in this field. During the past twelve years or "so, I have effected repairs and conversions to some thirty or "or forty buildings, within a radius of two miles around Mayfair. "In most cases, the whole of the works were carried out by my- "self or through sub-contractors, and for some two years of this "period, I controlled a building company which employed about "one hundred men who were engaged on my work and Govern- "ment work.

"The purpose of my acquiring the lease of 44, Green Street, "as the defendants at all material times well knew, was to "obtain vacant possession so that I could develop the same by "sub-division thereof. It was obvious that the premises were "far too big for any person in present conditions to be able to "occupy them as a single private residence." His Lordship found that, although the plaintiff stated in his affidavit that his purpose in acquiring the lease was that he should convert the property, his first endeavours were to dispose of the property for single occupation, either for use by an embassy or to a company requiring a prestige address for a senior executive. In cross-examination the plaintiff said that he would have liked to have disposed of the property without doing any works of conversion if he could have done so at a satisfactory profit. He had negotiations with or inquiries from at least four possible purchasers for a sale of this character. In paragraph 4 of his affidavit he said: "I am of the opinion that the proper market value of my interest "in the premises as they stood, with the benefit of the town "planning permission hereinbefore referred to, but the said "schedule of works not having been carried out, is £15,000, but "that the suitability of the premises for an embassy or as the "headquarters of an American television company would have "justified the payment of £17,250."

The plaintiff contended that the proper measure of damages

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was the kind of profit he would have made had he converted the house into two self-contained maisonettes and ground-floor offices. The defendants contended that the proper measure was the difference between the sale price and market value of the property at the date of their breach of contract.

G. A. Rink Q.C. and *Michael Brown* for the plaintiff.

H. Heathcote-Williams Q.C. and *Arthur Bagnall* for the defendants.

The following case, in addition to those referred to in the judgment, was cited in argument: *Flureau* v. *Thornhill*.[1]

Cur. adv. vult.

February 4. Buckley J. In this case I have to determine the amount of damages payable by the defendants to the plaintiff under a judgment of Harman J., delivered on April 24, 1958, declaring that the defendants had wrongfully repudiated an agreement of July 11, 1956, for the sale by the defendants to the plaintiff of a leasehold property, No. 44, Green Street, Mayfair, for £6,000, and directing an inquiry as to what damages (if any) the plaintiff had suffered as a result of such repudiation. Harman J. having directed that inquiry, the plaintiff in due course took out this summons to proceed under the judgment.

By agreement between the parties, as I understand it, the inquiry was reserved to be taken before the judge, and consequently the master has done no more than see that the evidence filed on the inquiry is in order. Normally, of course, the inquiry would be taken in chambers. I am not complaining in the present case about the course matters have taken because, as will appear, one point of law of some interest has arisen for decision which is not covered directly at any rate by authority, as regards a contract for the sale of land. But it ought not to be supposed that in the normal course a summons of this nature should be taken into court instead of being dealt with in chambers, even though cross-examination may be required.

[His Lordship stated the facts and continued:] In my judgment the plaintiff is not entirely correct when he says: "The "purpose of my acquiring the lease of 44, Green Street, as the "defendants at all material times well knew, was to obtain vacant "possession so that I could develop the same by sub-division "thereof." Conversion by the plaintiff was only one of possible alternative methods of turning the bargain to account which he had in mind when he bought it. Notwithstanding what the plaintiff says in paragraph 2 of his affidavit with regard to the defendants' knowledge of his purpose (which has not been elaborated, reinforced or explained in any other part of the

[1] (1776) 2 Wm.Bl. 1078.

evidence), I am not satisfied that the defendants had any knowledge at the date of the contract of how the plaintiff proposed to deal with the property. At that time the plaintiff himself did not know whether he would convert it, or sell it unconverted. These matters are relevant to a point which has been argued about the proper measure of damages to be applied in this case. The plaintiff contends that the proper measure of damages is the kind of profit which it is reasonable to suppose he would have made had he converted the four upper floors into two maisonettes, the ground-floor into offices, and the basement either into a self-contained flat or into subsidiary accommodation such as lavatories and storage for the ground-floor offices, and had he disposed of them as so converted. The defendants, on the other hand, contend that the proper measure is the difference between the sale price and the market value of the property at the date of their breach of contract.

The general rule of common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed by way of damages in the same position as if the contract had been performed (*Engell* v. *Fitch* [1]). In the case of a contract for the sale of land this rule is subject to the well-known qualification established by the decision of the House of Lords in *Bain* v. *Fothergill*,[2] which applies in any case in which the breach arises from the vendor's inability to perform the contract on account of a defect in his title. I am not, in this case, concerned with a breach of that kind. I therefore have to consider how the general rule ought to be applied in this case.

Mr. Rink, for the plaintiff, referred me to *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[3] Before I read the passage which I shall cite from that case, it will be convenient for me to read a very well-known passage from the judgment of Alderson B. in *Hadley* v. *Baxendale*.[4] He says: "Where two "parties have made a contract which one of them has broken, the "damages which the other party ought to receive in respect of "such breach of contract should be such as may fairly and reason-"ably be considered either arising naturally, i.e., according to the "usual course of things, from such breach of contract itself, "or such as may reasonably be supposed to have been in the "contemplation of both parties, at the time they made the con-"tract, as the probable result of the breach of it. Now, if the "special circumstances under which the contract was actually "made were communicated by the plaintiffs to the defendants, "and thus known to both parties, the damages resulting from the "breach of such a contract, which they would reasonably con-"template, would be the amount of injury which would ordinarily "follow from a breach of contract under these special circum-"stances so known and communicated. But, on the other hand,

[1] (1869) L.R. 4 Q.B. 659, 666.
[2] (1874) L.R. 7 H.L. 158.
[3] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.
[4] (1854) 9 Exch. 341, 354.

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" if these special circumstances were wholly unknown to the " party breaking the contract, he, at the most, could only be " supposed to have had in his contemplation the amount of injury " which would arise generally, and in the great multitude of cases " not affected by any special circumstances, from such a breach " of contract. For, had the special circumstances been known, " the parties might have specially provided for the breach of " contract by special terms as to the damages in that case; and " of this advantage it would be very unjust to deprive them."

Turning now to the *Victoria Laundry* case,[5] the Court of Appeal cited six propositions in six numbered paragraphs as follows[6]: " (1) It is well settled that the governing purpose " of damages is to put the party whose rights have been violated " in the same position, so far as money can do so, as if his " rights had been observed: (*Sally Wertheim* v. *Chicoutimi Pulp* " *Co.*[7]). This purpose, if relentlessly pursued, would provide him " with a complete indemnity for all loss de facto resulting from a " particular breach, however improbable, however unpredictable. " This, in contract at least, is recognised as too harsh a rule. " Hence, (2) In cases of breach of contract the aggrieved party is " only entitled to recover such part of the loss actually resulting " as was at the time of the contract reasonably foreseeable as " liable to result from the breach. (3) What was at that time " reasonably so foreseeable depends on the knowledge then " possessed by the parties or, at all events, by the party who " later commits the breach. (4) For this purpose, knowledge " ' possessed ' is of two kinds; one imputed, the other actual. " Everyone, as a reasonable person, is taken to know the ' ordin- " ' ary course of things ' and consequently what loss is liable to " result from a breach of contract in that ordinary course. This is " the subject-matter of the ' first rule ' in *Hadley* v. *Baxendale*.[8] " But to this knowledge, which a contract-breaker is assumed to " possess whether he actually possesses it or not, there may have " to be added in a particular case knowledge which he actually " possesses, of special circumstances outside the ' ordinary course " ' of things,' of such a kind that a breach in those special cir- " cumstances would be liable to cause more loss. Such a case " attracts the operation of the ' second rule ' so as to make " additional loss also recoverable. (5) In order to make the " contract-breaker liable under either rule it is not necessary " that he should actually have asked himself what loss is liable " to result from a breach. As has often been pointed out, parties " at the time of contracting contemplate not the breach of the " contract, but its performance. It suffices that, if he had " considered the question, he would as a reasonable man have " concluded that the loss in question was liable to result (see " certain observations of Lord du Parcq in the recent case of

[5] [1949] 2 K.B. 528.
[6] Ibid. 539, 540.
[7] [1911] A.C. 301.
[8] 9 Exch. 341.

"*A/B Karlshamns Oljefabriker* v. *Monarch Steamship Company* "*Ltd.*[9]). (6) Nor, finally, to make a particular loss recoverable, "need it be proved that upon a given state of knowledge the "defendant could, as a reasonable man, foresee that a breach "must necessarily result in that loss. It is enough if he could "foresee it was likely so to result. It is indeed enough, to borrow "from the language of Lord du Parcq in the same case, at page "158, if the loss (or some factor without which it would not have "occurred) is a 'serious possibility' or a 'real danger.' For "short, we have used the word 'liable' to result. Possibly the "colloquialism 'on the cards' indicates the shade of meaning "with some approach to accuracy."

I was also referred by Mr. Rink to the *Monarch Steamship Co.* case,[10] mentioned in the case which I have just read. I think it would be sufficient if I read two short extracts from the speech of Lord Wright in that case, and something from the speech of Lord du Parcq. Lord Wright, discussing this subject, said[11]: "The court will, however, assume that the parties as business "men have all reasonable acquaintance with the ordinary course "of business," and later[12]: "As reasonable business men each "must be taken to understand the ordinary practices and exigen- "cies of the other's trade or business. That need not generally "be the subject of special discussion or communication." Lord du Parcq said[13]: "I do not doubt the wisdom of the judges who, "in *Hadley* v. *Baxendale*[14] and the many later cases which "interpreted or explained that classic decision, have laid down "rules or principles for the guidance of those whose duty it is, "as judges or jurymen, to assess damages. When those rules "or principles are applied, however, it is essential to remember "what my noble and learned friend Lord Wright, and Lord "Haldane in the passage cited by him, have emphasized, that "in the end what has to be decided is a question of fact, and "therefore a question proper for a jury. Circumstances are "so infinitely various that, however carefully general rules are "framed, they must be construed with some liberality, and not "too rigidly applied. It was necessary to lay down principles "lest juries should be persuaded to do injustice by imposing an "undue, or perhaps an inadequate, liability on a defendant. The "court must be careful, however, to see that the principles laid "down are never so narrowly interpreted as to prevent a jury, "or judge of fact, from doing justice between the parties."

Founding himself on these authorities, Mr. Rink says that the damage to the plaintiff consequent upon the defendants' repudiation of their contract which the defendants could reasonably have foreseen at the date of the contract depends upon the circumstances of which knowledge at the date of the contract

[9] [1949] A.C. 196, 232; 65 T.L.R. 217; [1949] 1 All E.R. 1.
[10] [1949] A.C. 196.
[11] Ibid. 222.
[12] Ibid. 224.
[13] Ibid. 232.
[14] 9 Exch. 341.

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ought to be imputed to the defendants. This imputed knowledge, he says, includes the general conditions of everyday life and the general circumstances of the business of the parties. He says that the subject-matter of the contract was a house which everyone considered to be fit only for conversion and no longer to be suited to single occupation; that it was at least "on the cards" that a purchaser would convert the house before disposing of it, and that it follows that if the purchaser in fact intended to do this, and can show that it was reasonable to suppose that his profit by doing so would have been greater than if he had sold the property for its market value at the date of the breach of contract, he is entitled to damages measured by that probable profit. At this point I should observe that not only do the pleadings in the present case contain no allegations that the plaintiff was what I may term a professional converter of town houses, and no allegation that the defendants knew that that was his profession, but also (apart from paragraph 2 of the plaintiff's affidavit to which I have already referred) I have had no evidence at all of any such knowledge or of any actual knowledge by the defendants that the plaintiff either intended or was likely to carry out the conversion of the property himself. Had the pleadings contained such allegations, and had those allegations been proved, it may be that the ordinary common law rule as to the measure of damages to which I have made reference would operate differently than it does in a case in which those facts are not alleged or proved, notwithstanding that the claim was only for general damages. I cannot believe, however, that Lord Wright, in the passages which I have read from the *Monarch Steamship Co.* case,[15] meant that anyone entering into a contract must be treated as having constructive notice of the nature of the other party's business, or of its probable bearing on the loss which that other party might suffer in consequence of a breach of contract. In some cases the nature or the subject-matter of a contract or of its terms may be such as to make it clear that one of the parties is entering into the contract for the purpose of a particular business, and the circumstances may be such that the court will infer that the other party must have appreciated that this was so. It seems to me, however, that this can rarely be the case where the contract is for the sale of land. The vendor of a shop equipped for use as a butcher's shop would not, in my judgment, be justified by that circumstance alone in assuming, and ought not to be treated as knowing, that the purchaser would intend to use it for the business of a butcher rather than that of a baker or candlestick-maker, at any rate in the absence of covenants or other forms of restriction confining its use to butcher's business. Special circumstances are necessary to justify imputing to a vendor of land a knowledge that the purchaser intends to use it in any particular manner.

[15] [1949] A.C. 196, 222, 224.

In my judgment, neither the fact that No. 44, Green Street was ripe for conversion, nor indeed the fact that everybody recognised this, was sufficient for imputing to the vendors knowledge that the purchaser was a person whose business it was to carry out such conversions, or that he intended, or was ever likely, to convert the house himself for profit. In this connection I would point out that when using the expression " on the cards " in the *Victoria Laundry* case,[16] the Court of Appeal is referring not to possible circumstances which might be relevant to assessing the loss likely to arise from a breach of contract, but to the reasonable probability of a possible loss arising from a given state of knowledge, that is to say, an established state of knowledge of actual relevant circumstances. For these reasons, in my judgment, the plaintiff is not entitled to damages measured by reference to the profit obtainable by converting the property. The damages should be assessed in accordance with the principle normally applicable to cases of breach of contract for the sale of land, where the breach does not arise from a defect in the vendor's title, that is, by reference to the difference between the purchase price and the market value at the date of the breach of contract.

I must therefore consider the evidence as to the market value in February, 1956, of No. 44, Green Street. [His Lordship considered all the material evidence and continued:] I hold that the market value of the property at the relevant date was £14,500. The difference between this figure and the purchase price is accordingly £8,500.

Such a profit in the hands of the plaintiff would undoubtedly have attracted income tax, and Mr. Heathcote-Williams claims that in accordance with the decision in *British Transport Commission* v. *Gourley* [17] the defendants should only be liable for damages equivalent to the net profit which the plaintiff would have retained after paying tax. In *Gourley's* case,[17] however, it was conceded that no part of the sum awarded as damages would be subject to tax. Similarly, the decision in *West Suffolk County Council* v. *W. Rought Ltd.*,[18] where the principle of *Gourley's* case [19] was applied to an assessment of loss of profit as part of the compensation on a compulsory purchase, proceeded expressly on the basis that such compensation would not be liable to income tax. In the present case, on the other hand, it appears to me that any damages recovered by the plaintiff are liable to attract tax as part of the profits or gains of his business: *London Investment and Mortgage Co. Ltd.* v. *Worthington.*[20] I was also referred in this connection to *Vaughan* v. *Parnell.*[21] If the damages would be taxable in the hands of the plaintiff, in order

[16] [1949] 2 K.B. 528.

[17] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[18] [1957] A.C. 403; [1956] 3 W.L.R. 589; [1956] 3 All E.R. 216.

[19] [1956] A.C. 185.

[20] [1959] A.C. 199; [1958] 2 W.L.R. 842; [1958] 2 All E.R. 230.

[21] (1940) 23 T.C. 505.

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to give him the degree of indemnity to which he is entitled, I must, I think, award him a gross sum in damages equal to the gross amount of the profit which he would be likely to have made had there been no breach of contract. Accordingly, I hold that the plaintiff is entitled to receive £8,500 damages.

Order accordingly.

Solicitors: *Sampson & Co.; Thorold, Brodie & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)†

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Feb. 8, 9;
March 10.

BELLSHILL AND MOSSEND CO-OPERATIVE SOCIETY LTD. . . . . APPELLANTS;

AND

DALZIEL CO-OPERATIVE SOCIETY LTD. . RESPONDENTS.

Restraint of Trade—Arbitration award—Co-operative trading societies—Award under rules of union defining trading areas—Whether binding after society withdraws from union.

Trade Union—Membership—Termination—Whether arbitration award binding on member afterwards—Co-operative societies—Award defining trading areas.

Arbitration—Award—Frustration—Award under union rules—Whether binding on member after withdrawal from union—Co-operative societies—Award defining trading areas.

Two co-operative societies, registered under the Industrial and Provident Societies Act, 1893, and members of a co-operative union similarly registered, were in dispute as to their respective trading rights in a certain area, and submitted the dispute to arbitration under the rules of the union. These rules provided that one of the objects of the union was to act as arbiters in disputes between member societies, and that any disputes relating to overlapping should be submitted to arbitrators appointed by it, whose decision should be final and binding. The rules also provided that any member of the society might withdraw from the union by a written notice sent to its office. The award on the arbitration forbade trading in a certain area to one of the societies, which refused to comply and subsequently withdrew from the union.

Held, that on the society's withdrawal from the union the award ceased to bind it. It was unreasonable to suppose that a society joining the union and agreeing to submit its freedom of trading to arbitration, intended to bind itself for all time, whether or not it continued a member.

Birtley and District Co-operative Society v. *Windy Nook and District Industrial Co-operative Society (No. 2)* [1959] 2 W.L.R. 415; [1959] 1 All E.R. 623 disapproved.

Decision of the First Division of the Court of Session, 1959 S.L.T. 150 affirmed.

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† *Present:* VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD KEITH OF AVONHOLM and LORD DENNING.

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BELLSHILL AND MOSSEND CO-OPERATIVE SOCIETY LTD. v. DALZIEL CO-OPERATIVE SOCIETY LTD.

APPEAL from the First Division of the Court of Session.

The appellants, Bellshill and Mossend Co-operative Society Ltd., and the respondents, Dalziel Co-operative Society Ltd., were each companies registered under the Industrial and Provident Societies Act, 1893, and were each co-operative societies, trading as such in Lanarkshire. In this action the appellants sought (1) declaration that the respondents were barred by an award made on October 6, 1955, by arbitration under rule 10 of the rules of the Co-operative Union Ltd., (2) declarator that the award prohibited the respondents from trading in a certain locality both from fixed premises and from mobile shops or vans, and (3) interdict against the respondents so trading in that locality. Interim interdict was also concluded for, but, after being refused by the Lord Ordinary, Lord Guest, on November 15, 1957, was not again applied for. The respondents tabled a plea to the competency of the action, which, having been repelled by the Lord Ordinary, was not argued in the court below and no question now arose in connection therewith. Each party tabled a plea to the relevancy of the other's averments. The respondents also tabled pleas to the effect: (1) that as the arbitrators had an interest in the dispute and were committed to a view thereon before their appointment, the award should be reduced, and (2) that the award should not be enforced since it was in restraint of trade. The appellants tabled a plea to the effect that the respondents were barred by mora, taciturnity and acquiescence from challenging the qualification of the arbitrators. Following a debate, the Lord Ordinary, by interlocutor dated July 25, 1958, sustained the appellants' plea that the defence was irrelevant, except as regarded the plea that the arbitrators were disqualified from acting through their alleged interest in and predetermination of the dispute, and he allowed a proof before answer confined to these two issues only. The grounds of the Lord Ordinary's decision appeared from his judgment, but, shortly stated, were to the effect that the respondents' argument could not be sustained without a plea that the award was ultra fines compromissi. The respondents reclaimed against this interlocutor and by minute of amendment tabled a further plea to the effect that, if the award fell to be construed as regulating the conduct of the respondents other than as members of the Co-operative Union Ltd., it was ultra fines compromissi and ultra vires and should, therefore, be reduced ope exceptionis. By interlocutor dated February 13, 1959, their Lordships of the First Division allowed the reclaiming motion, sustained the respondents' plea to the relevancy of the appellants' averments and dismissed the action. The respondents now submitted that this interlocutor was well founded in law and should be affirmed by the House of Lords. Alternatively, and in the event of its being held that their Lordships of the First Division erred in law, the respondents submitted that a proof before answer should be allowed on the averments relating to the

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respondents' pleas that the award was reducible in respect of the arbitrators' interest in and predetermination of the dispute.

The facts are set out in the opinion of Viscount Simonds.

Sir Frank Soskice Q.C. (of the English Bar) and *J. M. Robertson Q.C.* and *G. S. Gimson* (both of the Scottish Bar) for the appellants.

R. S. Johnston Q.C. and *Peter Maxwell* (both of the Scottish Bar) for the respondents were not called on to argue.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Crediton Gas Co.* v. *Crediton Urban District Council*[1]; *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.*[2] and *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.*[3]

Their Lordships took time for consideration.

March 10. Viscount Simonds. My Lords, in and for some time prior to the month of October, 1955, two co-operative societies, both registered under the Industrial and Provident Societies Act, 1893, were in dispute as to their respective rights of trading in a certain area in the county of Lanark. They were the appellants the Bellshill and Mossend Co-operative Society Ltd., the original pursuers, whom I will sometimes call "Bellshill" and the respondents the Dalziel Co-operative Society Ltd., the original defenders, whom I will sometimes call "Dalziel."

Both societies were members of another society called the "Co-operative Union Limited," whose objects were by its rules stated to be to carry on certain trades and business, amongst them that of "arbiters in matters of dispute arising between "societies which cannot be settled locally and of propagating "co-operative principles and ideas and of organising co-operative "work in all its branches whether such work be in connection "with industries trades or business or for the promotion of "education and other objects and purposes of a similar character "with a view to the ultimate establishment of a Co-operative "Commonwealth." Rule 6 provided that the union should consist of all industrial and provident societies, joint stock companies and other bodies corporate which had for their object the promotion of co-operative principles and ideals and were members of the Co-operative Union at the time therein stated or might thereafter be admitted. Rule 9 provided that each applicant for admission should be deemed by such application to accept as the principles by which all its business transactions should be guided

[1] [1928] Ch. 447; 44 T.L.R. 369, C.A.

[2] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331, H.L.

[3] [1955] 2 Q.B. 556; [1955] 3 W.L.R. 212; [1955] 2 All E.R. 722.

—the desire to promote the practice of truthfulness, justice and economy in production and exchange by (amongst other means) preventing the waste of labour now caused by unregulated competition. Rule 10 provided that no society should be allowed to remain in membership with the union which did not abide by its rules, conform to its aims and accept the decisions of the central executive confirmed by congress and that any disagreement that might arise as to overlapping or any other matter which could not be settled in consultation between the parties should, in failure of conciliation, be submitted to persons appointed by the union as arbitrators and that their decision should be final and binding on all parties. Rule 12 provided that every society should as long as it continued a member of the union make an annual contribution to the funds of the union. Rule 15 provided that a society might withdraw from the union subject to the conditions therein stated or, if deemed guilty by the central executive of conduct detrimental to the union or to the movement generally, might be excluded from the union by the resolution of any congress as therein mentioned.

It is thus clear that membership of the union was optional and could be terminated at any time either voluntarily or by exclusion.

It is common ground that these rules were binding on Bellshill and Dalziel as members of the union. In accordance with them a dispute between the parties in regard to overlapping by Dalziel into the territory of Bellshill was in May, 1955, referred (apparently by the union) to the arbitration of three persons nominated by the union who were in fact three of its officials. Both parties appeared in due course before the arbitrators and on October 6 they made their award. It was that in relation to the dispute between Bellshill and Dalziel the co-operative service in the Bellshill area should be provided exclusively by Bellshill and Dalziel should not trade in this area from fixed premises therein nor from mobile shops or vans. The Bellshill area was defined. Dalziel did not accept the award and told Bellshill so. They did not observe it and on October 21, 1957, withdrew from membership of the union as they were well entitled to do. They continued to trade in the prohibited area.

On November 5, 1957, Bellshill commenced the action out of which this appeal arises. By the conclusions of their summons they sought, first, a declarator that the defenders were bound by the award of October 6, 1955, secondly, a declarator that the award prohibited Dalziel from trading in the defined area and, thirdly, an interdict against Dalziel from carrying on such trade. It will be observed that declarator and interdict alike were based on the contention that the award not only operated while Dalziel was a member of the union but was permanent and unqualified. This contention is now opposed by Dalziel on two grounds, first that upon its true construction the award is limited in its operation to the period of their membership of the union, and.

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secondly, that, if upon its true construction its operation is permanent, then it is ultra fines compromissi and is invalid. The first only of these grounds appears to have been urged before the Lord Ordinary, the second, which is embodied in the sixth plea-in-law for the defenders, having been added by leave before the First Division. Numerous other questions were raised and discussed, but I think it inexpedient to pronounce upon them, for I am satisfied, as I believe are all your Lordships, that the award cannot be upheld if it bears the meaning for which the appellants contend.

Whether or not it does bear that meaning is a matter upon which opinions may differ. For myself, applying the principles laid down in *Llanelly Railway & Dock Co.* v. *London & North Western Railway Co.*[1] and numerous other cases that were cited to us and regarding the award not in vacuo but in relation to the rules under which the dispute was referred to arbitration, I should have no difficulty in concluding that it was operative against Dalziel only while they were members of the union. But if the opposite view is taken, I see no answer to the argument that the award is ultra vires. I assume that the parties were contractually bound to each other by the rules of the union and that rule 10 constituted a submission to arbitration upon (inter alia) any question of overlapping that was in dispute. Nothing can be clearer than that the parties apart from the contract into which they had entered could trade as and where they would and that when the contract was determined that freedom was restored. What effect, then, is to be given to the submission to arbitration of a dispute in regard to a prohibited area of trade? The answer is plain. I find in Bell's Treatise on the Law of Arbitration in Scotland (2nd ed., 1887) a passage at p. 75, para. 128, which is entirely apposite: "From the opinions "which have been delivered in some recent cases, respecting the "ancillary submission clause it would appear that 'it is the "'natural construction of all such clauses that without very "'express words they are not to be carried beyond the term "'for which the primary contract endures.'" In the present case there are no express words which suggest that a member of the union is to be restricted in his trading after it has ceased to be a member. On the contrary, the rules contemplate that it may cease voluntarily or involuntarily to be a member and by so doing escape the burden and lose the benefit of membership. If so, it is unreasonable to suppose that a society joining the union and thereby agreeing to submit its freedom of trading to arbitration intends to bind itself for all time whether or not it continues to be a member. I cannot express my view better than in the words of Lord Ivory in *Pearson* v. *Oswald*,[2] which the Lord President cites in the present case, "this clause of "reference . . . is a subordinate contract entirely, ancillary to

[1] (1875) L.R. 7 H.L. 550, H.L. [2] (1859) 21 D. 419, 426.

"the primary contract with which it is connected, and except "in so far as it is ancillary to the execution of that contract, "I do not think it has any legal existence whatever." Here the primary contract relates to competition between members of the union while they are members: to that contract the submission is ancillary: an award made upon it cannot validly carry the matter further.

Learned counsel for the appellants invited your Lordships to draw some inference favourable to his contention from the words at the end of rule 11, "their decision shall be final and binding "on all parties" and from the words in rule 12 (1): "Every "society shall, so long as it continues a member of the union ". . . ," but I am, for my part, unable to get the least assistance from them. They do not appear to me to touch the question that we must answer. It was natural that he should also rely on a case recently decided in England, *Birtley and District Co-operative Society Ltd.* v. *Windy Nook and District Industrial Co-operative Society Ltd. (No. 2)*,[3] but upon that case I will only say that I concur in the Lord President's observations. I cannot regard the decision as correct.

At an earlier stage in this opinion I said that a number of other objections to the claim of Bellshill were raised by Dalziel. We were invited by counsel for Bellshill to hear and adjudicate upon these objections even though we should dispose of the appeal upon the grounds that I have discussed. This we declined to do and I only mention the matter in order to make it clear that we heard no argument and therefore express no opinion upon them.

The appeal must, in my opinion, be dismissed with costs.

I am asked by my noble and learned friend, Lord Radcliffe, who is unable to be here today, to say that he has read and concurs in the opinion I have just delivered.

LORD REID. My Lords, by becoming a member of the Co-operative Union the respondents agreed to be bound by the rules of that body. Under rule 9, "the principles by which all "its business transactions shall be guided" included (3), preventing "the waste of labour now caused by unregulated "competition." One of the methods of achieving this is by the prevention of "overlapping," *i.e.*, trading in the same area by more than one of the member societies. So the respondents agreed to limit their common law right as traders to carry on their trade wherever they desired to do so.

But rule 15 provides that a society may withdraw from the union and the respondents withdrew from the union in 1957. Thereafter they were free to carry on their business in any area, and this is admitted by the appellants with one exception.

[3] [1959] 2 W.L.R. 415; [1959] 1 All E.R. 623.

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Lord Reid.

Rule 10 provides: ". . . Any disagreement that may arise as to "overlapping or any other matter which cannot be settled in "consultation between the parties shall, in failure of conciliation, "be submitted to persons appointed by the Co-operative Union "Ltd. as arbitrators and their decision shall be final and binding "on all parties." The appellants maintain that if a disagreement as to overlapping has been submitted to arbitrators in terms of this rule and the arbitrators decide that a society shall not trade in a particular area, as happened in this case, then that society remains bound by that award even after it has withdrawn from the union.

I cannot so interpret rule 10. Its purpose appears to me to be to facilitate the smooth working of rule 9 by providing a domestic tribunal to settle disputes between members. Admittedly, if a member society, anticipating an award against it, chooses to forestall proceedings under rule 10 by withdrawing from the union before the union steps in under this rule, the withdrawing society cannot be prevented from competing in the areas of societies which remain members. I find nothing to indicate that the fact that the union has stepped in makes a difference. The arbitration in this case was not preceded by a submission agreed by the parties—if it had been, much might have depended on the terms of the submission to which the respondents agreed. But the respondents' only agreement was its agreement as a member of the union to be bound by the rules of the union, and it could only be by virtue of the rules that the respondents could still be bound by the award made against them while they were members. The rules ceased to bind the respondents when they withdrew, and it would, in my opinion, at least require some very clear provision in the rules to render an award made under the rules effective after the rules themselves had ceased to be binding. I can find no such provision.

I am confirmed in my opinion by considering what would be the alternative. Is the award to be binding for ever? Counsel for the appellants was unable to support that view, or to maintain that the concluding words of rule 10—"their decision "shall be final and binding on all parties"—have that meaning. Counsel felt bound to admit that the award would cease to be binding if the appellants ceased to provide efficient co-operative service in the area from which the award excludes the respondents. And, if it had been the appellants and not the respondents who had withdrawn from the union, it surely would not be possible for a non-member to enforce against a member an award made under the rules of the union. I find it impossible to read into the rules or the award that the award is to cease to have effect in circumstances such as these but is otherwise to remain effective against a non-member.

It is unnecessary to consider the further question whether the

award would in any event be unenforceable against the respondents as being in restraint of trade. I have not considered that question and I express no opinion on it.

In my judgment this appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, I agree.

LORD DENNING. My Lords, where two societies are in disagreement as to overlapping and the dispute is referred to arbitration under rule 10, it seems to me plain that any order made by the arbitrators delimiting trading areas can only apply so long as the two societies remain in membership with the union. The reason is because each society only subscribes to the principles of the union so long as it is a member, and must be taken to submit to the jurisdiction of the arbitrators only so long as it is a member. If it ceases to be a member, it is neither entitled to the benefits of the order nor bound by its obligations.

I can see grave objections to the arbitrators making a perpetual order restraining competition to continue beyond membership of the union. If such an order were to continue beyond membership of the union it would mean that the complaining society would be able to withdraw from the union, thus obtaining a free hand to compete within the territory of the defending society, and the latter would have no redress. Even during membership, the complaining society may serve the prohibited area so inefficiently that the prohibition should be removed. The changes in circumstances that may occur are so various that any order restraining competition, in order to be reasonable, must be capable of modification in the face of change. There must be "liberty to apply." And inasmuch as modifications can only be made during membership, the order must be limited to the period of membership.

It follows that I cannot agree with the decision of Streatfeild J. in *Birtley and District Co-operative Society* v. *Windy Nook and District Industrial Co-operative Society (No. 2)*[4] given on December 16, 1958.

I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Martin & Co. for Gray, Muirhead & Carmichael, W.S., Edinburgh, and Keyden, Strang & Co., Glasgow; Herbert Smith & Co. for Shepherd & Wedderburn, MacPherson & Mackay, W.S., Edinburgh.*

F. C.

[4] [1959] 2 W.L.R. 415.

[PRIVY COUNCIL.]

J. C.*
1960
March 9.

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA . . . . Appellant;

AND

JOHN WHELAN BROWN . . . . Respondent.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Criminal Law—Insanity—M'Naughten Rules—Irresistible impulse—Whether symptoms from which insanity can be inferred—Homicide. Australia—Murder—Insanity—M'Naughten Rules—Irresistible impulse. Criminal Law—Practice—Counsel—Reference to consequences of verdict by—Judge to direct jury of irrelevance.

Where the defence of insanity is raised in criminal proceedings the law will not recognise irresistible impulse—which per se affords no defence—as a symptom from which the jury may without evidence infer insanity within the M'Naughten Rules.

At the trial of the respondent on a charge of murder by shooting, in which the only defence was insanity, the medical evidence for the respondent was, inter alia, that he was a schizoid personality and that at the moment of shooting he knew the nature and quality of his act but did not know that what he was doing was wrong. In the course of his summing-up the trial judge had directed the jury that "uncontrollable impulse" was no defence in law. The respondent was found guilty and sentenced to death, and, his first appeal having been dismissed, he appealed further to the High Court of Australia, who quashed the conviction and ordered a new trial. In the course of their judgment the High Court stated: "To treat his "domination by an uncontrollable impulse as reason for a con- "clusion against his defence of insanity is quite erroneous. On "the contrary it may afford strong ground for the inference that a "prisoner was labouring under such a defect of reason from disease "of the mind as not to know that he was doing what was wrong . . . "the fact that the subject was mentioned would make it necessary "to put before the jury the true operation of uncontrollable impulse "as a possible symptom of insanity of a required kind and "degree":—

Held, reversing the order of the High Court and restoring the verdict of the trial court, that the above view of the High Court did not accurately represent the criminal law. In no leading case of recent years where the defence of insanity was raised had there been any suggestion that although irresistible impulse afforded no defence per se the law would recognise it as a symptom from which the jury might without evidence infer insanity within the M'Naughten Rules (post, p. 598).

The words "true operation of uncontrollable impulse as a "possible symptom of insanity of a required kind and degree" in the above passage in the High Court's judgment implied, erroneously, that the law knew and recognised uncontrollable impulse as a symptom of legal insanity within the meaning of the M'Naughten Rules, and that it was the judge's duty to instruct

* *Present*: Viscount Simonds, Lord Radcliffe, Lord Tucker, Lord Jenkins and Lord Morris of Borth-y-Gest.

the jury as a matter of law, and in the absence of any medical evidence, that it might afford a strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. That direction would, in effect, make a very considerable inroad into the M'Naughten Rules as hitherto interpreted.

Rex v. *Kopsch* (1925) 19 Cr.App.R. 50 and *Rex* v. *Rivett* (1950) 34 Cr.App.R. 87, C.C.A. considered.

Interlocutory observations of Greer J. in *Rex* v. *True* (1922) 16 Cr.App.R. 164, 167, C.C.A. disapproved.

Where, however, evidence had been given that irresistible impulse was a symptom of the particular disease of the mind from which a prisoner was said to be suffering, and as to its effect on his ability to know the nature and quality of his act or that his act was wrong, it would be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial (post, p. 599).

Sodeman v. *The King* (1936) 55 C.L.R. 192, P.C. considered.

There was on the evidence ground for surmising that the respondent might have suffered from such abnormality of mind as might, under the recent amendment of the law in England (Homicide Act, 1957, s. 2 (1)), be held to diminish his responsibility (post, p. 606).

If counsel in murder trials are permitted in their addresses to juries to refer to the consequences of their verdict, it is incumbent upon the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine (post, p. 602).

Judgment and order of the High Court of Australia reversed.

APPEAL (No. 49 of 1959) by special leave. On March 20, 1959, the respondent, John Whelan Brown, was found guilty of the murder of Neville Montgomery Lord on November 23, 1958, after a trial before Abbott J. and a jury in the Supreme Court of South Australia at Adelaide. He was sentenced to death. From that conviction he appealed to the Full Court of the Supreme Court of South Australia (Napier C.J., Mayo and Piper JJ.), who on April 15, 1959, dismissed his appeal. From that judgment the respondent appealed to the High Court of Australia (Sir Owen Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.), who on May 20, 1959, allowed his appeal, quashed the conviction and ordered a new trial. The Attorney-General for South Australia obtained special leave by Order in Council dated August 12 to appeal from that decision of the High Court.

The following summary of the facts relating to the killing of Lord, which were not in dispute, is taken from the judgment of the High Court: " Shortly before November 20, 1958, he [i.e., " the respondent] was engaged in Adelaide as a station hand for " Pine Valley, which is a sheep station about 65 miles north of " Morgan. Mr. Neville Montgomery Lord was a member of a " family to whom the station belonged and he had been the " manager of the station for some years. He was 32 years of age " and lived at the homestead with his wife and two young children. " There was a station cook, a woman whose room was adjacent " to but not part of the main building. The men station hands,

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" of whom there was only one other, lived in the men's quarters " perhaps 75 to 100 yards away. On the morning of Thursday, " November 20, 1958, Brown was picked up in Adelaide by a car " proceeding to Pine Valley and taken to his new job. He met " Mr. Lord on arrival at the station that afternoon. He was given " his room in the men's quarters and made the acquaintance of " the other station hand and the cook. The latter saw him at " meal-times during the next three days and he helped her with " the drying of dishes. Nothing occurred to excite comment. " Brown seemed quiet and well-behaved. Mr. Lord saw little of " him and all were sure that nothing had passed between them " that could excite any hostility in Brown to Mr. Lord. The " other station hand went off for the weekend. In his room there " stood visible from the door a .303 rifle and there were some " cartridges in the room with soft-nosed bullets for shooting " kangaroos. On Sunday night, November 23, Mr. Lord went to " bed about a quarter past nine. Mrs. Lord busied herself for a " little longer and went to the children's room between which and " the bedroom there was a communicating door. She was " attending to a child when, as she says, she heard the electric " light go on in the bedroom. Then there was a shot. She ran " through the communicating door and saw her husband lying on " the bed shot—shot through the head. She threw herself on the " bed. Brown came back through the passage door. She " screamed and he told her to be quiet, and after trying to quieten " her he ran out of the bedroom door into the hall or passage. " That led to the front door, about a yard distant, and also to the " back door. She described him as looking bewildered and " explained that she meant that she thought he might have been " taken aback that she had come from the next room, not knowing " there was a door between. She did not see him again. She " found the cook in her bedroom and they telephoned for help. A " doctor and a policeman arrived two or three hours later. Her " husband was dead. Brown had disappeared. A search for him " extended over the next four days. On the morning of Friday, " November 28, he came from some disused buildings some 25 " miles from the homestead of a station named Canegrass and " gave himself up. Canegrass homestead itself is 24 miles south " of Pine Valley homestead. As Brown gave himself up he asked: " ' Is he dead? ' He had carried the rifle for a time but had " abandoned it at a place about six miles from Pine Valley home- " stead. He answered the questions put to him by the police " then and thereafter without any apparent reservation. Accord- " ing to his answers he had gone to bed in his quarters at about " half-past eight on the Sunday night. He remained awake " thinking and then got up and got the rifle from the room of " the other station hand and there tested the loading of the rifle " on the bed. He took the rifle and cartridges; the magazine " was full. He went across to the house, wearing socks but no " boots or shoes. The lights were on and through the window he

" could see Mrs. Lord in another room. He walked in the front " door, went to the bedroom, put the rifle up, aimed it at Mr. " Lord and shot him. He was under the blanket and appeared, " so Brown thought, to be asleep. He said he went out of the " room to see where Mrs. Lord was. She went into the bedroom " and he then returned. He tried to quieten her and then ran " out the back way. He went to the cook's quarters to see where " she was. In answer to a question why he did so, Brown " answered: ' Because I thought that she might have rung up " ' and given the alarm.' Her light was then on but he could not " see her through the window. He then returned to his quarters " and took his hat, the rifle, and a pair of boots from the other " station hand's room, and set off. He said that neither Mr. Lord " nor any other person there had given him any reason to bear " malice or had any argument with him."

The only defence was insanity.

1960. Jan. 25, 26, 27, 28. *T. G. Roche Q.C.*, *D. A. Grant* and *W. A. N. Wells* (South Australian Bar) for the appellant.

L. J. Elliott (South Australian Bar) for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Reg.* v. *Stokes* [1]; *Rex* v. *Dinnick* [2]; *Rex* v. *Immer and Davis* [3]; *Reg.* v. *Layton.* [4]

March 9. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: The only real issue in the case was whether the defence had discharged the onus of proving on balance of probability that the respondent was legally insane when he shot Lord. This issue was further narrowed since the medical witnesses for the defence and for the prosecution agreed that the respondent was (1) what psychiatrists refer to as a schizoid personality, (2) that neither before nor after the shooting was the respondent suffering from any disease or disorder of the mind, and (3) that at the moment of shooting he knew the nature and quality of his act. Where they differed was that Dr. Forgan, for the defence, testified that in his opinion at the time of the shooting the respondent had lapsed into a temporary state of simple schizophrenia in which he did not know that what he was doing was wrong.

Dr. Shea, on the other hand, was of opinion that the respondent never at any time had schizophrenia, and that even if he did he not only knew the nature and quality of his act but also that it was wrong, as the respondent had told him when he examined him in prison.

Dr. Forgan's process of reasoning, shortly stated, appears from the following questions and answers in cross-examination: [His

[1] (1848) 3 C. & K. 185.
[2] (1909) 3 Cr.App.R. 77; 26 T.L.R. 74, C.C.A.
[3] (1917) 13 Cr.App.R. 22, C.C.A.
[4] (1849) 4 Cox C.C. 149.

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Lordship referred to the relevant evidence and continued:] Dr. Shea, on the other hand, was of opinion that there was no such thing as schizophrenia of five minutes' duration, which was roughly the period during which Dr. Forgan considered the attack in the present case must have lasted.

It will be convenient at this stage to set out certain questions and answers which appear in Exhibit "G," which is the statement of the respondent made to the police in the form of questions and answers. No objection to this statement being used in evidence on the ground of unfairness or for any other reason has been raised before any of the four tribunals before which this case has come. They are as follows:

I said: "You have told me that neither Mr. Lord nor any "other person had ever given you any reason to bear him any "malice."

He said: "Yes."

I said: "Is there any reason you wish to offer for your "conduct?"

He said: "Even though I do recall everything and I did it, I "don't think that I was responsible for my actions."

I said: "You knew that the rifle was loaded?"

He said: "Yes."

I said: "You knew that when you pulled the trigger it would "discharge a missile?"

He said: "Yes."

I said: "And that if the missile hit anyone it would at least "maim them and probably kill them?"

He said: "Yes."

I said: "Did you know at the time that it was wrong to point "a loaded rifle at a person and shoot at them?"

He said: "Yes. But I couldn't help myself."

I said: "Do you think that you would have pulled the trigger "of that rifle if there had been a policeman standing by you?"

He said: "No."

In order to follow their Lordships' opinion in this case appearing hereafter it is necessary to set out at some length certain passages in the summing-up of the trial judge, as well as the passages in the judgment of the High Court in which they are criticised. The passages in the summing-up are as follows: "On "the night of the shooting the accused says that he had gone to "bed early and that he got up and got the rifle and ammunition "just before he went into Mr. Lord's bedroom. The accused "himself owned no firearms and probably had he never seen the "rifle and ammunition in Dave's room he might never have "thought of shooting anybody. You will remember Mr. Elliott "drawing your attention to the fact that there was no motive "for this alleged crime. Gentlemen, throughout the centuries of "civilisation crimes have repeatedly been committed without any "apparent or discoverable motive. That is one of the reasons "why, in our childhood, we were taught never to put temptation

" in anybody's way and what would be temptation for another " man, might be no temptation whatsoever to us. You may, " perhaps, remember the words of Shakespeare—' How oft the " ' sight of means to do ill deeds makes ill deeds done.' There, " standing before his eyes in Dave's empty room was the rifle and " ample ammunition and there were the means to do ill deeds. " Do you think that perhaps those means to do ill deeds made the " ill deeds done in this particular case? You may, perhaps, think " that on November 23, the accused, when he shot Neville Lord " was acting on an uncontrollable impulse—a dreadful impulse " which arose suddenly and which he was unable to control. If " that view should commend itself to you, it is my duty to direct " you that that is no defence in law. The defence of uncon- " trollable impulse is unknown to our law, and if that, in your " considered view, is the only explanation of the death caused by " the accused on November 23, it is your duty to bring in a verdict " of guilty of murder. . . .

" You may, if you choose, when you go into the jury room, " take with you the statement of the accused signed by him as " John Stone. It comprises about seven pages of foolscap. You " will recall that he was asked by Detective Lenton whether he " knew anything about the shooting of Lord on the Sunday night " and he said, ' Yes '; and he was asked ' What do you know " ' about it? ' and his reply was, ' I don't know how to put it,' " whereupon Lenton asked him a number of questions all of which " he seemed to answer perfectly sensibly and plainly. On page 2 " of the statement the accused describes very plainly what he did " when he shot Lord and how he followed Mrs. Lord into the " room when she was singing out, as he put it, and he then ran " out the back way. On page 4 he was asked, ' After you shot " ' Lord why did you go looking for Mrs. Lord? ' and his rpely " was ' Because I got scared,' and when asked what he meant " by that he said, ' I don't know.' He was asked whether when " he went to look for Mrs. Schiller the rifle was freshly loaded, " and he said that it was, and he was asked why he went looking " for Mrs. Schiller and the accused said, ' I just wanted to see " ' where she was,' and he was asked ' Why? ' and his answer " was, ' Because I thought that she might have rung up and given " ' the alarm.'

" Well, gentlemen, you may ask yourselves why the accused " should think that anyone should be wanting to give an alarm " about him. Might I suggest to you that he then knew that what " he had done was wrong. He did not tell Detective Lenton " what he would have done, or whether he would have done any- " thing if he had found Mrs. Schiller, or found that she had given " an alarm by telephone. Perhaps, gentlemen, she may think now " that she was a fortunate woman that the accused did not find " her.

" On pages 5 and 6 of the signed statement, Exhibit ' G,' " Detective Lenton said, ' Is there any reason you wish to offer

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" ' for your conduct? ' to which the accused replied, ' Even
" ' though I do recall everything and I did it, I don't think I was
" ' responsible for my actions.' The detective said, ' You knew
" ' that the rifle was loaded? ' He replied, ' Yes.' Lenton said,
" ' You knew that when you pulled the trigger it would discharge
" ' a missile? ' and he replied, ' Yes,' and Lenton then asked,
" ' And that if the missile hit anyone it would at least maim them
" ' and probably kill them? ' to which the answer was, ' Yes.'
" The accused was then asked what you may think was a vital
" question, in view of the course the defence has taken—' Did
" ' you know at the time that it was wrong to point the loaded
" ' rifle at a person and shoot at them? ' The answer you may
" regard, if it so appeals to you, as the answer to the problem you
" have to solve. The answer by the accused to that question,
" ' Did you know it was wrong? ' was ' Yes, but I couldn't help it.'

" Now, gentlemen, if you accept the evidence in that state-
" ment Exhibit " G," it does not matter whether you think that
" the accused during that pregnant five minutes on the night of
" November 23 was or was not suffering from schizophrenia as
" Dr. Forgan thinks, if he did know, as he told Detective Lenton
" he did, that it was wrong to point the loaded rifle at a person
" and shoot at them. If you accept Dr. Shea's evidence you may
" have no doubt that the accused was not suffering from any
" mental disease and did know that he was doing wrong. If you
" will look at Exhibit ' G ' on page 6, you will see that after
" saying ' Yes ' to that question, the accused went on to say ' But
" ' I couldn't help myself. I knew it was wrong but I couldn't
" ' help myself.' These words, gentlemen, may suggest to you
" that the accused was thereby setting up the defence of ' uncon-
" ' trollable impulse ' which you may think is the true explanation
" of what he did. But, as you will remember gentlemen I have
" directed you, if that be the true explanation of what the accused
" did, that is no defence, and he is guilty in law of the crime
" charged. You may not like gentlemen, to convict a man of
" murder who ' couldn't help himself,' but if you are satisfied
" beyond reasonable doubt of the truth of that answer, that may
" be your duty.

" Detective Lenton's next question was, ' Do you think that
" ' you would have pulled the trigger of that rifle if there had been
" ' a policeman standing by you? ' To that the accused answered,
" ' No.' Now, if you accept that answer, you may infer if you
" think proper that the reason the accused answered ' No ' is
" because, again, he knew that pulling the trigger was wrong. . . .

" Mr. Chamberlain points out that if you acquit him, gentle-
" men, the accused may ultimately kill someone else. Well,
" gentlemen, you are not to concern yourselves with the conse-
" quences of your verdict, and if you are satisfied he was not
" guilty of this crime because of temporary insanity, then the
" future must take care of itself. Mr. Elliott tells you that if you
" find him not guilty because of insanity, I must commit him to

" gaol to await the Governor's pleasure. How long the Governor " may be prepared to detain a man whom no one will now say is " insane may be problematical, but again that is no concern of " yours. Even if you find him guilty, the Executive Council may " refuse to allow him to hang, but that again is no concern of " yours."

The passages in the High Court's judgment are the following: " After setting out the facts relating to this and recalling Brown's " statement that he had gone to bed on the Sunday night and " had then got up and taken the rifle, the charge to the jury " proceeded in a manner which we think very much open to " objection. It is desirable to set out the passage in full. ' The " ' accused himself owned no firearms and, probably, had he " ' never seen the rifle and ammunition in Dave's room he might " ' never have thought of shooting anybody. You will remember " ' Mr. Elliott ' (who was counsel for Brown) ' drawing your " ' attention to the fact that there was no motive for this alleged " ' crime. Gentlemen, throughout the centuries of civilisation, " ' crimes have repeatedly been committed without any apparent " ' or discoverable motive. That is one of the reasons why, in " ' our childhood, we were taught never to put temptation in " ' anybody's way and what would be temptation for another " ' man, might be no temptation whatsoever to us. You may, " ' perhaps, remember the words of Shakespeare—" How oft the " ' " sight of means to do ill deeds makes ill deeds done." There, " ' standing before his eyes in Dave's empty room, was the rifle " ' and ample ammunition and there were the means to do ill " ' deeds. Do you think that perhaps those means to do ill deeds " ' made the ill deeds done in this particular case? You may, " ' perhaps, think that on November 23, the accused, when he " ' shot Neville Lord, was acting on an uncontrollable impulse—a " ' dreadful impulse which arose suddenly and which he was " ' unable to control. If that view should commend itself to you, " ' it is my duty to direct you that that is no defence in law. The " ' defence of uncontrollable impulse is unknown to our law, and " ' if that, in your considered view, is the only explanation of " ' the death caused by the accused on November 23, it is your " ' duty to bring in a verdict of guilty of murder.'

" At a later point in his charge to the jury the learned judge " returned to the answer that Brown had given to the question " of the police officer whether he knew at the time that it was " wrong to point a loaded rifle at a person and shoot him, namely, " the answer ' Yes. But I could not help myself.' His Honour " said, ' These words, gentlemen, may suggest to you that the " ' accused was thereby setting up the defence of " uncontrollable " ' " impulse " which you may think is the true explanation of " ' what he did. But, as you will remember gentlemen I have " ' directed you, if that be the true explanation of what the " 'accused did, that is no defence, and he is guilty in law of " ' the crime charged.'

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" The objections to these passages which of course must be " taken together are, we think, very serious. The foundation of " the case in support of the plea of insanity was that Brown's " act in shooting Mr. Lord as he lay asleep lacked any motive " actuating a sane mind. Upon this the evidence was entirely " one way. Irresistible impulse as such had not been raised as a " defence and no one had suggested that it could amount to a " defence. The manner in which the first of the foregoing " passages discounted the importance or effect of the absence " of ascertainable motive put this cardinal matter, to say the " least of it, in a false light. It was not at all unlikely to produce " an adverse effect upon the jury with respect to that very " element in the case for Brown which if one were guided by the " evidence there was no reason to doubt. What follows im- " mediately concerning temptation and the sight of the means to " do ill deeds might not carry any very clear meaning to the " jury but its tendency could hardly be anything but prejudicial. " For it might be taken by them as suggesting that the prisoner, " finding a weapon available, was prompted to use it to shoot " Mr. Lord, for a reason which existed but was not ascertainable. " Then the possibility is introduced of the jury thinking it was " uncontrollable impulse. The result is a direction about uncon- " trollable impulse, which, if understood literally, is clearly " erroneous in point of law. For it is a misdirection to say that " if the jury think that the true explanation of what the accused " did was that he acted under uncontrollable impulse, that is no " defence and he is guilty in law of the crime charged. It is a " misdirection the operation of which might be to exclude the " prisoner's defence and to determine the verdict. Whatever the " learned judge may have had in mind in using the word ' only ' " when he first gave the direction about uncontrollable impulse " the second statement says in plain terms that because the " killing was done under uncontrollable impulse, if that were " the jury's opinion, therefore it amounted to murder and they " must convict the prisoner. It may be true enough that " although a prisoner has acted in the commission of the acts " with which he is charged under uncontrollable impulse a jury " may nevertheless think that he knew the nature and quality " of his act and that it was wrong and therefore convict him. But " to treat his domination by an uncontrollable impulse as reason " for a conclusion against his defence of insanity is quite " erroneous. *On the contrary it may afford strong ground for* " *the inference that a prisoner was labouring under such a defect* " *of reason from disease of the mind as not to know that he was* " *doing what was wrong. The law has nothing to say against* " *the view that mind is indivisible and that such a symptom of* " *derangement as action under uncontrollable impulse may be* " *inconsistent with an adequate capacity at the time to compre-* " *hend the wrongness of the act. This was put succinctly by*

" *Greer J., during the argument of the case of* Rex *v.* Ronald " True,[1] *in stating how in an earlier case he had directed the jury.* " *His Lordship said, ' What I really told the jury was that the* " ' *definition of insanity in criminal cases was the one laid down* " ' *by the judges in M'Naghten's Case,*[2] *but that men's minds* " ' *were not divided into separate compartments, and that if a* " ' *man's will power was destroyed by mental disease it might* " ' *well be that the disease would so affect his mental powers as* " ' *to destroy his power of knowing what he was doing, or of* " ' *knowing that it was wrong. " Uncontrollable impulse " in* " ' *this event would bring the case within the rule laid down* " ' *in M'Naghten's Case.' For that reason, even if no more* " *had been said than that uncontrollable impulse does not amount* " *to a defence, the fact that the subject was mentioned would* " *make it necessary to put before the jury the true operation of* " *uncontrollable impulse as a possible symptom of insanity of a* " *required kind and degree. . . .*

" It is not outside the province of a judge at a criminal trial " to put to the jury a view which he may take of a piece of " evidence or of facts. How far he should go must depend upon " circumstances. But if he does so and puts views adverse to " the prisoner it increases the importance of his putting clearly " and in its true light the case made for the prisoner, or for that " matter the case for him that fairly arises on the evidence, " however little validity in fact the judge may be inclined to " ascribe to it. It is difficult to resist the impression that the " position taken up by Dr. Forgan was not placed before the " jury by the summing-up in a way which could be understood " and appreciated. Perhaps that arose from the evident " difference between the view expressed by the learned judge " about the absence of known motive and the central significance " the witness placed upon the motiveless character of the act. " Doubtless it is true, as the learned judge pointed out, that the " jury might reject the views of the experts, but this possibility " leaves untouched the defect in the summing-up. Nor did the " rejection of the view that Brown had suffered from schizo- " phrenia necessarily dispose altogether of the question whether " there had existed a disease or disorder of the mind which might " satisfy the prerequisite condition required by the formula. In " all the circumstances we think that the cumulative effect of " the positive objections to those passages in the charge which " we have discussed is such that the conviction ought not to be " allowed to stand."

It is the concluding lines of the penultimate paragraph, beginning with the words " on the contrary " now printed in italics, which in their Lordships' view give rise to questions of

[1] (1922) 16 Cr.App.R. 164, 167, C.C.A.

[2] (1843) 1 C. & K. 130.

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great importance and far-reaching consequences in the administration of the criminal law. They would naturally be read by the judge who presides over the new trial and by all judges in similar cases in States where the English common law prevails as requiring them to tell the jury *as a matter of law* and in the absence of any medical evidence to that effect that irresistible impulse is a symptom of some disease or disorder of the mind which, although not preventing the patient from knowing the nature and quality of his act, yet does prevent him from knowing that it is wrong.

The words " the true operation of uncontrollable impulse as a " possible symptom of insanity of a required kind and degree " must imply that the law knows and recognises uncontrollable impulse as a symptom of legal insanity within the meaning of the rule in *M'Naughten's* case [3] and, in conjunction with the language used at the beginning of the passage in question, that it is the judge's duty to instruct the jury that it may afford strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. Furthermore, this direction is required not only in a case where there may have been no medical evidence, but even in a case, such as the present, where the medical evidence for the defence was to the effect that the prisoner when he committed the act was suffering from a specific disease or disorder of the mind known as schizophrenia which, although not preventing him knowing the nature and quality of his act, did prevent him from knowing it was wrong, but of which it was never suggested that irresistible impulse was a symptom or that it played any part in helping the medical witness for the defence to arrive at his diagnosis. So much so that counsel for the respondent on the present appeal, far from relying on irresistible impulse, contended that the trial judge should never have mentioned the subject in his charge to the jury as it formed no part of the case for the defence.

Their Lordships can find no support for the view that this accurately represents the criminal law.

At various times in the past attempts have been made to temper the supposed harshness or unscientific nature of the M'Naughten Rules. These attempts were supported by the high authority of Sir James Fitzjames Stephen, but in the end the rules remain in full force and their harshness has in this country been to some extent alleviated by the recent legislative enactment affording the defence of diminished responsibility. While the High Court, of course, fully recognise the binding force of the M'Naughten Rules, their Lordships think that the directions which they have indicated as appropriate for use by trial judges would in effect make a very considerable inroad into those rules as hitherto interpreted. Moreover, unless the law is presumed

[3] 1 C. & K. 130.

to take cognisance of irresistible impulse as a symptom of legal insanity, whence does the judge derive his knowledge of these matters, it not being permissible for him to make use of what he may have learned from evidence given in other cases?

Their Lordships must not, of course, be understood to suggest that in a case where evidence has been given (and it is difficult to imagine a case where such evidence would be other than medical evidence) that irresistible impulse is a symptom of the particular disease of the mind from which a prisoner is said to be suffering and as to its effect on his ability to know the nature and quality of his act or that his act is wrong it would not be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial.

Sodeman v. *The King*[4] is an Australian example of such a case. The actual decision in that case related to the burden of proof in cases where the defence of insanity is raised and to the sufficiency of the trial judge's direction thereon, but in the course of the judgments references were made to " irresistible impulse " and its possible bearing on the defence raised by the medical evidence in that case to the effect that if a man has an obsession and if he gives way to that obsession and does the thing which is always before his mind as the thing he wants to do, then in doing it he does not know the quality of his act, he does not know what he is doing, and does not know whether it is right or wrong. (Vide the judgment of Latham C.J.[5]) The learned Chief Justice used these words[6]: " But, on the other hand, it " should be remembered that, as already stated, the law " recognises that mental disease manifested in, for example, " what is called ' uncontrollable impulse,' may also be manifested " in lack of knowledge, or incapacity to have knowledge, of the " nature and quality of an act or of its character as a wrong act. " Such an impulse may be evidence of this very lack or in- " capacity. *Indeed, that was the effect of the medical opinions " given in evidence in this case, and this aspect of the case was " definitely put to the jury by the judge.*"

This passage must be read in the light of the concluding sentence now italicised. So read, their Lordships would not question it. But if the word " recognises " in the first sentence is construed to mean that the words which follow are matters of law which must or may be accepted and acted upon by juries without evidence it would not in their Lordships' opinion be an accurate statement of the law. The word " recognises " would seem to have been used in contrast to the rejection of irresistible impulse per se and means no more than that the law will not refuse to listen to evidence to the effect stated whereas it will refuse to listen to evidence of irresistible impulse per se.

[4] (1936) 55 C.L.R. 192; affirmed [1936] 2 All E.R. 1138, P.C.

[5] Ibid. 203.

[6] Ibid. 205.

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The presumption that the law takes note of such matters without evidence is implicit in the language of the High Court's judgment in the present case. It is this that their Lordships with great respect feel unable to accept.

It may be observed in passing that in the case of *The King* v. *Porter*[7] the charge to the jury by Dixon J. (as he then was) in which he dealt with the workings of the human mind appears to have been based upon the medical evidence given in that case. (Vide page 189, line 18, and page 190, line 18, "the medical "evidence included explanations of the course of mental "conditions in human beings generally.")

This distinction between what the law presumes and what the law will listen to is of the first importance in the present case since counsel for respondent has disclaimed any reliance on irresistible impulse either per se or as an element in the particular kind of mental disease relied upon to support the defence that the respondent, although aware of the nature and quality of his act, did not know that it was wrong, and submitted that the trial judge should never have referred to it in his charge to the jury.

Their Lordships do not derive much assistance from the interlocutory observations of Greer J. during the argument in the case of *Rex* v. *True*.[8] He was speaking from recollection of his summing-up in a case which he had tried two years earlier and in which no medical evidence had been given. No reference was made to his observations by the other members of the court and no authority has been cited in which the Court of Criminal Appeal has given its approval to such a direction. In none of the leading cases in recent years such as *Rex* v. *Kopsch*[9] and *Rex* v. *Rivett*,[10] where the defence of insanity was raised has there been any suggestion that although irresistible impulse affords no defence per se the law will recognise it as a symptom from which the jury may without evidence infer insanity within the M'Naughten Rules. In the latter of these cases the defence of insanity was based on evidence almost identical with the medical evidence in the present case.[11] It may, perhaps, be observed in passing that if such matters were left to a jury without the assistance of medical evidence there would seem to be two possible views which a layman might take as to the relevance of irresistible impulse to the M'Naughten tests. Some might think that before an impulse becomes irresistible there must have been some attempt to resist it and that the attempted resistance might well be due to knowledge of the wrongness of the act to which the prisoner felt himself impelled. Others might think that the irresistible impulse might impair the reasoning power to such a degree that it would no longer be able to

[7] (1933) 55 C.L.R. 182.
[8] 16 Cr.App.R. 164, 167.
[9] (1925) 19 Cr.App.R. 50, C.C.A.
[10] (1950) 34 Cr.App.R. 87, C.C.A.
[11] Ibid. 92.

appreciate the wrongness of the act. Why should the law prescribe that one of these views must be presumed to be correct rather than the other without medical evidence as to which is to be preferred with reference to the particular form of mental disease or disorder from which a prisoner is said to have been suffering?

Their Lordships are not, of course, suggesting that legal insanity cannot be sufficiently proved without medical evidence. The previous and contemporaneous acts of the accused may often be preferred to medical theory. But where the whole case for the defence is based upon the accused having a particular form of mental disease such as schizophrenia, the nature and symptoms of which are known to psychiatrists but knowledge of which cannot be attributed to a jury, the law will not step in to instruct a jury in the absence of medical evidence as to the "true" operation of uncontrollable impulse as a possible symptom of "insanity of a required kind and degree."

In arriving at a conclusion different from that of the High Court on a matter of this kind their Lordships may, perhaps, derive some comfort from the fact that they have had the advantage of a very full and helpful argument from both sides on this aspect of the case whereas they are informed that this particular matter not having been raised by the defence either in the Full Court or the High Court but having been taken by the court in the course of argument in the High Court, counsel may not have developed their arguments quite so fully or had so much opportunity of considering the matter as they have now been afforded. Moreover, they could not of necessity address their minds to the language in which the High Court eventually expressed its considered judgment.

Their Lordships now turn to other matters, which, though no doubt of great importance in the present case, are not of such a nature that their Lordships would normally investigate on appeal from the High Court. As, however, the Board has seisin of the appeal and as they are relied upon by the respondent as alone sufficient to justify the High Court in quashing the verdict and judgment at the trial they must be dealt with. They are as follows: It was contended by counsel for the respondent: 1. That the judge should never have mentioned irresistible impulse at all. This criticism is not to be found in the judgment of the High Court and is, indeed, contrary to its tenor, but it was strongly pressed by counsel for the respondent. 2. That the judge's references to irresistible impulse were so worded that the jury would or might infer that even if they were satisfied that the respondent did not know that what he was doing was wrong they must nevertheless find him guilty of murder if they thought he was acting on an irresistible impulse. 3. That the judge misdirected the jury in his references to the absence of motive. 4. That there was misdirection in the judge's reference

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to the consequences of the jury's verdict. 5. That there was misdirection in the judge's reference to Mrs. Schiller. 6. That the case for the defence was not sufficiently or fairly placed before the jury.

Points 2 to 6 inclusive were relied upon by counsel before the Board and appear in the judgment of the High Court. Points 1, 2, 3 and 5 were not raised by counsel on the appeal to the Full Court of the Supreme Court of South Australia or on appeal to the High Court. Numbers 2, 3 and 5 emerged in the course of the High Court hearing and No. 1 appeared for the first time before the Board. Their Lordships are not for one moment suggesting that the High Court were not entitled and indeed bound to take and act upon these points if they considered they amounted to serious misdirections, but the result has been that neither the High Court nor the Board have had the advantage of the views and experience of the Full Court of South Australia on four out of six of the matters now complained of and which had apparently escaped the notice both of counsel, who had been astute to draw the judge's attention after the jury had retired to what he submitted were defects in his summing-up and to remedy one of which the judge had recalled the jury, and of all three members of the Full Court of South Australia.

It will be convenient to deal first with Nos. 4 and 5. There is no reason to suppose that the High Court would have considered these matters by themselves as justifying quashing the verdict and judgment of the trial court. It would seem probable that the High Court, being minded to order a new trial by reason of what they considered serious misdirections with regard to the law of insanity, referred to them in order that they should not be repeated at the trial. Their Lordships feel bound, however, to say that in their opinion the observations of the trial judge on these matters were not open to criticism. With regard to No. 4, the Board were informed that it is common practice for counsel in South Australia in their addresses to juries in murder trials to refer to the consequences of their verdict. If such a practice is permitted it is incumbent upon the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue they have to determine. Their Lordships do not regard the language which the trial judge used on the present occasion as open to criticism. It was as follows: "Mr. Chamberlain points out that if you acquit him, gentlemen, "the accused may ultimately kill someone else. Well, gentle- "men, you are not to concern yourself with the consequences of "your verdict, and if you are satisfied he was not guilty of this "crime because of temporary insanity, then the future must take "care of itself. Mr. Elliott tells you that if you find him not "guilty, because of insanity, I must commit him to gaol to await "the Governor's pleasure. How long the Governor may be "prepared to detain a man whom no one will now say is insane

" may be problematical, but again that is no concern of yours. " Even if you find him guilty, the Executive Council may refuse " to allow him to hang, but that again is no concern of yours."

No. 5 concerns the judge's reference to Mrs. Schiller. The respondent in his statement to the police had said that after having shot Mr. Lord and after Mrs. Lord had gone into the bedroom where Mr. Lord was he (the respondent) had gone to see what the cook (i.e., Mrs. Schiller) was doing. He was asked " Why did you go looking for Mrs. Schiller?" He replied " I " just wanted to see where she was." He was asked " Why?" and replied " Because I thought she might have rung up and " given the alarm." In the written statement which he read from the dock he said: " On the Sunday evening when it " happened I seemed to be acting in a dream. I do not remember " why I chose Mr. Lord rather than Mrs. Lord or the lady cook." The judge's reference in his summing-up to the respondent's answers to the police on this matter have already been set out.

The conduct of the respondent immediately after the shooting was relevant to the state of his mind at the time of the shooting, and the observation with regard to Mrs. Schiller's good fortune would seem to have been fully justified on any view of the case having regard to the respondent's statement from the dock.

The more serious criticisms of the judge's summing-up, involved in Nos. 1, 2, 3 and 6 above, must now be dealt with. No. 1, viz., that the judge should never have referred at all to irresistible impulse, was, as already stated, a point taken by counsel for the respondent before the Board. It could not have been taken at an earlier stage, because the possible significance of irresistible impulse only emerged on reading the judgment of the High Court. Their Lordships do not consider it valid. It is true that it formed no part of the respondent's defence of insanity on the medical evidence adduced in support of this plea, nor was it relied upon by his counsel as having any relevance to his defence, but the respondent in his statement from the dock and in his answer " Yes, but I could not help myself " to the police officer's question " Did you know at the time it was wrong to " point a loaded rifle at a person and shoot at them " fully justified the judge in explaining to the jury in appropriate language that the criminal law of South Australia does not recognise the defence of insanity on the ground of irresistible impulse.

This leads to question No. 2, viz., whether the language used by the judge was appropriate or whether, as the High Court thought, it might lead the jury to infer that even if satisfied that the respondent did not know that what he was doing was wrong they must find him guilty of murder if they thought he was acting under an irresistible impulse.

The passages in the summing-up dealing with this matter and the High Court's criticism thereof have already been set out in full and it is not necessary to repeat them. They must, of course, be considered in the context of the summing-up taken as a whole

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and the course which the trial had taken. The sole issue had been whether the respondent had discharged the onus which lay on the defence of satisfying the jury that on balance of probability at the time when he shot Mr. Lord he was labouring under a defect of reason, due to disease of the mind, by reason of which he did not know that what he was doing was wrong. The greater part of the evidence and the summing-up and, it may be supposed, almost the whole of counsel's addresses to the jury would have been quite irrelevant if the short answer to the case had been: "Well, he says he could not help it, and if so he is guilty of murder "whether he knew it was wrong or not." Their Lordships do not consider that the language used by the judge could have been so interpreted by a jury who had listened to the whole case and, in particular, to the summing-up, which occupies nine pages of the printed record, and in which, in no less than seven different passages, the judge in the clearest possible language correctly instructed the jury as to the issues they had to decide and the onus of proof. It will suffice to set out the first and last of these passages. The first is as follows: "If after careful consideration "of the evidence that has been put before you, you are satisfied "on the balance of probabilities that the accused was on "November 23 labouring under a defect of reason due to disease "of the mind by reason of which he either did not know the "nature and quality of his act in killing Neville Lord, or did not "know that that killing was wrong then, and then only, your "verdict should be not guilty on the ground of insanity." He then went on to explain that in the present case all the medical evidence was to the effect that the respondent knew the nature and quality of his act, and that the real issue was whether he knew that his act was wrong. His last reference to this matter is to be found in the final passage of his charge. It reads as follows: "You may find him not guilty on the ground that he was "insane at the time he shot the deceased, which would mean "that you are satisfied beyond reasonable doubt that he killed "Lord, but that at that time he was suffering from the mental "disease of schizophrenia and did not know that he was doing "wrong and that, therefore, he is not criminally responsible for "his acts. Finally, if not satisfied on the probabilities that he "was insane you may find him guilty of murder."

The passages complained of have so far been dealt with in their general setting, but even taken in isolation—though no doubt in the light of the criticism to which they have now been subjected they might have been better worded—their Lordships do not think that they would be interpreted by a jury in the way suggested. The statement in the judgment of the High Court that "whatever "the learned judge may have had in mind in using the word "'only' when he first gave the direction about uncontrollable "impulse the second statement says in plain terms that because "the killing was done under uncontrollable impulse, if that were "the jury's opinion, therefore it amounted to murder and they

" must convict the prisoner," seems to their Lordships unjustified. The passage in the summing-up starting on page 65 of the record at line 13 and ending at line 44 has to be read as a whole, and shows that the judge was referring to the series of questions and answers in the respondent's statement to the police officer (Exhibit " G ") and in particular to the question " Did you know " at the time that it was wrong to point a loaded rifle at a person " and shoot at them," and the answer " Yes, but I could not help " myself." When the learned judge said: " These words, " gentlemen, may suggest to you that the accused was thereby " setting up the defence of uncontrollable impulse which you may " think is the true explanation of what he did. But as you will " remember, gentlemen, I have directed you if that be the true " explanation of what the accused did that is no defence and he " is guilty in law of the crime charged," the " true explanation " refers to the whole answer " Yes, [meaning, Yes, I knew it was " wrong] but I could not help myself," and is not confined to the words " I could not help myself." The respondent's answer, if accepted by the jury, in terms negatived the defence of insanity. Their Lordships are, accordingly, of opinion that these passages dealing with irresistible impulse read together did not amount to misdirection.

No. 3 deals with the direction with regard to the absence of motive. The passage complained of has been set out earlier in this judgment. It is true that what the judge said was more appropriate to a case where it is necessary to instruct a jury that it is not necessary for the prosecution to prove motive in order to establish a case of murder. There was no such need in the present case as the killing had been established beyond doubt, and it was common ground that the respondent had no conscious motive for his act. Nonetheless the reference to Shakespeare's words " How oft the sight of means to do ill deeds make ill deeds " done " was not wholly inappropriate in the present case. The medical witness for the defence was asked the following questions in cross-examination and gave the following answers:

" Q.—I suppose any action such as shooting a man could be " traced to some sort of impulse or emotion?

" A.—Yes. All human action is the result of some cause. " Something led to the impulse in this man to shoot Mr. Lord.

" Q.—It's really traceable to his feelings of inferiority and " guilt associated with his masturbation which produced an out- " burst of violence?

" A.—Yes.

" Q.—And one of the predominant and conscious characteris- " tics of the human mind is to justify oneself in one's own eyes?

" A.—Yes.

" Q.—There would be an element of ' playing big ' in front of " himself in this instance wouldn't there? In such an instance as " this, an unmotivated crime of this sort, it is ' playing big stuff ' " in his own eyes?

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" A.—That could be.

" Q.—It could also be influenced by the sight of a happily " married attractive young couple in contrast with his own view of " his own inadequacy?

" A.—That is the thing."

In the light of this evidence it would seem highly probable that the sight of the rifle and cartridge might have lit up these subconscious motives. However this may be, the absence of conscious motive was, and had been, common ground throughout the trial, and their Lordships do not consider that the judge's observations on this matter could have misled the jury. Moreover, when the jury were recalled in order that the judge might correct the words " the wholly insufficient reason which the " accused has given " which he had used in his summing-up and substitute in their stead the words " and wholly failed to give any " reason for so doing," he added: " You may think he was mad " for having killed the deceased and wholly failed to give any " reason for so doing." The original language had been used with reference to madness in the popular sense of the word as distinguished from legal insanity, and the substituted words must be read in the same context, but the whole passage at page 69 of the record tends to emphasise the motiveless nature of the crime.

Finally, it is said that the summing-up did not put the case for the defence and the medical evidence fairly or sufficiently before the jury. On this aspect of the case the Full Court of the Supreme Court of South Australia subjected the judge's charge to the jury and the evidence at the trial to a careful and detailed scrutiny, they referred to the authorities which have stated the principles—if they can properly be so called—upon which an appellate court in a criminal case will quash a conviction on the ground of misdirection or non-direction with regard to the evidence given at the trial or the presentation of the defence, and came to the conclusion to quote their words—" In the present case it is " manifest that the point upon which Mr. Elliott relied was before " the jury from first to last through the whole hearing. Applying " the rule laid down in the case *Immer and Davis* [12] we think " that the summing-up of the learned trial judge was sufficient."

Their Lordships have gone through the same process and are content to adopt as their own the words quoted above.

In the result, for the reasons indicated, their Lordships after anxious consideration of the questions raised in this appeal, some of which are of great importance in the administration of justice in murder cases involving the defence of insanity, are of opinion that no sufficient grounds have been established in this case to justify an appellate court in quashing the verdict and judgment of the trial court. In conclusion, their Lordships may perhaps permit themselves to refer to the concluding words of the judgment of the Full Court of the Supreme Court of South Australia: " While

[12] (1917) 13 Cr.App.R. 22.

" we really have no doubt that the verdict was right in point of " law (in so far as the appellant must be taken to have known " what he was doing and that it was wrong) nevertheless we think " that there is ground for surmising that the appellant may have " suffered from some such abnormality of mind as might, under the " recent amendment of the law in England [the Homicide Act, " 1957, s. 2 (1)], be held to diminish his responsibility. That " opinion is based very largely upon the evidence of Dr. Shea," and, without expressing any view one way or the other with regard to the correctness of the verdict which they think would be outside their province, to express their concurrence in the concluding words of the observations quoted above.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the High Court set aside and the verdict and judgment of the trial court restored.

Solicitors: *Blyth, Dutton, Wright & Bennett; Lawrence Jones & Co.*

C. C.

[PRIVY COUNCIL.]

HUSSENABAI HASSANALLY AND ANOTHER . APPELLANTS;

AND

MOHAMED MUHEETH MOHAMED CASSIM AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Restitution—Unjust enrichment—Roman-Dutch law—Bona fide occupier of land—Assumed lawful possession—Right against true owner to compensation for improvements—Equitable principles applicable.

Roman-Dutch Law—Fideicommissum—Land—Bona fide occupier—Partition—Right of occupier to compensation.

The second respondent, who upon the death of her mother became entitled to a half share in certain property subject to a fideicommissum, purported in 1945 to grant to a lessee—on whose death the appellants as executors of his estate were substituted as defendants—a lease of the whole of the property for a term of 30 years, the deed providing that the lessee was to erect on the land certain buildings, the use of which he was to enjoy during the term of the lease and which, at the end thereof, he was to deliver up to the lessor free of any payment. The lessee constructed the stipulated buildings. Thereafter, in 1953, an action was begun under the Partition Act, 1951, of Ceylon by one of the four children of the second respondent's sister (she having died in 1938) who were each

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* *Present*: VISCOUNT SIMONDS, LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST and the RT. HON. L. M. D. DE SILVA.

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entitled to a one-eighth share of the property subject to the fideicommissum, claiming a declaration of title to the property and a sale under the Act. The trial judge held that the second respondent had held herself out as the sole owner of the land, and that the lessee had constructed the buildings in the bona fide belief that she was in fact the sole owner. The appellants claimed that in the event of a sale of the property being ordered in terms of the Partition Act—which had the effect of extinguishing the leasehold rights—they should be paid out of the proceeds of sale a sum as compensation for the buildings erected and other improvements effected by the lessee. A decree for sale having been made:—

Held, that the appellants were entitled to the compensation claimed, and that the final adjustment of their rights should be made in the partition suit to which they were proper and necessary parties.

No distinction was to be drawn between the case of an improver whose bona fide occupation had rested on a purported lease and that of any other improver who had assumed to be in lawful possession; on the contrary, the right of the improver to compensation rested on the broad principle that the true owner was not entitled to take advantage, without making compensation, of the improvements effected by one who made them in good faith believing himself entitled to enjoy them whether for a term or in perpetuity.

Bellingham v. *Bloommetje* (1874) Buch. 36; *Rubin* v. *Botha* [1911] S.A.L.R., A.D. 568; and *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.* [1915] S.A.L.R., A.D. 636 applied.

Parkin v. *Lippert* (1895) 12 S.C.R. (Cape of Good Hope) 179 considered.

Soysa v. *Mohideen* (1914) 17 N.L.R. 279 overruled; in that case the claim, like that in the present case, was not made qua lessee, but in respect of the bona fide occupation of land under a lease which had been repudiated—the claim was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment. "It "would be difficult to imagine a clearer violation of the moral "principle upon which the rule against unjust enrichment rests, "than that an owner, who has, for whatever reason, prematurely "brought a lease to an end, should at once deny to the lessee the "rights which the lease or the common law gives him as lessee and, "because he was a lessee, deny also his claim to compensation for "improvements."

Hevawitarane v. *Dangan Rubber Co. Ltd.* (1913) 17 N.L.R. 49; *Government Agent, Central Province* v. *Letchiman Chetty* (1922) 24 N.L.R. 36; *Appuhamy* v. *Doloswala Tea and Rubber Co. Ltd.* (1923) 25 N.L.R. 267; and *Jasohamy* v. *Podihamy* (1943) 44 N.L.R. 385 considered.

Judgment of the Supreme Court of Ceylon (1957) 59 N.L.R. 160 reversed.

Appeal (No. 3 of 1959) from a judgment and decree of the Supreme Court of the Island of Ceylon (September 5, 1957) reversing a judgment and decree of the District Court of Colombo (May 20, 1955) in a partition action instituted by the plaintiff-respondent, M. M. M. Cassim, under the provisions of the Partition Act, No. 16 of 1951, for a declaration of title to a property in New Moor Street, Colombo, and for the sale of the property under the Act.

The following facts are taken from the judgment of the Judicial Committee: The appellants were the executors and trustees of the estate of one Akbarally Abdulhussan Davoodbhoy, who was originally the fifth defendant in the action out of which this appeal arose. Upon his death they were substituted for him as defendants. He will for convenience sometimes be referred to as the fifth defendant.

The action was concerned with certain land situated in New Moor Street, Colombo, which at the date of her death was held by one Rahumath Umma subject to a fideicommissum created in 1871 in favour of her descendants. She died in 1921 leaving as her heirs two daughters, Umma Shiffa and the second respondent Zaneera Umma, each of whom became entitled to a half share of the property subject to the fideicommissum. Umma Shiffa died in March, 1938, leaving as heirs her four children, the youngest of whom, Mohamed Cassim, became the plaintiff in the action and was a respondent to this appeal, and the others were defendants in the action and were also respondents to this appeal. The position then was that the second respondent was entitled to 4/8th shares of the property and the other four respondents who have been mentioned to 1/8th share each, all such shares being subject to the fideicommissum. For this reason there were added as defendants certain children of one of the children of Umma Shiffa who were also respondents to this appeal. It was in these circumstances that the plaintiff (the first respondent) brought his action under the provisions of the Partition Act, No. 16 of 1951, claiming a declaration of title to the property and a sale under the Act. But, for the reason which will now be stated, he made defendants not only the persons who were interested with him under the fideicommissum, but also the fifth defendant whose interest arose in a different way. It was not disputed that the latter's interest was such that he was a proper and necessary party to the suit.

On December 11, 1945, the respondent Zaneera Umma, who was entitled to 4/8th shares of the property, by a deed of that date granted to the fifth defendant in consideration of the sum of Rs.2,700 and of the covenants and conditions therein contained a lease of the property for 30 years from January 1, 1945, at the yearly rent of Rs.180 for the first 15 years and thereafter at the yearly rent of Rs.240. The deed contained a covenant by the lessee that he would " within a reasonable time lay out and " expend at his own expense in erecting and completing fit for " habitation with proper materials of all sorts upon the said " ground dwelling houses, tenements, shops, boutiques or " factories " as therein provided. It was further provided that the lessee, having completed the erection of the buildings as therein mentioned, should continue to exercise, use and enjoy the rights, benefits, interest and income of the premises and the buildings erected thereon during the pendency of the term of 30

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years demised by the lease and, further, that the lessee should keep the said buildings in proper order and condition and at the end of the term deliver up the whole of the premises to the lessor free of payment of any kind whatever.

The fifth defendant as lessee entered upon the demised land and duly constructed upon it the buildings for which the lease stipulated. The District Judge held that Zaneera Umma held herself out as the sole owner of the land and that the fifth defendant constructed the buildings in the bona fide belief that she was in fact the sole owner. He further held that the plaintiff in the action and the other heirs of Umma Shiffa made no protest but stood by and acquiesced in the improvement of the land by the fifth defendant. The Supreme Court did not concur in this last finding, but that was not material in the present appeal.

In these circumstances the fifth defendant by his amended statement of claim in the action (inter alia) claimed that in the event of a sale of the property being ordered in terms of the Partition Act the sum of Rs.35,000 as compensation for the buildings erected and other improvements effected by him should be paid to him out of the proceeds of sale.

The District Judge in the first place directed that the property should be sold subject to the right of the sixth and seventh defendants (the present appellants), who had by then been substituted for the fifth defendant, to remain in possession of a half share of the premises and the entirety of the buildings thereon for the full term of 30 years demised by the lease. This part of the order was not supported by the appellants and need not further be considered. The judge, however, further held that in the event of his order not being upheld the appellants were entitled to compensation out of the proceeds of sale for improvements effected by the fifth defendant. He fixed the quantum of compensation at Rs.25,125.45 and this figure was not in dispute. It was this part of the decision which was rejected by the Supreme Court (H. N. G. Fernando J. and T. S. Fernando J.) on appeal and which the appellants now sought to maintain.

1960. Jan. 14, 18. *E. F. N. Gratiaen Q.C.* (Ceylon) and *Walter Jayawardene* for the appellants.

The respondents did not appear and were not represented.

The following cases, in addition to those referred to in the judgment, were cited in argument: *General Ceylon Tea Estates Co. Ltd.* v. *Pulle* [1]; *Davith Appu* v. *Bahar* [2]; *Silva* v. *Banda* [3]; *Appuhamy* v. *Doloswala Tea and Rubber Co. Ltd.* [4]; *Fernando* v. *Rodrigo* [5]; *Dassanayake* v. *Tillekeratne* [6]; *Mudaliyar Wijetunga* v. *Duwalage Rossie.* [7]

[1] (1906) 9 N.L.R. 98.
[2] (1923) 26 N.L.R. 73.
[3] (1924) 26 N.L.R. 97.
[4] (1923) 23 N.L.R. 129.
[5] (1919) 21 N.L.R. 415.
[6] (1917) 20 N.L.R. 89.
[7] (1946) 47 N.L.R. 361.

March 7. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. This appeal from a judgment of the Supreme Court of the Island of Ceylon raises a question of considerable importance. It has involved an examination of a body of case law in which their Lordships have had the advantage of the assistance of learned counsel for the appellants, who, appearing without an opponent, has impartially directed attention to all material authority. The facts, which are not in dispute, can be shortly stated. [His Lordship stated the facts set out above and continued:] The Supreme Court, in deciding that the respondents are entitled to enjoy the fruits of the fifth defendant's labour and expense without paying any compensation therefor, were largely influenced by a decision of the Supreme Court in *Soysa* v. *Mohideen*.[1] But before examining this case their Lordships think it right to refer to certain authorities which, had they there been referred to, might well have led to a different conclusion. Their immediate purpose in doing so is to show that hitherto no distinction had been drawn between the case of an improver whose bona fide occupation had rested on a purported lease and that of any other improver who had assumed to be in lawful possession, but that, on the contrary, the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity.

Reference may first be made to textbooks of high authority. In Wille's Principles of South African Law, 4th ed., at p. 479, it is said: "A very common application of the doctrine of unjust "enrichment occurs in cases where improvements or additions "to landed property have been made, without the express or "implied consent of the owner of the property, by a person in "possession of the property. A person who expends money or "labour in improving property with the intention of doing so for "his own benefit, whereas in fact he had no right or title to "the property, in consequence of which the improvements are "acquired by the owner of the property by virtue of accession, "is entitled to claim from the latter the amount by which the "property has been enhanced in value.

"Improvements of this nature are effected, as a rule, to "the land of one person by a bona fide possessor of the land, "such as a fiduciary, or by a person who believes that he is a "fideicommissary. A bona fide occupier of land, such as a "person occupying land under the mistaken belief that he has "a lease of the property, has the same right to compensation "as a bona fide possessor."

Earlier editions of this work had substantially the same statement.

[1] (1914) 17 N.L.R. 279.

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In The South African Law of Obligations by Lee and Honoré (1950), paragraph 713, at p. 189, runs as follows: "Preservation "and improvement of property. A person who preserves the "property of another from loss, deterioration or destruction, or "who, acting on his own behalf, improves the property of "another, in the belief that it is or will be his own (or, in some "cases, that it belongs to a third person) may claim compensation "from the owner for necessary and useful expenses thereby "incurred, not exceeding the value of the benefit accruing to the "owner." For this proposition numerous cases were cited, to some of which their Lordships will now refer. Before doing so they observe that in the present case the often troublesome questions whether the improver has acted bona fide or mala fide and whether he is entitled to remain in occupation of the land until compensation has been paid do not arise. The bona fides of the fifth defendant is admitted and the appellants do not in a partition action claim to remain in possession.

In 1874 *Bellingham* v. *Bloommetje* [2] was decided by Villiers C.J. in the Supreme Court of the Cape of Good Hope. It must be examined at length because it goes to the root of the matter, and it has not been fully appreciated in the Supreme Court of Ceylon. The headnote so far as material is as follows: "Where a "person has bona fide built upon land not his own, he is entitled "to compensation for useful expenses incurred by him to the "extent to which the value of the land has been enhanced by the "building." The defendant acting in good faith and the belief that he had a lease of certain land, which in fact did not form part of land leased to him, built on it a house and a dam. The true owners sought to evict him. It was held that he was entitled to compensation for the amount by which the value of the land was enhanced by the house and dam. The Chief Justice says [3]: "I "am of opinion that the appellant had not sufficient reasons to "believe he was building on another man's ground, but that he "was the bona fide occupier of the land. . . . All the Roman-"Dutch authorities are agreed that, where a bona fide occupier "has built upon land belonging to another he is entitled to com-"pensation for the useful expenses incurred by him, that is to "say, for the expenses to the extent to which the value of the "land has been enhanced by the building." For this proposition the learned judge cites a wealth of authority, including Voet and Grotius, and then goes on to discuss the rights of a mala fide possessor, which are not now relevant. But the salient fact is that in this case the improver, who was held to be entitled to compensation, thought that he was, but in fact was not, the lessee of the land which he had improved. It was because he bona fide thought that he was entitled to occupy the land and in that belief improved it, that his claim to compensation arose. Nothing turned on the fact that he was truly the lessee of the adjoining

[2] (1874) Buch. 36. [3] Ibid. 38.

land or that his bona fide mistake was about the boundaries of the land demised. He was a bona fide occupier.

In *Parkin* v. *Lippert* [4] the facts were somewhat complicated, but the case illustrates the importance of bearing in mind the distinction between improvements effected by a lessee whose lease endures for the stipulated term, and those effected by a lessee whose term is prematurely determined by operation of law. The material part of the headnote is as follows: "Where a lessor "takes advantage of the law which puts premature end to a lease "upon the insolvency of the lessee, he is liable, in the absence "of any stipulation to the contrary, to the trustee of the lessee's "estate for the value of improvements made by such lessee in "contemplation of the lease being allowed to run its full term, "and to a sub-lessee, to whom the lessee had legally sublet the "land before his insolvency, and who in contemplation of the "lease continuing to its end had made such improvements." The same learned judge having invoked the principle that "the "presumption against forfeiture of property in any shape or form "lies at the root of the well-known maxim of our law that no one "shall be enriched at the expense of another" observed that there was no difference in principle, although there might be in degree, between the case of a lease being abruptly terminated by the operation of a special law, and that of a bona fide possessor making improvements in the belief that he will have the permanent enjoyment of them. Here, then, was the case of an improver who, lawfully occupying under a lease and in that capacity making improvements, was entitled to compensation because his occupation was prematurely determined.

In *Rubin* v. *Botha* [5] the essential facts closely resembled those of the present case, and the decision derives special importance from the fact that it was that of Lord de Villiers C.J., Innes J. and Maasdorp J.P. There the plaintiff and defendant entered into an agreement of lease under which the plaintiff was to have the use and occupation of a portion of the defendant's farm for 10 years without payment of rent, and was to erect a building thereon which, at the expiration of that period, was to become the property of the defendant. After the plaintiff had erected the building and been in occupation of the building for three years the defendant gave him notice to quit on the ground that the agreement was null and void as not having been executed as required by the Transvaal law. It was held that the plaintiff was entitled to be paid for the improvements to the extent to which the value of the defendant's farm had been improved thereby, less the value of the plaintiff's use and occupation for three years. There was a difference of opinion as to the quantum of compensation, which does not arise in the present case, but there was unanimity upon the right to some compensation. Some passages

[4] (1895) 12 S.C.R. (Cape of Good Hope) 179.

[5] [1911] S.A.L.R., A.D. 568.

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may be quoted from the judgment of the Chief Justice, with whom Maasdorp J. agreed. "The present case," he said,[6] "differs from the many cases in the Cape Supreme Court relating "to the compensation payable to the owner of land by the person "effecting improvements thereon in this respect, that the "improvements were made by a person who knew that he was "not the owner and intended that the buildings should become "the property of the owner, but believed that he would, as lessee, "enjoy the use and occupation for the full period contemplated "by the lease executed between him and the owner. That lease "proved to be null and void by reason of its not being notarial, "and the question to be determined is what should be the basis "of the compensation admittedly payable by the defendant to "the plaintiff." The learned Chief Justice then referred to his decision in *Bellingham* v. *Bloommetje*,[7] which has already been cited, and to the authority of Groenewegen upon which it had been decided, and said[8]: "Lessees, as has often been pointed "out in the Cape cases, especially in *De Beers Mines* v. *London* "*& South African Exploration Co.*,[9] stand on a different footing "from other occupiers as their rights have been defined by special "legislation. Where, however, as in the present case, the "relation of lessor and lessee does not exist between the owner "and the occupier by reason of the agreement of lease proving "null and void, there is no valid reason why the basis of com-"pensation applicable to lessees should be applied to improve-"ments made by the occupier." Then, after referring to the already cited case of *Parkin* v. *Lippert*,[10] the Chief Justice said[11]: "The plaintiff was not a 'possessor' in the strictly juristic sense "of the term, but he was a bona fide occupier, who believed he "had the right, not only of occupation, but of erecting the "buildings on the land so occupied. True it is that he intended "that the building should become the property of the defendant, "but only upon the expiration of the 10 years during which the "occupation was to last. The defendant took advantage of "the law which, by declaring the lease to be void, frustrated the "true intentions of both parties, and there appears to me to be no "reason in the world why he should not be subject to the equit-"able rule of the Dutch law that no one should be enriched to "the detriment and injury of another." Then a little later[12]: "The defendant in the present case took advantage of the law, "which declared his agreement to be void, and he cannot insist "upon compensation being payable as if the lease had been a "valid one."

Their Lordships have referred at length to this case both because it appears to them to apply in an unimpeachable way the

[6] [1911] S.A.L.R., A.D. 568, 574.
[7] Buch. 36.
[8] [1911] S.A.L.R., A.D. 575.
[9] (1893) 10 Juta 359.
[10] 12 S.C.R. (Cape of Good Hope) 179.
[11] [1911] S.A.L.R., A.D. 576.
[12] Ibid. 577.

cardinal principle of Roman-Dutch law in regard to unjust enrichment, and because it was ignored in the leading case of *Soysa* v. *Mohideen*,[13] to which they will presently recur. But before doing so they will mention *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.*[14] In that case again the defendants had leased a piece of land but had by mistake sunk a well beyond its boundary within the plaintiff's land. The plaintiff bringing an action for ejectment, the defendants claimed compensation for the improvement effected by the sinking of the well. The court (consisting of Innes C.J., Solomon J.A. and Maasdorp J.A.) considered and applied *Rubin* v. *Botha*[15] and held that they were entitled to it. There is much in the judgments of all three judges which illuminates the principle, but their Lordships think it sufficient to cite a single passage from the judgment of the Chief Justice[16]: "But it [*Rubin* v. *Botha*] certainly did decide that a person who "had made improvements upon the land of another, not as "possessor, but under the mistaken idea that he was lessee, was "entitled to compensation on the same basis as a possessor, "subject to an equitable deduction necessitated by the special "circumstances."

Why, then, it must be asked, did the court in the present case deny to the fifth defendant the right to compensation, thereby depriving him of the fruit of his labours and expense and permitting the unjust enrichment of the co-heirs? The answer is found in *Soysa* v. *Mohideen*[17] which, rightly perhaps, appeared to them to be a binding authority. It must therefore be closely examined. Two important points were raised in the case, only one of which is relevant to the present question, and the facts can be shortly stated. A parcel of land which was subject to a fidei-commissum had been occupied by the defendant in the action as lessee of one of the fiduciarii who was entitled to one half of the property and had agreed to pay him half the value of the buildings upon the termination of the lease. The plaintiffs, the fidei commissarii (the fiduciarii having died), successfully challenged the validity of the lease, whereupon the defendant claimed to retain possession of the land until the plaintiffs paid him half the cost of his improvements. This claim was rejected by the court, and once again their Lordships must cite considerable passages of the judgment, pointing out with respect how error has found its way into their conclusions. At a first hearing before Lascelles C.J. that learned judge said[18]: "I think that there can be no doubt "that under the Roman-Dutch law a lessor had not the jus "retentionis which would entitle him to remain in possession "against a successful claimant until he has been compensated for "improvements. The occupation of a lessee is not possessio "civilis, for he does not occupy the property in the belief that it "is his own. On the contrary, his interest in the property is

[13] 17 N.L.R. 279.
[14] [1915] S.A.L.R., A.D. 636.
[15] [1911] S.A.L.R., A.D. 568.
[16] [1915] S.A.L.R., A.D. 647.
[17] 17 N.L.R. 279.
[18] Ibid. 281.

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" defined and limited by the terms of the lease." The learned Chief Justice thought that the uncertainty which existed upon that branch of the law should be set at rest and adjourned the case for re-argument before the Collective Court. The observation that has been cited proved to be the basis of the judgment of that court. The Chief Justice himself added little to his previous judgment. De Sampayo A.J. opens the relevant part of his judgment with the words [19]: " A lessee is not a bona fide " possessor, and is therefore not entitled to compensation for " improvements on that footing." Their Lordships observe that he, like the Chief Justice, assumes that he is dealing with a claim by a lessee, whereas the very basis of the claim is that the lease has been repudiated and that he cannot claim under it. In the words of Lord de Villiers, he was not a possessor in the strict juristic sense but he was a bona fide occupier who had effected improvements in the mistaken belief that he would enjoy them for the term of the lease. The learned judge proceeded to distinguish other cases upon which their Lordships do not think it necessary to pronounce. His judgment was, in their Lordships' view, vitiated by the original erroneous assumption. None of the cases in the South African courts, to which reference has been made, were noticed by the court. Pereira J. fell into the same errors. After stating that it was well settled law in the colony that, in order to be entitled to compensation for improvements, a person should have not only possession of the property but bona fide possession of it, and that by " possession " is here meant what is known to the civil law as the possessio civilis as distinguished from the possessio naturalis, he held that a lessee has not possessio civilis of the land that he enjoys under the lease, for he knows that the land he enjoys does not belong to him: therefore he is not entitled to compensation for improvements. The question whether or not the possession of a lessee is possessio civilis may be open to argument. But in this context it is beside the point. For, as already stated, the claim made by the defendant in the case under review (like the claim made by the appellants in the present case) was not made qua lessee but in respect of the bona fide occupation of land under a lease which had been repudiated. It would, as their Lordships think, be difficult to imagine a clearer violation of the moral principle upon which the rule against unjust enrichment rests, than that an owner, who has, for whatever reason, prematurely brought a lease to an end, should at once deny to the lessee the rights which the lease or the common law gives him as lessee and, because he was a lessee, deny also his claim to compensation for improvements. Their Lordships must accordingly pronounce that this case was wrongly decided, and have the less reluctance in doing so because, long though the decision has stood, no questions of title can be affected by a contrary view of the law.

[19] 17 N.L.R. 279, 284.

But though this decision has stood for so many years, there have been in the courts of the Island of Ceylon cases which, in principle, are not easy to reconcile with it. Thus, in *Hevawiterane* v. *Dangan Rubber Co. Ltd.*[20] (a case decided shortly before *Soysa* v. *Mohideen*[21]) it was held that a "bona fide possessor" need not necessarily be the owner of the property possessed, nor need he have a legal right to possess it, but that it is sufficient if his possession is the result of an honest conviction in his mind of a right to possess. These words were quoted with approval by Wood Renton A.C.J. from Pereira, Right to Compensation, and were not dissented from by the same Pereira J. who was a party to the decision in the later case. It would seem that a discrimination between these two cases can only rest upon a confusion as to the capacity in which a person, who thought he occupied under a valid lease but did not, claims.

A case which usefully illustrates the spirit in which the principle has been developed is *Government Agent, Central Province* v. *Letchiman Chetty*.[22] There the relevant facts (taken from the headnote) were that the Government Agent took steps to acquire a swamp under the Land Acquisition Ordinance but suspended it. On the outbreak of plague he entered into possession under the Plague Regulations and, in anticipation of the conclusion of the acquisition proceedings, improved the land by filling it and draining it with drains which extended out of the land. No formal order of possession was obtained under the Land Acquisition Ordinance. At this stage the scheme was modified, and the old proceedings under that ordinance were abandoned and new proceedings started. The question then was whether the land should be valued as at the date of the award in those proceedings, or whether the Government Agent was entitled to compensation for improvements effected by him while he was in possession. He was held to be so entitled upon the ground that he was a bona fide possessor. For a person who takes possession of land and executes improvements upon it in expectation of a formal title which in good faith he believes himself certain to obtain may be such a possessor. Bertram C.J., in a weighty and learned judgment, treats of the development of the law, observing[23]: "In my opinion it would be a most unfortunate "position if the law had not developed principles which would "enable it to deal justly with such a case." In that case the question was mainly whether the possession was mala fide or bona fide. No doubt appears to have been entertained that if there was bona fides a valid claim to compensation was established. Again, it appears to their Lordships that upon any equitable principles it is unjustifiable to deny to an evicted lessee compensation which is awarded to one who has no title at all however firm may be his belief that he will get one.

[20] (1913) 17 N.L.R. 49.
[21] Ibid. 279.
[22] (1922) 24 N.L.R. 36.
[23] Ibid. 40.

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Reference must now made to *Appuhamy* v. *Doloswala Tea and Rubber Co. Ltd.*[24] In that case there was much discussion of the rights of a lessee in respect of improvements and Garvin A.J. said[25]: "It is well settled law that in Ceylon a lessee who has "improved his leasehold cannot maintain a claim for compensa- "tion in respect of these improvements against a third party who "establishes a title superior to that of his lessor from a source "other than the lessor. The law was declared in this sense in "*Soysa* v. *Mohideen*.[26] Since the decision of that case nothing "new has been discovered in the writings of the jurists." The learned judge then referred to the two South African cases which have already been examined, *Bellingham* v. *Bloommetje*[27] and *Rubin* v. *Botha*[28] and said[29]: "In neither of these cases was "compensation granted to the improver in his character of lessee "of the property improved. Indeed, it was the circumstance that "he was not in law the lessee of the premises which enabled him "to contend that he was a possessor who entered upon the "premises bona fide, and with the intention of holding and "enjoying the premises, if not as owner, at least for a specified "period of time, and entitled in equity to a measure of compensa- "tion assessed on that footing." It is difficult to understand why the acknowledged principle of those cases did not apply to the case before the learned judge. But at least he did not dissent from it, and the high authority of Garvin J. may be said to reinforce that of the distinguished South African judges who affirmed the right to compensation in such a case.

In *Jasohamy* v. *Podihamy*[30] the right of compensation for improvements was extended to a usufructuary who made improvements with the consent and acquiescence of the owner. The interest of the case lies in the fact that Keuneman J. cites from Wille's Principles of South African Law, 1937 ed., p. 353, the passage which has already been quoted. It will be observed that the generality of the statement of the relevant law in this citation does not exclude the case of a person who occupies land and improves it in the mistaken belief that he is a lawful lessee. This view is enforced by the fact that the learned judge then refers without disapproval to *Rubin* v. *Botha*[31] and *Fletcher and Fletcher* v. *Bulawayo Waterworks Co. Ltd.*[32]

Counsel referred their Lordships to many other cases in which, as he contended, the courts of Ceylon had sought to mitigate the rigour of the law as laid down in *Soysa* v. *Mohideen*[33] by means of the doctrine of acquiescence or otherwise. But they think it unnecessary to examine them and will return to the case under appeal. As already observed, the judges of the Supreme Court founded their judgment on *Soysa* v. *Mohideen* and, in particular, on the passages that have already been cited from the judgment

[24] (1923) 25 N.L.R. 267.
[25] Ibid. 269.
[26] 17 N.L.R. 279.
[27] Buch. 36.
[28] [1911] S.A.L.R., A.D. 568.
[29] 25 N.L.R. 269.
[30] (1943) 44 N.L.R. 385.
[31] [1911] S.A.L.R., A.D. 568.
[32] [1915] S.A.L.R., A.D. 636.
[33] 17 N.L.R. 279.

of Pereira J., H. N. G. Fernando J. concludes the relevant part of his judgment by saying that, having considered many of the cases subsequent to *Soysa*, he would hold that none of them had in any way qualified the principle therein laid down that the rights, if any, arising from a contract between a lessor and lessee cannot be enforced by the lessee as against the fideicommissary owners who were not parties to the contract. This passage serves to emphasise in the clearest way the error which permeates *Soysa's* case [34] and the case under appeal. In that case, as in this, the claim of the improver was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment. It is beside the mark to discuss whether the possession of a lessee is civilis or naturalis, for it is not as lessee that the claim is made. It is, on the contrary, because he is denied his contractual rights by the premature termination of the lease, that he asserts his claim to compensation. Their Lordships entertain no doubt that in allowing it they follow the line of development of an important equitable principle, and derive some satisfaction from the fact that the law of Ceylon will thus be brought into harmony with that established in South Africa nearly a century ago.

As they take this view upon the main question that was argued, their Lordships do not think it necessary to discuss an alternative claim, which was founded on the view that the lessor, Zaneera Umma, was entitled to compensation as between herself and her co-heirs, and that by subrogation the fifth defendant, and therefore the appellants, are entitled to the benefit of her claim. This is a matter which may in some other case call for determination. It is unnecessary and would be inexpedient to deal with it now.

Their Lordships are satisfied that the final adjustment of the rights of the parties, including the party claiming compensation as an improver, can and should be made in the partition suit. The amount of compensation, if payable, has not been disputed, nor has any equitable plea been advanced for its reduction.

Their Lordships will therefore humbly advise Her Majesty that the order of the Supreme Court should be set aside, that the order of the District Court should be restored so far as it directed the sale of the property in accordance with the provisions of the Partition Act, 1951, and the bringing of the proceeds of sale into court to abide further order and the payment of costs, but that provision should be made by such further order for paying the sum of Rs.25,125.45 thereout to the appellants in priority to the beneficial interests of other parties.

The respondents must pay the costs of the appellants in the Supreme Court and of this appeal.

Solicitors: *Fisher Dowson & Wasbrough.*

C. C.

[34] 17 N.L.R. 279.

[COURT OF APPEAL.]

C. A.

1960
Feb. 9, 10, 11, 12.

Lord Goddard, Pearce and Upjohn L.JJ.

LEGGE and Others *v.* MATTHEWS and Another.

[Plaint No. PP. 262.]

Landlord and Tenant—Rent restriction—Decontrol—Sublease—Part of premises lawfully sublet—Decontrol of whole premises—Whether subtenant of part forming separate dwelling-house protected against head landlord—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3)—*Housing Repairs and Rents Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 41—*Rent Act*, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *ss.* 11, 27 (2), *Sch.* 4, *paras.* 1, 2.

In 1953 the tenant of premises within the protection of the Rent Acts lawfully sublet to the second defendant the ground floor, comprising a separate dwelling-house for the purposes of those Acts. After April, 1957, the tenant remained in possession of the premises as a statutory tenant until, in July, 1957, the premises as a whole were decontrolled by the Rent Act, 1957. The rateable value of the ground floor was, however, below the limits of the decontrolling provision. In October, 1958, an order for possession was made against the tenant, but the operation of the order was suspended for six months. The landlords also sought to recover possession against the subtenant:—

Held, (1) that section 41 of the Housing Repairs and Rents Act, 1954 [1] (which applied not only where the superior letting was contractual but also where it had become statutory and covered all cases where the superior letting was of a dwelling-house which at the moment was not controlled) applied so that the Rent Acts operated as if the landlords had let the ground floor under one letting and the rest of the premises under another.

(2) That, accordingly, the ground floor remained within the ambit of the Rent Acts and, by virtue of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,[2] the subtenant was deemed to become the tenant of the landlord.

Cadogan v. *Henthorne* [1957] 1 W.L.R. 1; [1956] 3 All E.R. 851 applied.

(3) Accordingly, the landlord was not entitled to an order for possession.

Quaere, whether the alteration as from the date of decontrol in

[1] Housing Repairs and Rents Act, 1954, s. 41: "Where a dwelling-house to which the Act of 1920 applies (hereinafter referred to as 'the sub-let part') forms part of premises, not being such a dwelling-house, which have been let as a whole on a superior letting, then from the coming to an end of the superior letting the operation of the Rent Acts in relation to the sub-let part shall be the same as if in lieu of the superior letting there had been separate lettings of the sub-let part and the remainder of the premises, for the like purposes as under the superior letting, and at rents equal to the just proportion of the rent under the superior letting."

[2] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15: "(3) Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any subtenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

the terms of the occupation of the head tenant during the transitional period of grace under Schedule 4 to the Rent Act, 1957, amounts to a determination of the head tenant's interest, or is more properly regarded as a mere variation not amounting to a determination, and whether, if it amounts to a determination, the tenancy between the landlord and the subtenant, which is to be deemed to exist by virtue of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, can exist during the transitional period whilst the former tenant is still in possession.

APPEAL from Judge Clark sitting at Clerkenwell County Court.

In 1953 premises known as 322, Hornsey Road, Holloway, within the protection of the Rent Acts, were let to one Alice Matthews, and in the same year she lawfully sublet the ground floor to one Ann Bodger. The ground floor comprised a separate dwelling-house for the purposes of the Rent Acts. On April 22, 1957, a notice of increase of rent, reflecting an increase of rates, was served on the tenant so that, thereafter, she remained in possession as a statutory tenant. On July 6, 1957, the premises as a whole were decontrolled by virtue of sections 11 (1) and 27 (2) of the Rent Act, 1957, because the rateable value of the premises was £48. The ground floor had, however, a rateable value of only £16 and was not, therefore, within the scope of the decontrolling provision. On December 5, 1957, the landlords, the trustees of M. C. A. Legge's marriage settlement, served on the tenant a notice in accordance with paragraph 2 of Schedule 4 of the Rent Act, 1957, requiring her to render up possession on October 6, 1958. At the expiry of that notice the landlords applied for an order for possession against her but she applied for a suspension. The county court judge made the order but suspended it for six months. The plaintiffs also sought possession against the subtenant.

The county court judge held that the subtenant was still protected and he refused to order her to deliver up possession. The plaintiffs appealed.

[The relevant provisions of the Rent Act, 1957, are set out in the judgment of the court.]

Christopher B. Priday for the landlords, plaintiffs.

R. E. Megarry Q.C. and *Peter G. Mason* for the subtenant, the second defendant.

The first defendant did not appear at the appeal and was not represented.

In addition to the cases referred to in the judgment; the following were referred to in argument: *Knightsbridge Estates Trust Ltd.* v. *Deeley* [3]; *Hunt* v. *Bliss* [4]; *Morrison* v. *Jacobs* [5];

[3] [1950] 2 K.B. 228; 66 T.L.R. (Pt. 1) 867; [1950] 1 All E.R. 577, C.A.

[4] (1919) 36 T.L.R. 74, D.C.

[5] [1945] K.B. 577; 61 T.L.R. 550; [1945] 2 All E.R. 430, C.A.

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American Economic Laundry Ltd. v. *Little*[6]; *Berkeley* v. *Papadoyannis*[7]; *Roe* v. *Russell.*[8]

Cur. adv. vult.

February 12. Pearce L.J., reading the judgment of the court, stated the facts and said: The question before us is whether the judge was right in holding that the second defendant was protected by other Acts as subtenant, and in refusing to make an order against her for possession.

The effect of section 11 of the Rent Act, 1957, was to decontrol the whole house but to allow the tenant to continue in possession for a certain transitional period. The house therefore became decontrolled on July 6, 1957 (see section 27 (2)) and thereafter the tenant was only protected in a transitional status in accordance with Schedule 4.

Section 11 (1) of the Rent Act, 1957, reads: "The Rent Acts "shall not apply to any dwelling-house the rateable value of "which on November 7, 1956, exceeded, in the Metropolitan "Police District or the City of London £40, elsewhere in England "or Wales £30, and in Scotland £40."

Section 11 (7) reads: "The transitional provisions contained "in Schedule 4 to this Act shall have effect in relation to "dwelling-houses which cease to be subject to control by virtue "of subsection (1) or (3) of this section; . . ."

Paragraphs 1 and 2 (1) of Schedule 4 to the Act are as follows: "1. In this Schedule 'the time of decontrol' means the time "at which the Rent Acts cease to apply to a dwelling-house by "virtue of subsection (1) or (3) of section 11 of this Act. 2. (1) "Where immediately before the time of decontrol the dwelling-"house was the subject of a statutory tenancy or of a controlled "tenancy which would or might come to an end within 15 "months of that time by effluxion of time or notice to quit, the "tenant under that tenancy shall be entitled until the date "hereinafter mentioned, and subject to the following provisions "of this Schedule, to retain possession of the dwelling-house in "the like circumstances, to the like extent and subject to the like "provisions (including in particular provisions as to recovery of "possession by the landlord) as if the Rent Acts had not ceased "to apply to the dwelling-house."

The landlords served on the first defendant the appropriate notice expiring on October 6, 1958, and as from that date they became entitled to an order for possession against her.

At common law the subtenant would cease to have any right to possession when the tenant's rights determined. Section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions)

[6] [1951] 1 K.B. 400; 66 T.L.R. (Pt. 2) 1080; [1950] 2 All E.R. 1186, C.A.

[7] [1954] 2 Q.B. 149; [1954] 3 W.L.R. 23; [1954] 2 All E.R. 409, C.A.

[8] [1928] 2 K.B. 117; 44 T.L.R. 278, C.A.

Act, 1920, provided certain protection for the subtenant; but this protection was inapplicable where the head tenancy was not protected by the Acts: *Cow* v. *Casey*.[1] Accordingly, section 41 was inserted into the Housing Repairs and Rents Act, 1954. Its effect was notionally to carve out of the unprotected larger tenancy the smaller part that was sublet, so that the subtenancies might be protected. It is conceded that these are the only sections that could avail the subtenant here and the question is whether she is protected by either of those sections or by their joint effect.

[His Lordship read section 15 (3) and section 41 and went on:] Each side relied on an argument as to the general intention of the legislature. For the landlords it was said that since the Rent Act, 1957, was a decontrolling Act and said no word about the protection of subtenants, it appeared that subtenants in houses decontrolled by the Act were not intended to have any protection. For the subtenant it was argued (and as it seems to us with greater force) that it was hard to believe that the legislature while specifically protecting subtenants where the head tenancy remained controlled (section 15 (3) of the Act of 1920) and subtenants where the head lease was never controlled (section 41 of the Housing Act, 1954) should treat as a special unprotected class those subtenants whose head tenancy happened to be in the class decontrolled by the Act of 1957, namely where the premises were of a rateable value between £100 and £40. And not all who were in that special class would be unprotected. For some might be subtenants whose head tenant's interest was a tenancy with more than 15 months to run; in which case it was conceded that the head tenant received no transitional protection under Schedule 4 and when the head tenancy determined the subtenants would still be protected. Anomalous as some of the results of the Rent Acts have proved to be, it is difficult to believe that such an arbitrary anomaly as that was intended. We approach the matter on the footing that it is unlikely that such a result was intended, and that it is far more likely that the legislature omitted from the Act of 1957 any clause for the protection of subtenants in the belief that existing enactments already sufficed for that purpose. Nevertheless if such a result is of necessity produced by terms of the various Acts, general intention is irrelevant.

If one leaves out of account for the moment the transitional period, the effect of the decontrol of this house in July, 1957, was to destroy the statutory tenancy immediately. This was so decided in *Dunnachie* v. *Urwin*,[2] a case in New Zealand where statutes similar to our Rent Acts are in force. Adams J. there said[3]: "The evidence shows that the rights of the defendant "after the determination of the lease in December, 1949, rested

[1] [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197, C.A.
[2] [1951] N.Z.L.R. 79.
[3] Ibid. 81.

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" wholly on the statute, there being no ground for holding that any " new tenancy was created; and I think it is clear that, when he " ceased to be entitled to the protection of the statute, he was " relegated to the same position as would have been his on the " termination of the lease if no such statute had been in force." If we may say so respectfully, that decision was clearly right.

The statutory tenancy having been thus determined, section 15 (3) of the Act of 1920 according to the subtenant's argument would apply to protect him since all its requirements are fulfilled. " The interest of a tenant to which the Act applies is deter- " mined " and the subtenant to whom a part of the premises has been lawfully sublet is deemed to become tenant of the landlord on the same terms as those of his subtenancy.

But the landlords argue that the transitional tenancy makes all the difference. By reason of it there is never any moment at which " the interest " of a tenant to which the Act applies is determined, since the interest is not determined until the end of the transitional period, and by then the Act no longer applies since it ceased to apply at the beginning of the transitional period. Therefore both conditions are not fulfilled simultaneously as section 15 (3) of the Act of 1920 requires.

The subtenant's argument (which the judge accepted) is that the tenant's interest was in fact determined at the beginning of the transitional period, whereupon section 15 (3) of the Act of 1920 came into operation; and that the tenant's transitional rights thereafter, although they enabled him to " retain possession of " of the dwelling-house in the like circumstances to the like " extent and subject to the like provisions " were not " the " interest of the tenant " as it had been heretofore.

Mr. Priday for the landlords has argued that the statutory tenancy under the Rent Acts was prolonged by Schedule 4 for the transitional period. But the schedule, deliberately as it seems, avoids so doing. It gives him in place of it " a right to " retain possession " which is so described throughout the schedule. The former tenant if asked his status during the transitional period could no longer truthfully describe himself as a statutory tenant but only as a former statutory tenant who had a right to remain for not less than 15 months until the expiry of a properly served notice. Moreover, although his right to remain is defined as " to the like extent and subject to the like pro- " visions " as if the Rent Act still applied, it differs from his rights as a statutory tenant in various respects which Mr. Megarry for the subtenant pointed out to us. He may pay a different rent since his rent cannot (except as regards an increase in rates) be increased as can that of a statutory tenant (para. 3). He is, unlike a statutory tenant, liable to lose his rights and to be dispossessed on notice expiring after 15 months from the commencement of his transitional rights (para. 2 (2)). His right to remain apparently does not cease to exist as do the rights of a statutory tenant on the grant of a tenancy unless it be for

three years or more (para. 4). He has rights of compensation (para. 5) which are not possessed by a statutory tenant. And finally rights are expressly given by paragraph 14 to his widow and others corresponding to those given to a tenant under section 12 (1) (*g*) of the Rent Act, 1920; this would be unnecessary if he remained a statutory tenant.

Whether this alteration in the terms of the head tenant's occupation amounts to a determination for the purposes of section 15 (3) or is more properly regarded as a variation not amounting to determination we need not finally decide for reasons which will appear. Assuming it does amount to a determination, the problem arises as to how, if at all, the tenancy between the landlord and the subtenant which is thereby deemed to exist can exist during the transitional period of the former tenant. Mr. Megarry says that it can be treated as the grant of a concurrent lease to take effect in reversion expectant on the tenant's transitional "period of grace"; see Woodfall, Landlord and Tenant (1954), 25th Ed., p. 285, para. 704. He also submits that the case is analogous to the decision in the House of Lords in *Moodie* v. *Hosegood*,[4] where it was held that the right of the deceased husband's estate to a contractual tenancy of controlled premises could be suspended or dormant until the widow's statutory tenancy (section 12 (1) (*g*) of the Rent Act, 1920) came to an end.

There is, we think, a further difficulty in applying section 15 (3) to this case without the aid of section 41 of the Housing Repairs and Rents Act, 1954. The interest of a tenant is determined simply because the Act of 1920 ceases to apply to the house. How then can it be said that this a case where "the "interest of a tenant of a dwelling-house to which this Act "applies is determined?" For it is difficult to see how both those conditions can exist simultaneously in this case. At one moment of time it is a case where the interest of a tenant of a dwelling-house to which this Act applies is *not* determined. At a later moment it becomes a case where the interest of a tenant of a dwelling-house to which this Act does *not* apply is determined. Can it be said that there is any stage at which the two necessary conditions co-exist? However, it is not necessary finally to decide this point because we think that, when combined with section 41, section 15 (3) clearly protects the subtenant.

It is contended for the landlords that section 41 can have no application to this case since it only applies to contractual lettings and not to statutory tenancies. We cannot accept that argument. The section deals with the position where a superior tenancy was uncontrolled and therefore the subtenant was unprotected (as in the case of *Cow* v. *Casey*[5]). But the words are general, and are not confined to a situation where the superior letting has

[4] [1952] A.C. 61; [1951] 2 T.L.R. 456; [1951] 2 All E.R. 582, H.L.

[5] [1949] 1 K.B. 474.

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never been a controlled dwelling-house. Provided that the superior letting is of a dwelling-house which at that moment is not controlled, the section applies. It seems irrational to suppose that subtenants should lose the benefit of its protection merely because at an earlier period of time the head tenancy had ceased to be contractual and had been statutory. The words " let " and " sublet " are used without differentiation. The word " sublet " is clearly from the terms of the section intended to cover statutory as well as contractual subletting. It would be wrong to read into the word " let " an artificial connotation that limits it to contractual letting while reading the word " sublet " in a wider sense that includes a statutory tenancy. Moreover the words " sublet " and " let " are used throughout the section in the past tense. At some time every letting or subletting has been contractual; but the section does not exclude those that have at a later stage become statutory.

In our opinion, section 41 does apply to the facts of this case. " A dwelling-house to which the Act . . . applies " (namely the ground floor) " forms part of premises, not being such a dwelling-" house (namely the whole house now decontrolled by the Act) " which have been let as a whole on a superior letting " (namely the original letting to the tenant in this case). The section then provides that the operation of the Rent Acts shall be the same as if the landlords, instead of letting the house as a whole, had let the ground floor to the tenant under one letting and the rest under another, with the result that the ground floor comes within the ambit of the Act, and section 15 (3) comes into operation and deems the subtenant to become the tenant of the landlord. This is in accordance with the interpretation of the subject by Hallett J. in *Cadogan* v. *Henthorne*,[6] and we accept his reasoning.

In our opinion the county court judge came to a correct conclusion and the appeal fails.

Appeal dismissed with costs. Leave to appeal to House of Lords refused.

Solicitors: *Pennington & Son; Compton & Co.*

E. D.

[6] [1957] 1 W.L.R. 1; [1956] 3 All E.R. 851.

[PROBATE, ETC., DIVISION.]

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Sachs J.

Estoppel—Per rem judicatam—Husband and wife—Custody—Whether spouse estopped in custody proceedings from making allegations which could have been made at hearing of suit for divorce.

A husband, whose wife had been granted in an undefended suit a decree nisi of divorce on the ground of his desertion, sought in custody proceedings to allege that, contrary to the finding of the judge who heard the suit, so far from having deserted the wife, she had deserted him and, further, that she had committed adultery other than that disclosed in her discretion statement:—

Held, (1) that as the court which heard the suit had made an express finding that the husband had deserted the wife, and had based the decree nisi on that finding, the doctrine of res judicata applied to estop the husband in the custody proceedings from denying that he had deserted the wife, and from alleging that she had deserted him.

Corbett v. *Corbett* [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69, C.A. distinguished.

(2) That the evidence relating to adultery was not to be excluded, because no facts establishing that offence had been raised or pronounced on at the trial, and because the matter in issue in the custody application, namely, which party was the better suited to have custody of the child, having regard to that child's welfare, was different from the issue at the trial, and the evidence relating to adultery might be relevant to prove that one spouse was less suitable than the other to have custody of the child, and it was not on any other ground against public policy to exclude that evidence.

Duchesne v. *Duchesne* [1951] P. 101; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784 distinguished.

SUMMONS adjourned into open court.

On June 30, 1959, a wife was granted a decree nisi of dissolution of marriage on the ground of the husband's desertion, the court's discretion being exercised in the wife's favour in respect of her adultery. The suit was undefended, the husband's answer having been struck out on his own application, but he was represented by counsel at the hearing on custody of the children and costs. On September 3, 1959, the husband issued a summons for custody of the children and, in support of that summons, on September 16, 1959, he swore an affidavit alleging that, contrary to the finding of the judge who heard the suit, he had not deserted the wife, but that, in fact, she had deserted him and, further, that she had committed adultery beyond that disclosed in her discretion statement. The wife thereupon took out a summons applying that the paragraphs in the husband's affidavit alleging desertion and undisclosed adultery by her be ordered to be deleted from his affidavit. The registrar refused so to order. On

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

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October 20 the wife, by summons, appealed against the registrar's decision. Sachs J. reserved his judgment into open court.

John Syms for the wife.

D. J. Turner-Samuels for the husband.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Bater* v. *Bater* (*otherwise Lowe*) [1]; *Harriman* v. *Harriman* [2]; *Hoystead* v. *Taxation Commissioner* [3]; *Cooper* v. *Cooper* (*No. 2*) [4]; *Bernard* v. *Bernard* (*Sutton cited*) [5]; *Fisher* v. *Fisher*.[6]

Cur. adv. vult.

Dec. 10. SACHS J. read the following judgment: This appeal raises in acute form constantly recurring and much disputed questions as to estoppels in custody proceedings initiated under the Matrimonial Causes Acts. These questions are of wide importance, not least because of the anxieties involved in any point which concerns the welfare of children.

In practice, the relevant facts as to which dispute arises normally fall into one of four categories:

(1) Facts which are the subject of express or implicit findings by the trial judge upon evidence laid before him, which result in the conclusion that a matrimonial offence has, or has not, been committed, or that a recriminatory plea has, or has not, been established, and which then form the foundation upon which a decree is granted or a prayer for a decree rejected.

(2) Facts which are the subject of express findings by the trial judge, but which have not been used for the above foundation.

(3) Facts as to which no evidence has been adduced at trial but which, if established, could have formed the basis for the grant of a cross-prayer or for a recriminatory plea affecting the discretion of the court.

(4) Facts which, if established, would not have provided a basis for relief or a recriminatory plea of the type referred to in category (3), but which might have come somewhat close to so doing, and which were either not the subject of evidence adduced before the trial judge or were not the subject of findings by him.

The first category covers not merely a finding that a matrimonial offence—for example, cruelty—has been committed, but also any specific findings as to conduct which was held to be cruel, such as any blows held to have been struck. Facts in this category fall within that strict definition by which res judicata is stated to relate to a fact "directly in issue in the case" which has "actually been decided by the court and appears from the

[1] [1906] P. 209; 22 T.L.R. 408, C.A.

[2] [1909] P. 123; 25 T.L.R. 291, C.A.

[3] [1926] A.C. 155; 42 T.L.R. 207, P.C.

[4] [1955] P. 168; [1954] 3 W.L.R. 923; [1954] 3 All E.R. 358, D.C.

[5] [1958] 1 W.L.R. 1275; [1958] 3 All E.R. 475.

[6] [1959] 3 W.L.R. 471; [1959] 3 All E.R. 131, C.A.

"judgment itself to be the ground on which it was based": *per* Lush J. in *Ord* v. *Ord*,[1] citing Sir James Stephen's Digest of the Law of Evidence, 10th ed., p. 53.

The second category, to quote an example from the run of the chambers work in this court, would include a finding that a respondent wife chastised a child with undue harshness, but that this did not affect the petitioner's health and that, for this sole reason, did not constitute part of the cruelty for which a decree was granted. An allegation of promiscuously lascivious conduct short of adultery could fall into the fourth category, as would the almost limitless allegations that could fall within the ambit of matters proper to be considered in relation to the exercise of the court's discretion as discussed in *Blunt* v. *Blunt*.[2]

The present case is a relatively simple one of a not unusual type. On June 30, 1959, the wife obtained a decree nisi of divorce on the grounds of her husband's desertion commencing in 1950. The suit came into the undefended list after the husband's answer had on May 1, 1959, been struck out at his own request. When the facts upon which the charge of desertion was based were proved in court, the husband was represented by counsel in relation to costs and custody.

The three children of the marriage have been with the husband and his mother since 1950. Between that year and the end of 1956, the wife only saw them on about five occasions, for reasons which she attributes to the husband. Since 1956, she has not seen them at all. In those circumstances the husband, on September 3, 1959, issued an application that he be granted the custody of the children. In support of that application he seeks to put in evidence facts showing that, contrary to the finding of the trial judge, he was never in desertion and that the relevant separation was really due to the wife's desertion, and further, that the wife, before the date of the decree nisi, committed adultery with men other than the man she has now married—the last of such allegations being one which concerned 1957. As regards each of his allegations the husband relies on matters within his own knowledge at the date of the decree nisi.

The wife claims that the husband is estopped from alleging either her desertion or her adultery with the other men.

The facts set up by the husband as regards the desertion thus fall into the first of the above four categories. The way he seeks in custody proceedings to go behind the decree is typical of attempts to which one becomes accustomed in chambers, on applications stemming alike from decrees granted in defended and in undefended causes.

The facts set up by the husband as to his wifes' adultery fall into the third category and are typical of the allegations made by a spouse who has allowed a decree to be obtained against him in an undefended suit.

[1] [1923] 2 K.B. 432, 440; 39 T.L.R. 437, D.C.

[2] [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76, H.L.

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I am thus here solely concerned with the law relating to the first and third categories, in an instance where the facts sought to be set up were at the date of the hearing within the knowledge of the party now alleging them.

On the question of estoppel in custody proceedings under the Matrimonial Causes Acts, the industry of counsel has only brought to light one reported case, and in view of the arguments raised with regard to its effect it seems best first to consider what conclusion I would reach in the light of other authorities dealing with res judicata and estoppel.

At the outset it is to be noted that the jurisdiction of this Division to deal with the custody of children is the creature of statute, and that under the above Acts it only arises when a lis between a husband and wife commences. The custody application is made in the suit—here divorce proceedings—and whether or not a final decree has resulted, the title of the proceedings remains unaltered, save, of course, in so far as the parties may change their names. Here the application was made before decree absolute and has continued after it. In law I cannot here see any distinction between the position before, and after, the final decree; the application is made in the same suit as that in which the decree is granted, and is for what is usually termed ancillary relief.

To the extent that the application, whether made in the prayer of the petition or by later summons, is, albeit in one sense a separate proceeding, yet made in the same suit, the position is different from that of almost all other cases in which estoppels have been considered, and in which the courts have considered, in a second set of proceedings, the effect of what happened in an earlier set of proceedings. It may thus well be that as between the trial of the matrimonial cause and the ancillary custody application an analogy to the trial of separate issues in an action or cause is closer than the analogy to trials of two successive causes.

I will now turn to the position, in a custody application, of facts that are in the third category—here the adultery allegations. Whether one looks on the custody application as if it were a second cause successive to the trial at which the decree nisi was granted, or whether one looks on it as being a further proceeding in the same suit as that trial, it seems to me completely clear that the matter in issue in the custody application is different from that at the trial. At trial, the issue is whether the grounds for relief, or a bar to relief, have been established. On the application for custody, the issue is which party is the better suited to have custody of the child, having regard to that child's welfare.

In establishing that a spouse is less suitable to have the custody of a child, it may prove relevant to put in evidence facts which may also establish that the spouse has committed a matrimonial offence. If the facts which establish that offence were not raised and pronounced upon at trial, I know of no principle of estoppel as applicable to successive suits or actions which can prevent those facts being put in evidence on the matter in issue in

the custody application. A fortiori can they thus be put in evidence if the truer analogy is to the trial of separate issues in the same set of proceedings.

I pause only to note that Mr. Syms, in arguing the contrary view, was constrained to assert that even if the husband's case was that for a period immediately before the decree nisi the wife had been living the life of a common prostitute, the husband's affidavits could not mention that fact, despite his being obviously able to refer to facts in the fourth category, e.g., lascivious and promiscuous conduct short of adultery.

Once it is clear that the law of estoppel cannot for the above reason apply to these third-category facts, the relevant evidence of adultery can only be excluded if it can be shown that there should be applied to custody proceedings those passages relating to maintenance proceedings which state that, even where there is no estoppel, a spouse is "for reasons of public policy pro-"hibited from asserting" matters known at the date of trial which, if then raised, might well have provided an effective answer to the petition or resulted in cross-decrees: see *Duchesne* v. *Duchesne*.[3] To my mind, however, there arises in custody proceedings an additional factor touching public policy—the welfare of the children. That factor is of such importance that plainly the court, whatever be the position as regards maintenance proceedings, should not in custody proceedings exclude on grounds of public policy evidence which would not be excluded under the established rules relating to estoppel.

I would add that in *Duchesne* v. *Duchesne*,[4] Pearce J. dealt with no third-category facts and only excluded those in the first category; that the facts excluded in *Lindsay* v. *Lindsay*,[5] which he cited on the public policy point, were also, as appears from the judgment of Lord Merriman P.,[5a] first-category facts; and that, accordingly, *Robinson* v. *Robinson*,[6] the only other case so cited, seems to be left as the sole direct authority for the application of this new and controversial facet of public policy to evidence of third-category facts, and that case concerned a maintenance application.

In my view, the attempt in the present case to exclude the evidence as to adultery accordingly fails, because the doctrine of estoppel does not apply, and because it is not on any other ground against public policy to exclude that evidence.

That disposes of so much of this appeal as relates to the allegations of adultery. There remain for consideration those passages in the husband's affidavit which seek to show that he never was in desertion, and which fall into what I have called the first category. Here much more difficult questions arise. This much, however, is plain. If the correct analogy is that of

[3] [1951] P. 101, 113; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784.
[4] [1951] P. 101.
[5] [1934] P. 162; 50 T.L.R. 441.
[5a] Ibid. 168, 443.
[6] [1943] P. 43; 59 T.L.R. 170; [1943] 1 All E.R. 251.

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successive proceedings, then unless the custody application falls into some exceptional class of the type I will later discuss, the doctrine of res judicata applies. Similarly, unless the application falls into some such exceptional class, no one would be disposed to argue that the doctrine of res judicata does not preclude the same court, in one set of proceedings, from being asked, in effect, to reverse in a later phase of those proceedings a finding of fact reached in an earlier phase.

The point propounded with persuasive force by Mr. Turner-Samuels is that the same sort of exception applies to an application under section 26 (1) of the Matrimonial Causes Act, 1950, as applies to issues affecting status tried by this court under section 4 of that Act. As regards section 4, the exception stems from the phrases in it commencing: "On a petition for divorce it shall be "the duty of the court to inquire, so far as it reasonably can, into "the facts alleged" and in certain possible bars to relief. Its effect was discussed by the Court of Appeal in *Thompson* v. *Thompson*.[7] My attention was particularly directed to those parts of the judgment of Denning L.J. which, at p. 29, first explain how "estoppels bind the parties but not the court," and then, at pp. 31 to 33, deal with the manner in which the court can either exercise its discretion to enforce the estoppel or allow the parties a relitigation of the relevant facts.

Such an exception to the long-established rule of res judicata must either derive from statute or exist by reason of some inherent power or duty of the court. Of statutory provisions in relation to custody proceedings the one and only section which Mr. Turner-Samuels pressed on me was section 1 of the Guardianship of Infants Act, 1925. This provides: "Where in any "proceeding before any court . . . the custody . . . of an "infant, . . . is in question, the court, in deciding that question, "shall regard the welfare of the infant as the first and paramount "consideration, and shall not take into consideration whether "from any other point of view the claim of the father, . . . in "respect of such custody, . . . is superior to that of the mother, "or the claim of the mother is superior to that of the father." That section, however, does not contain words such as those above cited as being part of section 4 of the Matrimonial Causes Act, 1950. To my mind, it deals simply with the weight to be attached to facts once they are proved, and not with the question of what evidence is admissible to prove them. The word "regard" is thus used in much the same sense as it is in the phrase "having regard to" in section 19 (2) of the last cited Act. Moreover, the provisions of section 1 of the Act of 1925 apply to all courts and, if construed in accordance with Mr. Turner-Samuel's submission, empower each court to disregard the previous findings of fact not only of its own but of every other court and, for instance, enable magistrates and county court

[7] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161, C.A.

judges to decide de novo whether decisions of fact made in this Division (whether or not confirmed on appeal) are, in their view, right or wrong. It is a bold submission. I doubt if it has previously been made during the 34 years since the passing of the Act of 1925, and I do not feel able to accept it. Had the legislature intended so far-reaching a result it would surely have used phraseology quite different and, perhaps, more akin to that used in section 4, or, alternatively, section 7 of the Matrimonial Causes Act, 1950.

If there is some other statutory provision which here frees this court from the rule of res judicata, it has not been cited. I pause to note that the Matrimonial Proceedings (Children) Act, 1958, does not apply to the proceedings now before me and has not been considered.

Next arises the question whether a court of this Division can, by virtue of its inherent jurisdiction in relation to children, exercise its discretion to go behind what would normally be res judicata. If it were exercising that delegated power of the Crown as parens patriae which is the origin of the relevant Chancery proceedings relating to infants, the argument might be attractive, but the consistent trend of a whole series of decisions, the two latest being that of Upjohn J. in *In re Andrews*,[8] and that of Winn J. in *Winstone* v. *Winstone*,[9] precludes my taking the view that when exercising statutory jurisdiction under the Matrimonial Causes Act, 1950, this court is in precisely the same position as if it were exercising inherent jurisdiction. The judgment of Lord Goddard C.J. in *In re A. B.* (*an Infant*),[10] further illustrates from a different angle how careful a court must be before acceding to an argument that it can exercise inherent powers as parens patriae when dealing, in relation to infants, with questions that arise under statutes.

Moreover, the rules as to res judicata in its strict sense and estoppel, in so far as it derives from or includes that of res judicata, are usually said to be rules of evidence. It is relevant to mention that, save only in regard to welfare officers' reports, this court is, in custody proceedings, bound by the usual rules of admissibility: see *Rossage* v. *Rossage* [11] as to hearsay.

It follows that I find myself unable, on general principles, to find a ground on which, in this custody application, the doctrine of res judicata does not apply to facts falling in the first category, even if that application is regarded as a successive proceeding rather than a part of one set of proceedings. There remains the question of whether authority enables me to say that it does not so apply.

[8] [1958] Ch. 665; [1958] 2 W.L.R. 946; [1958] 2 All E.R. 308.

[9] [1959] 3 W.L.R. 660; [1959] 3 All E.R. 580.

[10] [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C.

[11] [1960] 1 W.L.R. 249; [1960] 1 All E.R. 600, C.A.

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Mr. Turner-Samuels naturally pressed *Corbett* v. *Corbett* [12] on me as being such an authority. Mr. Syms' first answer was that the relevant parts of the judgment were obiter, but, of course, even if that were so, I would wish to follow them if I could. More weighty was the problem he posed as to what precisely were the facts to which the relevant passages in the judgment relate and the circumstances in which they were spoken.

In that case, the respondent wife had, on her cross-prayer, secured a decree nisi on account of her husband's cruelty, the court exercising its discretion in her favour in relation to adultery with the co-respondent disclosed in the discretion statement, and held to have been conduced to by the husband's cruelty. The husband then appealed and on appeal moved for leave to call fresh evidence. The fresh evidence was directed to proving, first, that the wife had committed adultery with men other than the co-respondent (one of the affidavits being that of a man who swore he had spent the night with her) and, secondly, that although the adultery with the co-respondent was properly disclosed in the discretion statement, the wife's association with him had been longer than therein stated and had its monetary aspect. The object of trying to introduce this fresh evidence was largely to enable the court to say that the trial judge had come to a wrong conclusion on questions of credibility. But from the point of view of a judge dealing with a custody issue, if the motion failed, as it did, the only evidence that could have been expected to affect his mind on that issue, viz., that relating to the adultery with other men, quite clearly fell into the third category. So, probably, did the evidence concerning the wife's association with the co-respondent.

In that state of affairs, counsel for the husband put forward an ab inconveniente argument that rejection of the motion would affect the custody issue by permitting an estoppel to arise. His argument did not apparently reach the stage when authorities were cited; counsel for the wife does not appear to have been called on to deal with it; it received no mention at all in the leading judgment of Sir Raymond Evershed M.R.; and nothing relating to it formed part of the ratio decidendi of that judgment, with which both the other members of the court expressly agreed.

Birkett L.J., however, said [13]: "The question of the custody "of the child will, of course, be in the complete discretion either "of the registrar or of the judge, and he will decide what evidence "he will hear and what he thinks relevant to the particular issue "which he then has to determine"—a passage which, contrary to my first impression, does not on reflection seem to me intended to preclude the judge from making decisions on admissibility as well as on relevance. Romer L.J., after some observations to which I will later refer, said in conclusion [14]: "All I am saying is that, "for my part, I take the view that it should not be regarded as "matter to be excluded from his consideration altogether, merely

[12] [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69, C.A.

[13] [1953] P. 205, 218, C.A.

[14] Ibid. 219.

" on the ground that it did not form part of the evidence in the " divorce proceedings."

It thus appears that Mr. Syms was right in submitting that the references to the estoppel argument were obiter. Indeed, they partake rather of the nature of guidance from an appellate court to a first instance tribunal relating to the special facts of the case under appeal, but even so, not intended to be a binding direction. In any event, Romer L.J.'s views related to third-category facts; he had not been asked to address his mind to first-category facts and he obviously had not had the benefit of such full and careful arguments on this point as have been before me.

Earlier, however, he had said [15]: " Some at least of the " evidence contained in these affidavits would, if true, be of " relevance in the custody proceedings, and, in my opinion it " should not be excluded merely because it did not form part of " the material on which the issues of divorce were determined," and he said that to exclude such evidence " would result in prevent- " ing the court from discharging its paramount duty in matters " relating to the care and custody of the children, namely, to " ascertain what directions will best serve the interests of " the children themselves." It was this passage which Mr. Turner-Samuels most relied upon.

It is not unlikely that in using those phrases Romer L.J. may have had in mind in reference to third-category facts that part of the then relatively recently reported judgment in *Duchesne* v. *Duchesne* [16] which touched on public policy and which I have already considered. In that event, he would by those phrases simply have been negativing its application to custody cases in the same way as I have mentioned. But it would anyway seem to me what Jenkins L.J.[16a] has spoken of as an " abuse of authori- " ties " to apply those phrases to first-category facts and thus to a case " in which the facts and circumstances are entirely different " and which raise questions to which their authors were not direct- " ing their minds at all." Accordingly, I do not accept the submission that *Corbett* v. *Corbett* [17] provides even obiter guidance on the way in which the court should here deal with such of the husband's allegations as fall into the first category.

It follows that it is for me to affirm so much of the learned registrar's order as concerns third-category facts and hold them to be admissible, and to vary his order in so far as he refused to cause to be expunged allegations of first-category facts from the affidavit of the husband.

In case, however, this appeal goes further, I must naturally consider what would be the course that should here be taken on the footing that the court has as regards first-category facts a

[15] [1953] P. 205.

[16] [1951] P. 101; [1950] 2 All E.R. 784.

[16a] In *Martell* v. *Consett Iron Co. Ltd.* [1955] Ch. 363, 414; [1955] 2 W.L.R. 463; [1955] 1 All E.R. 481.

[17] [1953] P. 205.

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discretion of the type discussed by Denning L.J. in *Thompson* v. *Thompson*.[18]

It seems to me that where an estoppel exists which binds the parties unless the court says otherwise, the wife is normally entitled before answering her husband's affidavit to know whether those statements in it which are prima facie inadmissible are going to be considered by the court. In the present case that question would conveniently be raised by the application under appeal and would properly be dealt with here and now.

A procedure by which a court is in the course of a single set of proceedings asked, in effect, to stand on its head and come to a diametrically opposite finding of fact to that found and acted upon by it earlier therein, involves an exercise which is, to my mind, somewhat unattractive. It might also quite easily result in the ridiculous situation that on the same day and in the same cause it would act on opposite conclusions of fact in a custody and in a maintenance application.

The court's discretion in favour of such a course would, to my mind, only be exercised in truly exceptional cases of quite a different nature to the present one. Moreover, where, as here, the children have been in the care of the husband for eight or nine years, the question of "whose was the desertion" is one which Mr. Turner-Samuels very properly conceded to be "of a "weight that would be marginal or negligible," and, in my view, it cannot in practice influence the result of this custody application at all. Evidence which is solely directed to the question who, in 1949 or 1950, was in desertion, is either irrelevant or of such nominal importance as to raise a time-wasting issue. On the footing that I had a discretion whether or not to admit the evidence I would refuse to admit it.

It only remains to mention that both counsel asked me to draw different and, indeed, opposite inferences from the existence and wording of rules 54 and 56 of the Matrimonial Causes Rules, 1957, which concern interventions, separate representation, and directions for the initiation of wardship proceedings. Suffice it to say that in the present suit no one has intervened and no reason exists why the court should cause those rules to be brought into operation. Here I am dealing with a simple application as between two parties in which one of them has made a commonplace—one might almost say common-form—attempt to go behind findings of first-category facts. Until some case arises in which the provisions of those rules are utilised, the question does not arise as to whether they may not provide a safety valve preventing this court in a truly exceptional case from being subjected to undue pressure by the rule as to res judicata.

The result is that I order the parts of the husband's amended affidavit of October 27, 1959, agreed by Mr. Turner-Samuels to be solely directed to the question of desertion, to be deleted. That

[18] [1957] P. 19.

affidavit (which, like its predecessor, was not drafted by Mr. Turner-Samuels) cannot be filed as it stands, and should be re-sworn and filed after the appropriate adjustments have been made.

In conclusion, I repeat my indebtedness to both counsel for their full and helpful arguments, coupled with their references to a number of authorities, starting with *Finney* v. *Finney* [19] and *Conradi* v. *Conradi, Worrall and Way*,[20] in addition to those I have cited.

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Solicitors: *Wainwright & Co.; Robert K. George.*

[19] (1868) L.R. 1 P. & D. 483. [20] Ibid. 514.

[COURT OF APPEAL.]

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[1958 L. No. 1958.]

Sellers, Ormerod and Harman L.JJ.

Shipping—Charterparty—Cargo—"Full and complete cargo"—Declaration of quantity—"Quantity in owners' option to be declared by the "master"—Declaration by master of approximate quantity—Vessel unable to load amount declared—Whether owners in breach of contract—Limits of tolerance of "approximate" or "about"—Effect in law of master's declaration.

Contract—Construction—Ut res magis valeat quam pereat—Promise to give notice of capacity of ship—Notice giving approximate capacity—Whether binding subject to de minimis rule.

Election or Option—Effect of exercise—Charterparty—Notice of capacity of ship.

Words and Phrases—"About."

Ships' Names—Dominator.

A charterparty in the "Gencon" form, dated November 4, 1957, for a single voyage, provided by clause 1 that the *S.S. Dominator* was to proceed to a named port "and there load a full and complete "cargo of not more than 10,450 tons and not less than 8,550 tons "wheat in bulk, quantity in owners' option, to be declared by the "master in writing on commencement of loading . . ."

On arrival at the port the master of the vessel wrote to the charterers that "the approximative [*sic*] cargo to the holds will "be . . . Total 10,400 tons." The charterers brought that quantity of cargo to the port, but in fact the master had over-estimated the capacity of the vessel and she loaded 331 long tons short. As a result of the vessel's inability to load the whole of the cargo the charterers incurred expenses which they sought to recover from the shipowners:—

Held, that the option in clause 1 of the charterparty did not consist of words of expectation only but was a true option which permitted the shipowners who exercised it to limit the primary meaning of "full and complete cargo" such that, once the declaration was made, the quantity declared by the master of "approximative . . . 10,400 tons" became substituted for the wide range of maximum and minimum quantities in the charterparty and became a "full and complete cargo" within clause 1. But the

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word "approximative"—which was to be construed as meaning "about"—must be given its full effect in the contract as a word which allowed a limit of tolerance greater than that allowed under the de minimis rule and which was wide enough to cover the deficiency of some 3·18 per cent. by which the quantity actually loaded fell short of 10,400 tons. Accordingly, the charterers having failed to object to that form of declaration, the shipowners were not liable for any breach of contract.

Morris v. *Levison* (1876) 1 C.P.D. 155, and *The Resolven* (1892) 9 T.L.R. 75 applied.

Decision of Diplock J. [1959] 1 Q.B. 498; [1959] 2 W.L.R. 405; [1959] 1 All E.R. 502 reversed on this point.

Action.

By a printed charterparty in the form known as "Gencon," recommended by the Documentary Council of the Baltic and White Sea Conference, dated November 4, 1957, made between the plaintiffs, Louis Dreyfus & Cie., as charterers, and the defendants, Parnaso Cia. Naviera S.A., as owners of the *S.S. Dominator*, it was provided, by clause 1, that the vessel was to "proceed to La Pallice . . . and there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk, quantity in owners' option, to be declared by the master in writing on commencement of loading . . . which the charterers bind themselves to ship, and being so loaded the vessel shall proceed to Karachi . . . and there deliver the cargo on being paid freight."

By clause 2 of the charterparty "Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods . . . or by personal want of due diligence on the part of the owners or their manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the owners or their manager.

"And the owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the captain or crew or some other person . . . for whose acts they would, but for this clause, be responsible, or from unseaworthiness, of the vessel on loading, or commencement of the voyage or at any time whatsoever."

The third paragraph of clause 2 in the printed form provided: "Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused" but that paragraph had been deleted and the following words inserted in typescript "Owners to be responsible for number of bags signed for in bills of lading."

Clause 16 provided that the charterers were "to supply a sufficient quantity of cargo in bags for safe stowage as required

"by the master, not exceeding 7½ per cent. of the entire cargo, "such quantity to be declared by the master in writing on "commencement of loading."

The vessel arrived at La Pallice on November 23, 1957, when, on the request of the charterers' agents for an immediate declaration in accordance with the provisions of clause 1 of the charterparty, the master, after making calculations, wrote to the agents in the following terms:

"To the shippers, La Pallice.

"I . . . the Master of the steamer *Dominator*, I have to "notify you that I shall require 300 tons wheat in bags for "loading and the approximative [*sic*] cargo to the holds will be "as follows:—

"No. 1 hold 1,600 long tons.
" 2 hold 3,000 ditto.
" 3 hold 2,000 ditto.
" 4 hold 2,150 ditto.
" 5 hold 1,650 ditto.
"Total:—10,400 tons."

The master had inadvertently calculated the quantity of cargo which the vessel could load on the basis of summer marks instead of winter marks on which the vessel was sailing, so that she was unable to load the total of 10,400 tons and in fact loaded 331 long tons short. The charterers had brought the whole of the cargo to La Pallice and as a result of the inability of the vessel to load the 331 long tons incurred expenses which were agreed at £155 8s. 2d.

The charterers withheld that amount from the freight and alleging that, upon the declaration by the master, the shipowners became obliged to load and/or warranted that the vessel was capable of loading 10,400 tons, claimed a declaration, inter alia, (a) that by reason of the inability of the vessel safely to load the 331 long tons the shipowners were in breach of the charterparty and (b) that the damages suffered by reason of that breach amounted to £155 8s. 2d.

The shipowners denied that they were under any liability to the charterers and alleged that had the vessel been able to take 10,400 tons the 331 long tons would have been loaded and that she had in fact sailed from La Pallice with a full and complete cargo. They denied that the notification by the master to the charterers had the effect in law for which the charterers contended or any effect in law. Further or alternatively they relied on clause 2 of the charterparty as exempting them from any liability to the charterers.

Diplock J.[1] held on clause 1 that once the shipowners had exercised their option through the master of declaring the quantity of cargo to be carried, the quantity so declared was to be deemed a full and complete cargo for the purposes of the charterparty;

[1] [1959] 1 Q.B. 498; [1959] 2 W.L.R. 405; [1959] 1 All E.R. 502.

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that the word "approximative" in the master's notice, which purported to be given under the clause and therefore to be of an exact quantity, referred only to those limits of tolerance imported into such commercial contracts by the de minimis rule, so that the notice was a good declaration under clause 1; and that, accordingly, the quantity of cargo to be loaded under the contract was 10,400 tons; and he granted declarations accordingly to the charterers.

The shipowners appealed against that part of the decision and also against the trial judge's construction of clause 2 of the charterparty—the exceptions clause—but on the hearing of the appeal the court intimated that they would allow the appeal in the shipowners' favour without considering the questions raised on the exceptions clause.

A. A. Mocatta Q.C. and *Michael Kerr* for the shipowners.
R. A. MacCrindle for the charterers.

The following cases, not referred to in the judgments, were cited in argument: *Istros (S.S. Owners)* v. *F. W. Dahlstroem & Co.*[2]; *Shipton Anderson & Co.* v. *Weil Bros. & Co.*[3]

Sellers L.J. This is a claim by way of declarations involving no more than £155, and it can be answered in favour of the appellants, in my judgment, on one of the three grounds on which they rely, namely, that the shipowners took on board approximately 10,400 tons, which was, in fact, a full and complete cargo. If they did that, they were under no obligation to do more on any view of this case which has been advanced before us. [His Lordship stated the relevant facts, set out above, and continued:]

Diplock J. held that, once the master had declared the quantity to be carried, the quantity of cargo which the ship was bound to load and the charterers were bound to ship was the quantity so declared. The judge then stated that "approximative" is a word which has no defined limits of tolerance and he construed the declaration as if it was for 10,400 tons with an obligation limited only by those limits of tolerance which the de minimis rule imports. The master was a Greek, and when he said "approxi- "mative" he was, in my view, saying the same thing in respect of quantity as the agents had said in a letter of November 8: "it is anticipated the vessel will lift a cargo of about 10,400 long "tons."

I would regard 331 tons deficiency in a cargo of 10,400 tons, a deficiency of just over 3 per cent., as fulfilling the obligation to ship about 10,400 tons: see *Morris* v. *Levison*[1] and *The Resolven*.[2] In the absence of any trade evidence on the matter,

[2] [1931] 1 K.B. 247.
[3] [1912] 1 K.B. 574; 28 T.L.R. 269; 17 Com.Cas. 153.
[1] (1876) 1 C.P.D. 155.
[2] (1892) 9 T.L.R. 75.

it is, in my opinion, within a reasonable commercial margin in respect of such a cargo.

Mr. MacCrindle argued strenuously that a declaration by the master at the commencement of loading could be and was intended to be precise, and that to state "about" was not in accordance with the requirement. The declaration was, however, accepted without complaint, and I do not think it should be read by either party in assessing their rights and obligations as if "approximative" was not there. It is still a statement of quantity much narrower in its latitudes than the wide range in the charterparty.

That is sufficient to decide this case in favour of the appellants. But Mr. Mocatta invited us to go further and to hold that the declaration had not the effect alleged by the charterers and found by the judge, that whatever quantity the master declared within the limits specified in the charterparty was to be deemed to be a full and complete cargo for the purposes of the charterparty. He submitted that such a declaration by the master could not be interpreted so as to alter the contractual liability under the charterparty, and was merely an intimation to the charterers as a matter of convenience to give them a closer idea of the anticipated cargo required within the very wide limits of 8,550 to 10,450 tons. The alternative submission was that the declared quantity became the maximum quantity which the ship could demand in substitution for the charterparty maximum of 10,450 tons. As the charterers were, apart from the declaration, not only obliged but entitled to load a full and complete cargo up to 10,450 tons, then, if the master was able to declare a lower quantity which became binding whether the ship were fully loaded or not, he could, in variance of the charterparty, deprive the charterers of their right to load a full cargo if they wished to do so. If the declared quantity was to be deemed a full and complete cargo, then, it was said, no meaning remains in the words "and there load a full and "complete cargo."

These are substantial arguments, and it is perhaps surprising that charterers are prepared to contend that the phrase "quantity "in owners' option to be declared by the master in writing on "commencement of loading" does make drastic inroads on what would without it have been their rights.

Without the declaration, the charterparty would require the charterers to load and the shipowners to receive a "full and "complete cargo" within the limits specified, and, as the judge states, if that were all, the obligation of the parties would have been that the owners warranted a minimum capacity of 8,550 tons before the vessel was fully loaded, and the charterers were under an obligation to provide a full and complete cargo up to 10,450 tons (if the vessel were capable of holding so much), but under no obligation to provide more even if there remained capacity in the ship to take more: see *Carlton Steamship Co. Ltd.*

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v. *Castle Mail Packets Co. Ltd.*,[3] and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[4]

Notwithstanding the force of Mr. Mocatta's submission, and the reliance he placed on the observations of a very experienced commercial judge, MacKinnon J., in *Chandris* v. *Louis Dreyfus & Co.*,[5] cited by the judge, I have come to the conclusion that once the declaration was properly made the quantity stated therein became substituted for the wide range of maximum and minimum quantities stipulated in the charterparty and established the quantity to be loaded. I doubt whether it is right or necessary to say that such a quantity is deemed to be a full and complete cargo, although that might often be the effect. It becomes the maximum which the shipper is required to load, but I am inclined to think that, in this case and with this declaration, if the vessel had not been fully laden with 10,400 tons, the charterers could have required the acceptance of a similar margin, say 3 per cent., above that quantity, relying on the provision that she was to take a full and complete cargo limited only by the declared quantity; that is, the shipowners could not have relied on the minimum quantity of his declaration.

At first sight it seems an unlikely option for a charterer to grant or accept in the charterparty, as it would appear more of a detriment to the shipper than a benefit to the shipowner. I felt doubt at one time whether the option could benefit the shipowner to whom it was given; but if it served his purpose he could by the declaration of the master take less cargo than a full and complete cargo, and thereby speed the dispatch of his ship from the loading port, or leave room for the intake of cheap bunkers and stores, for instance, subsequently to loading the charterparty cargo. The exercise of the option, unless it is a precise calculation of what cargo will bring the vessel down to her load line, would operate, it would seem, to the prejudice of the charterer, as the master (to whom the stowage of a cargo may often be an uncertain factor) would tend to stipulate for less than a full cargo to be on the safe side against such a claim as has arisen here. The benefit to the charterer, it is said, is that he is informed of the precise amount of cargo he will be required to ship, and can make arrangements accordingly with the minimum of expense, as he would not provide surplus cargo. The master in the present case no doubt intended to be on the safe side, but he erred in calculating on a summer load line when the ship had shortly before changed to winter marks. As it happened, the ship just took the minimum of the amount he stipulated as I have felt it ought to be interpreted.

Before Diplock J. the shipowners had also relied on an exceptions clause in the charterparty. This point had been found against them and the finding was subject to appeal, but it became

[3] (1897) 2 Com.Cas. 173.
[4] [1910] 1 K.B. 627; 26 T.L.R. 301.
[5] (1934) 50 Ll.L.Rep. 141.

unnecessary in the view which the court took of the declaration, and it was not argued before us.

I would allow the appeal and refuse the declarations which the judge gave.

ORMEROD L.J. I also would allow this appeal. On the question of the construction of the first clause of the charterparty, I am in full agreement with the view expressed by my Lord, and would add nothing. I only add a few words on the meaning to be put on the captain's declaration, as we are differing from the judge on that question.

The judge took the view that it was right for him to construe the declaration as one "complying with the terms of the contract, "if such a construction is open to me." Such a declaration, in his view, was one which purported to declare an exact quantity within such limits of tolerance as would come within the de minimis rule. He then came to the conclusion that, as the word "approximative" was one without any defined limits of tolerance, it should be so construed as referring only to such tolerance, and held, therefore, that the notice was a good notice. Whether a declaration allowing a greater limit of tolerance than that suggested by the judge would be a good declaration under this charterparty is a question on which I feel some doubt. But the charterers accepted this declaration as a good declaration, and it is on that basis that I would approach this question.

I find it difficult to accept the conclusion of the judge that the word "approximative" gives to the parties no more tolerance than would the de minimis rule. To do so means that the word was inserted into the declaration for no purpose whatsoever. It is true that the master of the ship was Greek, and his use of the word "approximative" is some indication of his lack of command of English. But that does not seem to be sufficient reason for failing to give effect to the language of the document as it is before us. In my judgment, "approximative" refers to something more than the tolerance suggested by the judge. How much more depends on the surrounding circumstances. The ship was unable to load by 331 tons the 10,400 tons referred to in the notice, which is a difference of 3·18 per cent. In the circumstances of this case, this comes, in my judgment, within the tolerance imported into the declaration by the word "approxima-" "tive." I would, therefore, allow the appeal on this ground.

HARMAN L.J. I agree. I do not feel any doubt that the judge rightly construed the words of the charterparty, and that all of them form part of the contract, that is to say, that the option phrase does not consist merely of "words of expectation," the phrase rejected in *Morris* v. *Levison*.[6] What, then, do these words, regarded, of course, in the light of the surrounding

[6] 1 C.P.D. 155.

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circumstances, mean? The meaning of the words preceding the reference to the option is not in doubt, having regard to the authorities, *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[7] and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*,[8] cited by my Lord. They are a warranty by the owners that not less than 8,550 tons shall be carried. They give the shipper the right to load up to the higher figure, if the vessel will take so much, but no more, even though she could carry more. Thus an inroad is made on the primary meaning of "full and complete "cargo." The option that follows is an option to the owners by their agent, the master, to put a further limit on this same right by declaring the quantity. This declaration need not, in my judgment, be made. It is truly an option. But if the option be exercised, of course within the limits set by the document, then the figure declared by the master must be read into the contract, and will constitute, as between the parties, a full and complete cargo. The drafting is not elegant. It would be better expressed by some such words as "such tonnage not more than about 10,450 "tons, nor less than about 8,550 tons, as the master shall in "writing declare before loading starts, this to be treated as a "full and complete cargo." I think, however, the meaning is tolerably clear.

The next question is of the meaning of the notice. The judge thought that "quantity" in the option must be construed as "exact quantity," that, ut res magis valeat, the words in the notice must be made to comply, and that the quantity should be read as 10,400 tons precisely, notwithstanding the word "approximative." He therefore felt bound to give to the latter word an unnatural meaning and treat it as a reference to such trifling differences as would be implied in its absence under the doctrine of de minimis. For myself I see no necessity to desert the cardinal principle applicable to the construction of all documents, namely, to give its natural meaning to every word, if possible. I think "approximative" must be given its natural meaning of "about" or "more or less," and that whatever tolerance is appropriate to that expression becomes no less a part of the contract than the reference to 10,400. This, of course, works both ways. If the ship could have carried more, then the shippers could have asked for the excess; if less (as proved to be the case) then they must be content with less. Both sides appear to have assumed that the quantity can be well declared by such words as "10,400 more or less," and I think that is right. But if it is wrong, the charterers should have objected at the time and insisted on a more exact definition.

Alternatively, the option was never exercised at all, and in that case there was no breach because a full and complete cargo was in fact loaded.

It remains to consider whether the deficiency in carrying

[7] (1897) 2 Com.Cas. 173. [8] [1910] 1 K.B. 627.

capacity, some 3·18 per cent., leaves the quantity within the tolerance indicated. I think it does. It is not so great a difference as alters the obligation so substantially as to make it a different bargain. I would conclude that there was no breach of contract.

C. A.
1960
LOUIS DREYFUS & CIE. v. PARNASO CIA. NAVIERA S.A.

Appeal allowed.
Judgment for the shipowners on claim and counterclaim, with costs in Court of Appeal and below.
Leave to charterers to appeal to House of Lords refused.

Solicitors: *Holman, Fenwick & Willan; Richards, Butler & Co.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

JOY MUSIC LTD. *v.* SUNDAY PICTORIAL NEWSPAPERS (1920) LTD.

1960
Feb. 25.
McNair J.

[1957 J. No. 6328.]

Copyright—Infringement—Literary work—Parody—Words of popular song—Whether reproduction of substantial part of original work—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 74), *s.* 49 (1).

A special feature article in a newspaper supporting activities of H.R.H. Prince Philip which had been criticised in certain quarters contained a parody of a popular song entitled "Rock-a-Billy." The parody concerned the same subject-matter as the article, was described as the writer's version of the song and acknowledgment was made to the plaintiffs, music publishers, in whom the copyright of the song was vested. The only similarity between the wording of the parody and of the original song was in the use of the words "Rock-a-Philip, rock," which were repeated in the chorus of the parody in the same way that the words "Rock-a-Billy, rock" were used in the chorus of the song.

The plaintiffs sought, inter alia, an injunction to restrain the defendants, the printers and publishers of the newspaper, from publishing the parody on the grounds that it was a reproduction of a substantial part of the original work to which they had not consented, which constituted an infringement of their copyright:—

Held, (1) that in considering whether a parody of a literary work constituted an infringement of the copyright in that work the main test to be applied was whether the writer had bestowed such mental labour upon the material he had taken and had subjected it to such revision and alteration so as to produce an original work.

(2) That applying that test to the present case, although the parody had its origin in the song "Rock-a-Billy," it had been produced by sufficient independent new work to be in itself not a reproduction of the words of the original song but a new original work derived therefrom; and, accordingly, as it was not a reproduction of a substantial part of the original work within the meaning

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of section 49 (1) of the Copyright Act, 1956,[1] there was no infringement and the action would be dismissed.

Dictum of Younger J. in *Glyn* v. *Weston* (*Western*) *Feature Film Co.* [1916] 1 Ch. 261, 268; 32 T.L.R. 235 applied.

Action.

The following statement of facts is taken substantially from the judgment. The plaintiffs, Joy Music Ltd., a company incorporated in Great Britain, were the owners by assignment of the copyright in Great Britain in the words and music of a song entitled "Rock-a-Billy," which had been published both in record and in sheet music form. The song had first been published in Great Britain in April, 1957, was extremely popular, reaching its zenith as a hit song in May, 1957. It was still popular in August, 1957, the material time for the purposes of the present action. The sheet music described the title of the song as "Rock-a-" Billy," stated that it was to be played in "solid rock," and set out the melody to which it was to be played. The song started with a chorus of four lines, which were as follows:

"Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock,
"Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock,
"Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock,
"Rock-a-Billy, Rock-a-Billy, Rock, Rock."

That chorus followed each of four verses, one of which was as follows:

"Some people think it came from Tennessee
"Then it spread on out to the lone prairie
"It's a 'Hill Billy Rock' and a Fiddle-dee-dee
"Turns me inside out, Gimme some."

The other verses were of a similar character and were not material to the present action.

On August 4, 1957, a special feature article appeared in the "Sunday Pictorial" printed and published by the defendants, headed "Rock-a-Philip, Rock! Rock!" The article, after stating that certain persons had been criticising H.R.H. Prince Philip for his activities including gliding, and referring to the fact that he had occasional accidents with his car, or a fall in the polo field, continued as follows: "So what? Give us a chord in 'G' and we'll

[1] Copyright Act, 1956, s. 1: "(1) "In this Act 'copyright' in relation "to a work . . . means the exclusive "right . . . to do, and to authorise "other persons to do, certain acts in "relation to that work . . . (2) . . . "the copyright in a work is infringed "by any person who, not being the "owner of the copyright, and without "the licence of the owner thereof, "does, or authorises another person "to do, any of the . . . acts in relation to the work . . ."

S. 2: ". . . (5) The acts restricted "by the copyright in a literary . . . "work are—(*a*) reproducing the work "in any material form; . . ."

S. 49: "(1) Except in so far as "the context otherwise requires, any "reference in this Act to the doing "of an act in relation to a work . . . "shall be taken to include a reference "to the doing of that act in relation "to . . . a substantial part thereof, and "any reference to a reproduction . . . "shall be taken to include a reference "to a reproduction . . . of a substantial part of the work . . ."

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" sing Paul Boyle's version of ' Rock-a-Billy ' in support of the " dashing Duke." It then set out two stanzas and two choruses of a lyric which ran as follows:

" Never mind what all the fuddy duddies say,
" Philip's making history in his own sweet way!
" If he wants to spread his wings, well, that's okay!
" What's the fuss about?

" *Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, rock!*
" Never mind the fogies that you shock, shock, shock,
" Everybody's got to learn to take a knock,
" *So Rock-a-Philip, Rock-a-Philip, Rock, Rock!*

" When he's playing polo, it's the same refrain:
" ' Look at Philip sticking out his neck again! '
" What's the good of wrapping him in cellophane?
" Let him have his shout!

" *Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, rock!*
" Nobody could say that you're a crock, crock, crock,
" Every little tumble improves your stock,
" *So Rock-a-Philip, Rock-a-Philip, Rock, Rock!* "

The article ended with the words " With acknowledgments " to Joy Music Ltd., publishers of the Guy Mitchell hit song " ' Rock-a-Billy.' "

In this action the plaintiffs claimed that the words of the lyric set out above were published in the newspaper without their consent and were a reproduction or colourable imitation of a substantial part of the words of the song " Rock-a-Billy," that the defendants had infringed the plaintiffs' copyright in the song and were aware that the publication of the words constituted such an infringement. They further claimed that each copy of the issue of the newspaper in which the words appeared was an infringement of their copyright in the song and was the plaintiffs' property, and that by selling or disposing of the same the defendants had converted it to their own use and intended to continue the acts of infringement and conversion. They accordingly claimed an injunction to restrain the defendants from printing or publishing in the " Sunday Pictorial " or elsewhere any substantial part of the song " Rock-a-Billy " or any colourable imitation thereof, and from selling or otherwise disposing of any copies of the newspaper containing any substantial part of the song or any colourable imitation of it; and damages for infringement of copyright and for conversion.

By their defence the defendants denied that the words published by them were a reproduction or colourable imitation of the song " Rock-a-Billy " or that they were guilty of any infringement or conversion. They contended that if the words published did constitute an invasion of the plaintiffs' rights (which they denied) the plaintiffs had consented to and/or acquiesced in the infringement. In support of the latter contention they relied on a

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telephone conversation alleged to have taken place at 6 p.m. on a day in the week ending July 27, 1957, in which Paul Boyle, the features editor of the "Sunday Pictorial" had informed a person of authority in the plaintiffs' office (whom the defendants were unable to identify) that he was writing a parody of the song "Rock-a-Billy," probably adding that the subject-matter of the parody was to be the activities of H.R.H. Prince Philip, and in which he said he assumed it would be all right provided that the usual acknowledgment to the publishers was made at the foot, and had been informed that that was all right.

By their reply the plaintiffs denied giving consent to the publication, and claimed that, if anyone purported to give his consent thereto on behalf of the plaintiffs, such person acted without the knowledge, consent or authority of the plaintiffs.

K. E. Shelley Q.C. and *Helenus Milmo* for the plaintiffs.
F. E. Skone-James and *David Hirst* for the defendants.

The following cases, other than those referred to in the judgment, were cited in argument: *Hawkes & Son Ltd.* v. *Paramount Film Service Ltd.*[2]; *Chappell & Co. Ltd.* v. *Thompson & Co. Ltd.*[3]

McNair J. stated the facts and continued: The question I have to determine, it seems to me, under the Copyright Act, 1956, is whether in Paul Boyle's version of "Rock-a-Billy" it can be said that the defendants, to use the words of section 49 of the Act, have reproduced "a substantial part of the work." That is the issue of fact to which I have to direct myself: have the defendants reproduced a substantial part of the work the copyright of which is vested in the plaintiffs? In the statement of claim the allegation made is that the "said words are a repro- "duction or colourable imitation of a substantial part of the "words of the said song," but it seems to me that the words "or colourable imitation" are not strictly relevant to the case under the Copyright Act, 1956, at least in relation to an alleged infringement of literary copyright. The words "colourable imita- "tion" do appear in some of the earlier cases, and particularly in section 35 (1) of the Copyright Act, 1911, in the definition of "infringement"; but when the Act of 1956 came to define infringing copy, as it did in section 18 (3), the words "colourable "imitation" are not to be found. Accordingly, in my judgment, today, when considering infringements of literary copyright, that colourable imitation is not a relevant consideration. The question is: has there been a reproduction of a substantial part of the words of the song?

I have had evidence called before me on behalf of the plaintiffs that, at any rate from the point of view of someone who is selling the song as a song accompanied by music, or from the

[2] [1934] 1 Ch. 593; 50 T.L.R. 363, C.A.

[3] (1934) Macg.C.C. (1928–35) 467.

point of view of someone who is hoping to sell a record of the words and music, the real point of the plaintiffs' song "Rock-a-" Billy" is to be found in the words of the chorus, and it is said that the gimmick, or stunt, or leading idea of this work is to be found in the chorus, and in the chorus as played with a "rock" emphasis, that being the particular form of musical emphasis embodied in the modern rock-and-roll. That I can quite understand; and the same witness also said that from the point of view of public performance the verses are quite immaterial and, indeed, may never be played at all. I can quite understand that that may well be so if this work is regarded as a musical production; but from the point of view of literary copyright it seems to me that similar considerations may not apply, and I have to look at the whole of the words of the song bearing in mind that special emphasis or weight has to be given to the words of the chorus because they are repeated four times as against the single reproduction of each verse. Whether or not there has here been a reproduction of a substantial part of the plaintiffs' work would, if I had been sitting with a jury as I well might have been, be a pure jury question which a jury would have to determine as a matter of fact, but before they could determine that they would have to receive directions from the presiding judge as to how they were to approach the matter.

It is on the question of this direction that I have been referred to a number of authorities, mostly not in this Division, where similar questions have been discussed, and it is quite clear that the question of substantiality is not determined solely by any process of arithmetic. It would not be right merely to say that the whole of the original copyright consisted of so many lines, the lines which appear in the alleged infringing copy were few, and, therefore, not a substantial part. One has really to look to a large extent—I will not say at the primary "idea," because idea cannot be the subject of copyright—but at the essential feature of the work which is alleged to have been subject to copyright. It has been said that the only leading directive in the cases is such as is given by Lindley L.J. in *Hanfstaengl* v. *Empire Palace*,[1] that is, to bear in mind that the whole conception of copyright is based upon monopoly, and the Acts, accordingly, had to be construed with reference to the protection of the owner's monopoly, but care must be taken always not to allow the Copyright Acts to be made instruments of oppression and extortion. "It is on such considerations as these that fair reviews "of literary works, although containing lengthy extracts from "them, are not infringements of the copyrights of them; that a "representation of part of a dramatic piece, if confined to some "comparatively insignificant part of it, is not an infringement "of the copyright in such piece."[2] He also observed that "in "doubtful cases the extent to which the copying has been carried

[1] [1894] 3 Ch. 109; 10 T.L.R. 530, C.A.

[2] [1894] 3 Ch. 109, 128.

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" and the object sought to be attained . . . are matters which " must be considered "[3]: and then, after dealing with the sketches in question in that case, in which the court had to consider whether a reproduction in sketch form of some dramatic tableaux vivants, which themselves were based on the plaintiff's work, were infringements or not, Lindley L.J. decided that, on his appreciation of the facts, no unfair use had been made of the plaintiff's original copyright, and that there had been no substantial taking, and that was sufficient to settle the case. But he continued and gave this illustration of a use which was not an infringement, namely " The amusing sketches in Punch of the " pictures in the Royal Academy are not, in my opinion, infringe- " ments of the copyrights of those pictures, although probably " made from the pictures themselves,"[4] and there it seems to me the judge is saying: " These are not infringements judged by the " purpose and intention with which they had beenproduced."

It is clear to me that what Paul Boyle, the person responsible for this feature article in the " Sunday Pictorial," did was, as he states in the article itself, to make his own version of " Rock-a- " Billy." He did not actually reproduce the words; he did not actually reproduce any part of the plaintiffs' song; but he made his own version of it. I was told that there is no reported decision on the question whether a parody of a copyright work is an infringement. It is clear that the mere use of an idea is not protected by copyright, and I have not been referred to any case where it has been held that the use of a particular metre, at any rate in a literary work, is the appropriate subject-matter of copyright. In *Glyn* v. *Weston (Western) Feature Film Co.*[5] Younger J. states[6]: " Making all allowance for the fact that prior to the Act of 1911 " literary copyright did not include the acting right, it certainly is " remarkable that no case can be found in the books in which a bur- " lesque even of a play has been treated as an infringement of copy- " right, although burlesque, frequently more distinguished than " the thing burlesqued, is as old as Aristophanes, to take Mr. " Hartree's example. It may well be that as far as English law " is concerned one reason for this striking state of things is that " the older cases insist upon the necessity of establishing that the " alleged piracy is calculated to prejudice the sale or diminish " the profits or supersede the objects of the original work, whereas " it is well known that a burlesque is usually the best possible " advertisement of the original and has often made famous a work " which would otherwise have remained in obscurity." Then the judge continues: " More probably, however, the reason is to be " found involved in such observations as those of Lindley L.J. in " *Hanfstaengl* v. *Empire Palace*,[7] or in such a decision as that " of the Court of Appeal in *Francis, Day & Hunter* v. *Feldman* " *& Co.*,[8] or in the principle that no infringement of the plaintiffs'

[3] [1894] 3 Ch. 109.
[4] Ibid. 130.
[5] [1916] 1 Ch. 261; 32 T.L.R. 235.
[6] [1916] 1 Ch. 261, 268.
[7] [1894] 3 Ch. 109, 128.
[8] [1914] 2 Ch. 728.

" rights takes place where a defendant has bestowed such mental " labour upon what he has taken and has subjected it to such " revision and alteration as to produce an original result." His final conclusion is [9]: " If, therefore, it were necessary for me to " express an opinion upon this aspect of the case I should decide " that on this ground also the plaintiff fails." The concluding observation is by no means an authority binding upon me, apart from the fact that the passage is obiter, but it provides me with a very clear indication as to the way in which I should decide this interesting question as to whether a parody can be held to be an infringement. If one had to direct a jury on this question, one would clearly tell them of these various tests that have been suggested as guiding tests, and it would be proper to emphasize to them this test which Younger J. suggested as to whether the defendant had bestowed such mental labour on what he had taken and subjected it to such revision and alteration as to produce an original work. I cannot help thinking that a jury with that direction would have said that, although it is clear that the article in the " Sunday Pictorial " had its origin in " Rock-a-Billy," it was produced by sufficient independent new work by Paul Boyle to be in itself, not a reproduction of the original " Rock-a-Billy," but a new original work derived from " Rock-a-Billy." And, that being my conclusion of fact, quite shortly I say that I am not satisfied that the article in the " Sunday Pictorial " does reproduce a substantial part of the words of the " Rock-a-Billy " song of which the plaintiffs have the copyright.

[His Lordship then said that his conclusion made it unnecessary for him to deal with other aspects of the case, in particular with the issue as to licence or permission. The evidence by which the defendants sought to make good that point, the onus of establishing which was plainly on them, was to be found in the evidence of Paul Boyle, at the material time the feature writer of the " Sunday Pictorial " specialising in musical and theatrical matters, which was to the effect that, it having come to the knowledge of the editorial board that attacks were being made on H.R.H. Prince Philip for certain of his activities, he was charged with the duty of preparing a feature article taking the opposite view. Having prepared his version of " Rock-a-Billy," a song familiar to him, appreciating that it was desirable to publish an acknowledgment of copyright material, he had a telephone conversation with someone in the plaintiffs' office, asked if there would be any objection, and was told that would be all right. His Lordship was satisfied that a telephone conversation did take place but it was not made plain by Paul Boyle that the parody to be published would include references to H.R.H. Prince Philip, and anyone who desired to obtain informal licence to use copyright material must explain clearly and fully the purpose or nature of the proposed infringing material and the purpose for which it was to be used. If a licence

[9] [1916] 1 Ch. 261, 269.

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was to be relied on it was essential that the purpose for which this material was to be used should have been drawn to the attention of the licensor, who might have refused to allow it to be used in that connection. He was not satisfied on the evidence that any licence was obtained from the plaintiffs which would justify the production of the article in the " Sunday Pictorial " if that production had been of such a character as would have, contrary to his view, involved an infringement.

It was unnecessary to express a view on damages. It was clear on the evidence that the song " Rock-a-Billy " was originally a valuable piece of property for the plaintiffs, but he was satisfied that by the time this publication was made its value had been largely exhausted, and the song had lost substantially the whole of its value before the production of this article. There would be judgment for the defendants.]

Judgment for defendants with costs.

Solicitors: *Davenport, Lyons & Co.; Nicholson, Graham & Jones.*

E. M. W.

[PRIVY COUNCIL.]

J. C.* 1960 Mar. 8.

BEATRICE SUNEETHRA PERERA . . Appellant;

AND

N. A. PERERA and Others . . . . Respondents.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Roman-Dutch Law — Exceptio rei venditae et traditae — Execution — Seizure of property.

Ceylon—Execution—Doctrine of exceptio rei venditae et traditae—Principle of, and application—Civil Procedure Code (Legislative Enactments of Ceylon, 1938 *Rev., c.* 86), *s.* 238—*Construction.*

By section 238 of the Civil Procedure Code of Ceylon: " When " a seizure of immovable property is effected under a writ of execu- " tion . . . and notice of the seizure is registered . . . any sale . . . " made after the seizure and registration of the notice of seizure " . . . is void as against a purchaser from the Fiscal selling under " the writ of execution and as against all persons deriving title " under or through the purchaser."

J., the appellant's husband, was in financial difficulties and his property was under seizure in several cases, in one of which judgment had been entered for Rs.1,000 on a promissory note. Pursuant to an agreement with his uncle to assist him to settle his debts and so prevent his property from being sold in execution, he sold the property, worth about Rs.30,000, to his uncle for Rs.16,000—the

* *Present*: Viscount Simonds, Lord Tucker, Lord Jenkins, Lord Morris of Borth-y-Gest and the Rt. Hon. L. M. D. de Silva.

amount of his debts—subject to his right to repurchase it for the same amount within five years. The conveyance of April 17, 1950, stated that the property was free from any incumbrance. The purchase price of Rs.16,000 was paid to J.'s creditors. On the death of the uncle on August 28, 1950, the property passed to his daughter, the second respondent, and J. recognised her as the new owner.

Owing, apparently, to inadvertence, J. had ommitted to include in the statement to his uncle of his debts the Rs.1,000 judgment on the promissory note, under which at the time a notice of seizure under section 237 (1) of the Civil Procedure Code had been served on him and registered. In pursuance of the seizure his property was put up for sale and purchased by one T. in February, 1951, for Rs.250. A few days after T. had obtained a Fiscal's transfer on the sale in execution he sold the property to the appellant for Rs.3,000. In July, 1951, the appellant, who was found to be a nominee of her husband J., instituted the present action against, inter alios, the second respondent, for a declaration of title to the property:—

Held, that although the title passed through the execution proceedings in the first instance to the appellant, the benefit of that title passed immediately thereon to the uncle's devisee, the second respondent, under the Roman-Dutch law doctrine of the exceptio rei venditae et traditae.

In section 238 of the Civil Procedure Code the words "all "persons" did not include the judgment debtor; to hold otherwise and that J. was rendered immune by section 238 from the consequences of his own act, namely, the conveyance by him to his uncle, would be to permit gross injustice, because by so holding J., who had sold the property and had had the advantage of the consideration, would be entitled to evict his uncle (now the uncle's devisee, the second respondent).

Inasmuch, therefore, as section 238 did not render void as between themselves the deed of conveyance from J. to his uncle, there was no statutory provision which hindered the operation of the common law, and the title passed by operation of law automatically from the appellant as J.'s nominee to the second respondent under the doctrine of exceptio rei venditae et traditae at the moment that T. transferred the property to the appellant.

Anund Lall Doss v. *Jullodhur Shaw* (1872) 17 Suth.W.R. 313 and *Gunatilleke* v. *Fernando* (1921) 22 N.L.R. 385 considered.

Decree of the Supreme Court of Ceylon affirmed.

APPEAL (No. 24 of 1957) from two decrees of the Supreme Court of Ceylon (February 21, 1956).

The following facts are taken from the judgment of the Judicial Committee: This was an action for declaration of title brought in July, 1951, by the appellant in the District Court of Colombo in respect of certain property which had previously been sold by her husband, one Julius Perera, to one Lewis on deed D 9 of April 17, 1950. Lewis had died in August, 1950, leaving the property to his daughter, the second respondent, who was the second defendant in the action. Probate of Lewis's will was issued to the second defendant's husband, who was the first defendant and was the first respondent. The appellant also asked for an order of eviction. The third, fourth and fifth respondents were persons in occupation under the second respondent.

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The district judge gave judgment for the appellant subject to the payment by her of a sum of Rs.12,304.79 as compensation to the respondent. That compensation was in respect of a similar sum belonging to Lewis which had been utilised to pay off a mortgage on the property.

The appellant and the second respondent both appealed to the Supreme Court. The former complained that the order for compensation was insupportable, and the latter contended that the appellant was not entitled to a declaration of title or to a writ of ejectment. The Court of Appeal (Gratiaen J., with whom Gunasekara J. agreed) held that the respondent was entitled to succeed, set aside the order of the district judge and dismissed the action.

The Supreme Court accepted the findings of fact of the district judge, and those that are relevant to a decision of this appeal can be shortly stated. The appellant (plaintiff) had been found to be a nominee of Julius, her husband. At the end of 1949 and in the beginning of 1950 Julius was in serious financial difficulties. His property was under seizure in several cases, one of which was D.C. Colombo 9041/S. In that case judgment had been entered for Rs.1,000 and interest payable on a promissory note. In April, 1950, Lewis, who was Julius's uncle, reluctantly agreed to assist Julius to settle his debts so as to prevent his property, worth about Rs.30,000, from being sold in execution. He received from Julius a document indicating that Rs.16,000 was required to meet his liabilities. An agreement was arrived at and was implemented on April 17, 1950, whereby Julius sold the property to Lewis for Rs.16,000 subject to the vendor's right to repurchase it for the same amount within five years. The conveyance contained the following warranties and assurances: "And I the said "vendor for myself and my heirs, executors, administrators and "assigns do hereby covenant, promise and declare with and to "the said vendee, his heirs, executors, administrators and assigns "that the said premises hereby sold and conveyed are free from "any encumbrance whatsoever and that I have not at any time "heretofore made, done or committed or been party or privy to "any act, deed, matter or thing whatsoever whereby or by reason "whereof the said premises or any part thereof are, is, can, shall "or may be impeached or encumbered in title, charge, estate or "otherwise howsoever and that I and my aforewritten shall and "will at all times hereafter warrant and defend the same or any "part thereof unto him and his aforewritten against any person "or persons whomsoever and further also shall and will at all "times hereafter at the request of the said vendee or his afore-"written do and execute or cause to be done and executed all "such further and other acts, deeds, matters, assurances and "things whatsoever for the further and more perfectly assuring "the said premises hereby sold and conveyed and every part "thereof, unto him or his aforewritten as by him or his afore-"written may be reasonably required."

The Rs.16,000 was paid to the creditors whose names had been disclosed in the document handed by Julius to Lewis. At the same time Lewis was placed in possession of the property as owner and Julius acted as rent collector from his former tenants who attorned to Lewis. When Lewis died and the property passed to the second respondent the appellant and Julius acknowledged her as the new owner.

The material upon which the appellant's case was constructed arose from the following further facts. When Julius persuaded Lewis in April, 1950, to save the property from forced sales, he had (perhaps through inadvertence as stated by the Supreme Court) omitted to mention in the statement of his debts the debt payable under the decree in D.C. Colombo No. 9041/S (mentioned above) under which at the time a notice of seizure under section 237 (1) of the Civil Procedure Code had been served on him and registered. Lewis was unaware of the decree and of the seizure. It will be seen presently that the appellant (Julius's nominee) was claiming on a title derived through execution proceedings in case 9041/S against Julius. The registration of the seizure had been kept alive by the judgment-creditor's proctor, a Mr. Rasanathan. In pursuance of the seizure the property was put up for sale by the Fiscal and purchased in February, 1951, for Rs.250 by one Thiagarajah, who was Rasanathan's father-in-law. He had been held by the courts in Ceylon to have been Rasanathan's nominee. A few days after Thiagarajah had obtained a Fiscal's transfer on the sale in execution he sold it to the appellant for Rs.3,000. She then instituted this action. In effect Julius was trying to evict the devisee from Lewis to whom he had transferred the property and who had helped him out of his difficulties.

The district judge held that Thiagarajah was a nominee of Rasanathan, but found that it was "not possible to hold that "Thiagarajah was a nominee for Julius Perera." Chiefly for that reason he was unable to hold that the execution proceedings were a fraud contrived by Julius (as alleged by the respondent), and the Supreme Court found itself "unable to hold that the learned "judge was wrong in rejecting this argument (of fraud) on the "evidence before him." The district judge held that the transfer to Lewis was void under the provisions of section 238 of the Civil Procedure Code and that the appellant, though Julius's nominee, got good title from Thiagarajah and that she was entitled to succeed. The Supreme Court held that, although the title passed through the execution proceedings in the first instance to the appellant, the benefit of that title passed immediately thereon to Lewis's devisee under the Roman-Dutch law doctrine of the exceptio rei venditae et traditae.

1960. Jan. 13. *Joseph Dean* for the appellant.
The respondents did not appear and were not represented.

The following cases, in addition to those referred to in the

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judgment, were cited in argument: *Fernando* v. *Fernando* [1] and *Rajapakse* v. *Fernando*.[2]

March 8. The judgment of their Lordships was delivered by the Rt. Hon. L. M. D. de Silva. For reasons which follow their Lordships are of opinion that the decision of the Supreme Court must be upheld. In view of that opinion the correctness of the order for compensation does not arise for consideration. [His Lordship stated the facts as set out above and continued:] The only question which arises on this appeal is whether the Supreme Court was right in holding that, although the title passed through the execution proceedings in the first instance to the appellant, the benefit of that title passed immediately thereon to Lewis's devisee under the Roman-Dutch law doctrine of the exceptio rei venditae et traditae. It will be necessary to consider the doctrine itself and also whether sections 237 and 238 of the Ceylon Civil Procedure Code in any way hinder or modify the application of the doctrine.

Sections 237 and 238 are to the following effect: "237.—(1) If "the property is immovable, the seizure shall be made by a "notice signed by the Fiscal prohibiting the judgment-debtor "from transferring or charging the property in any way, and all "persons from receiving the same from him by purchase, gift or "otherwise." The only other subsection of this section has no bearing on the questions arising in this case.

"238. When a seizure of immovable property is effected under "a writ of execution and made known as provided by section "237 and notice of the seizure is registered before the first day "of January, nineteen hundred and twenty-eight, in the book "formerly kept under section 237 or is registered on or after the "first day of January, nineteen hundred and twenty-eight, under "the Registration of Documents Ordinance, any sale, convey-"ance, mortgage, lease, or disposition of the property seized, "made after the seizure and registration of the notice of seizure "and while such registration remains in force is void as against "a purchaser from the Fiscal selling under the writ of execution "and as against all persons deriving title under or through the "purchaser."

It is argued for the appellant that as a purchaser from Thiagarajah she is a person "deriving title under or through the "purchaser" at the Fiscal's sale, and that consequently section 238 makes "void" as against her (and in effect against Julius, she being Julius's nominee), the conveyance by Julius to Lewis. Their Lordships do not agree.

As observed by the Supreme Court, the words "all persons" in section 238 are words of the "utmost generality" and "are "ex facie wide enough to include the judgment-debtor himself." But the section has been designed and enacted to protect persons

[1] (1906) 9 N.L.R. 1. [2] [1920] A.C. 892, J.C.

against the acts of the judgment-debtor and not to protect or to benefit the judgment-debtor himself. The implication therefore arises that in this context "all persons" do not include the judgment-debtor. It is reasonable and just to hold that such an implication arises and the necessity for so holding is illustrated by the facts of this case. To hold that the judgment-debtor is rendered immune by section 238 from the consequences of his own act, namely, the conveyance by him to Lewis, would be to permit gross injustice because by so holding Julius, who had sold a property and had had the advantage of the consideration, would be enabled to evict his vendee (actually vendee's devisee). He would do so by taking advantage of a consequence of the non-disclosure by him to Lewis (whether deliberately or by inadvertence it matters not) of something he should have disclosed, namely, the decree and seizure in case 9041/S. If this disclosure had been made, Lewis would without doubt have paid off the judgment debt or made some other arrangement before accepting the conveyance from Julius.

Their Lordships observe that in the case of *Anund Lall Doss* v. *Shaw* [1] the Board, dealing with a section of the Indian Civil Procedure Code which declared "null and void" a private alienation after a seizure in execution proceedings had been effected, thought it could not be "null and void against all the world "including even the vendor." The language of the section was in many ways different from section 238 and the facts in the case were also different, but the view expressed supports the view taken by their Lordships.

If, as held by their Lordships, section 238 does not render void as between themselves the deed of conveyance from Julius to Lewis, there is no statutory provision which hinders the operation of the common law. Their Lordships are of opinion that the title passed by operation of law automatically from the appellant as Julius's nominee to the second respondent under the doctrine of the exceptio rei venditae et traditae at the moment that Thiagarajah transferred the property to the appellant. This doctrine and its development are discussed in a judgment of the Board delivered by Lord Phillimore in *Gunatilleke* v. *Fernando*.[2] Relying on the authority of Voet, Book 21, Title 3, he there set out in terms appropriate to that case the basic principle relevant to the present case thus [3]: "Under this exception the purchaser who "had got possession from a vendor, who at the time had no title, "could rely upon a title subsequently acquired by the vendor."

In the present case it might perhaps be suggested that it could not be said that Julius (at the time he executed the conveyance in favour of Lewis) had no title. It could be suggested that he had a title which he could not alienate. A reference to the authority relied on by Lord Phillimore shows that the exceptio is applicable to such a case. Voet, Book 21, Title 3, Section 1

[1] (1872) 17 Suth.W.R. 313.
[2] (1921) 22 N.L.R. 385.
[3] Ibid. 390.

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(Gane's translation) is to the following effect: "When the right "of an alienator is confirmed the right also of him to whom, if "you have regard to the start of the matter, the alienation had "been wrongfully made, is confirmed at the first moment of "acquisition of ownership by the original vendor."

Any "alienation wrongfully made" and not necessarily an alienation by a person without title is covered. Julius when he was under a prohibition against alienation made a wrongful alienation which was ineffective and the doctrine is applicable to his conveyance. It will also be seen that under the doctrine "at "the first moment of acquisition" of title by Julius (under the deed in favour of his nominee) that title passed to the second defendant as Lewis's successor.

For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal be dismissed. As the respondents have not appeared, there will be no order as to costs.

Solicitors: *T. L. Wilson & Co.*

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[CHANCERY DIVISION.]

1960
March 10.
Buckley J.

In re BUGLE PRESS LTD.
APPLICATION OF H. C. TREBY.

[00834 of 1959.]

In re HOUSES AND ESTATES LTD.

[00833 of 1959.]

Company—Amalgamation—Scheme—Scheme for acquisition of shares by transferee company—Whether scheme unfair—Onus of proof—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 209 (1).

Of the three shareholders in a publishing company with an issued share capital of 10,000 shares of £1 each, the two majority shareholders each held 4,500 and the minority shareholder the remaining 1,000. In 1958 the majority shareholders promoted and caused to be incorporated a transferee company to the memorandum of which they were the sole subscribers and of which they each held 50 of the 100 issued shares. The only business ever transacted by the transferee company was the making on July 14, 1959, of an offer to all three shareholders for their shares at £10 each and the subsequent taking of steps to acquire those of the minority shareholder compulsorily. The price suggested was based on a valuation of the fair price for the transferor company's share capital as £100,000, the valuers stating that they had examined the transferor company's accounts and had obtained from the transferee company's secretary and from a named firm such further information as they required.

The minority shareholder refused the offer, considering it far below the value of his shares; his evidence, inter alia, was that twice already in 1959 the majority shareholders had offered on

the transferee company's behalf to buy them for much more than £10,000; that he had found that other persons, experienced in dealing with such property, had agreed with him that £10,000 was not enough; and that the printing dispute—the valuers' reason for ignoring the publishing company's profits for the six months ended April 30, 1959—was transient and was innocuous to the publishing company's undertaking.

The transferee company having given notice of intention to exercise its statutory right of compulsory acquisition, the minority shareholder sought a declaration under section 209 of the Companies Act, 1948,[1] that the transferee company was neither entitled nor bound to acquire his shares in the transferor company on the terms of the scheme, notwithstanding that it had been approved by nine-tenths of the shareholders. The transferee company filed no evidence supporting the valuation or as to the nature of the instructions or information upon which it was made:—

Held, (1) that in the circumstances the onus of showing that the price was fair was on the transferee company. It was not a case in which the 90 per cent. majority who accepted an offer were unconnected with the persons making the offer, when there was a heavy burden on a dissentient shareholder to show that he ought not to be compelled to accept, for, although the transferee company was in law distinct from its only two shareholders, as a matter of substance the persons putting forward the offer, those two shareholders, were the holders of the 90 per cent. majority shareholdings in the transferor company, and it was therefore for them to satisfy the court that the scheme was one which the minority shareholder ought reasonably be compelled to accept.

(2) That the transferee company had not discharged the onus upon it. There was no evidence substantiating the valuation, no opportunity for cross-examination, and the court, being ignorant of the instructions and information on which it was made, was not in a position to see whether it was one on which it was reasonable to rely. The applicant, accordingly, was entitled to the declaration sought.

In re Hoare & Co. (1933) 150 L.T. 374; *In re Press Caps Ltd.* [1949] Ch. 434; [1949] 1 All E.R. 1013, and *In re Sussex Brick Co.*, post, p. 665, note, distinguished.

ADJOURNED SUMMONSES.

The applicant, Henry Charles Treby, a dissenting shareholder, asked, under section 209 (1) of the Companies Act, 1948, for

[1] Companies Act, 1948, s. 209 (1): "Where a scheme or a contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as 'the transferee company'), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company. . . ."

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declarations that the transferee company, Jackson and Shaw (Holdings) Ltd., was neither entitled nor bound to acquire his shares in Bugle Press Ltd. (in the case of the first summons) or in Houses and Estates Ltd. (in the case of the second summons) or any of them, on the terms of a scheme and contract dated July 14, 1959, notwithstanding that it had in each case been approved by nine-tenths of the shareholders.

The following statement of facts is taken substantially from the judgment of Buckley J.

Bugle Press Ltd., the transferor company, was incorporated in 1950 to carry on the business of booksellers, publishers, newspaper and magazine proprietors and other like businesses referred to in its memorandum of association, and its principal business was the publication of a periodical. Its issued share capital was 10,000 shares of £1 each, all of one class, 4,500 of which are held by George Douglas Shaw, 4,500 by Henry Robert Jackson (hereinafter together called "the majority shareholders") and 1,000 by the applicant, who is thus the holder of 10 per cent. of the issued shares of the company.

Jackson and Shaw (Holdings) Ltd., the transferee company, was promoted by the majority shareholders and was incorporated on September 5, 1958. The majority shareholders were the subscribers of the memorandum and held equally the issued shares of the transferee company, 100 in number. The transferee company apparently carried on no business except in relation to the transactions hereinafter mentioned.

On July 14, 1959, solicitors to the transferee company wrote to the applicant's solicitor a letter containing an offer to acquire his 1,000 shares in the transferor company at £10 each. In that letter they stated: "It is a known fact that Messrs. Jackson and "Shaw, the holders of 90 per cent. of the issued capital, will "accept this offer," and they asked to be told within 14 days whether the applicant was prepared to accept. But he was not prepared to do so. That offer was based, with regard to the price mentioned in it, on a valuation which the transferee company had obtained from Price Waterhouse & Co. in which they valued the fair price to be paid by the transferee company for the whole of the share capital of the transferor company at £100,000.

In that valuation Price Waterhouse & Co. explicitly stated that they had examined the transferor company's accounts and had obtained such further explanations as they had required from the secretary of the transferee company and from West and Drake: the court had no means of knowing precisely what position was occupied by West and Drake.

The applicant did not accept that offer because he considered that the value of his holding of shares in the transferor company was considerably more than the amount offered for it. In his affidavit filed on September 25, 1959, he set out his reasons for considering that the value of the transferor company's undertaking was greater than the value of £100,000 put on it by Price

Waterhouse & Co. They are that in April, 1959, and in May, 1959, offers had been made either by the majority shareholders, or on behalf of the transferee company, for his holding in the transferor company of sums appreciably in excess of £10,000, namely, £12,500 and £14,500, and that in correspondence which he had had with other persons who were experienced in dealing with property of that kind in the publishing and newspaper world he had found that those other people had agreed with his view that the price of £10,000 would be too low. He also expressed in his affidavit the view that Price Waterhouse & Co. were not correct in another matter, but that related to an asset of another company. However, he did say that in one respect, namely, in excluding reference to the profits of the transferor company for the six months ended April 30, 1959, Price Waterhouse & Co. had overlooked an important element which he considered that they ought to have taken into account in arriving at their valuation, and that the printing dispute—which was the reason given by Price Waterhouse & Co. for ignoring the profits of that half-year—was, in fact, a transient matter which could not affect the true value to be put on the undertaking of the transferor company.

In those ways the applicant indicated that he considered that Price Waterhouse's valuation was unsatisfactory, and one with which he did not agree, and which was at any rate open to criticism, whether well- or ill-founded.

Moreover, there was one other matter which he also mentioned in his affidavit, that one of the figures given in Price Waterhouse's valuation, being the figure for the profits for the half-year which they said they did not pay any attention to, was wrong by an amount of £5,000. It might have been that, since they did not pay any attention to the profits for that half-year, that would not perhaps have influenced Price Waterhouse's view; nevertheless, it was another ground for saying that the valuation at any rate deserved to be looked into.

The applicant having declined the offer, the transferee company gave him notice under section 209 of the Companies Act, 1948, of its intention to exercise its statutory rights of compulsory acquisition under the section. In fact, that notice was given on August 19, 1959, before the expiration of the period of four months mentioned in the section, but by agreement between the parties no point was taken on that, and the argument proceeded on the basis that the notice was duly given, and that unless the court thought fit to say (as it could say under the section) that it should not, the section would operate as the result of that notice, or as the result of a later notice given on November 19, 1959, after the issue of the summons.

The facts relating to Houses and Estates Ltd., the company to which the second application related, were substantially the same as those with regard to the transferor company, except that the amount of the issued share capital of the company and, consequently, the price offered differed, and the 90 per cent. interest

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was held by the majority shareholders and their respective wives.

Sir Milner Holland Q.C. and *Morris Finer* for the applicant.
Ralph Instone for the transferee company.

The cases cited in argument are referred to in the judgment.

Buckley J. stated the facts as set out above and continued: In this judgment I think it will be convenient for me to deal with the transferor company in the first case, because the facts of the two cases being in all essentials identical, what I say with regard to that company will also apply with equal force to Houses and Estates Ltd.

Section 209 (1) of the Companies Act, 1948, is in the following terms: "Where a scheme or contract involving the transfer of "shares or any class of shares in a company (in this section "referred to as 'the transferor company') to another company, "whether a company within the meaning of this Act or not (in "this section referred to as 'the transferee company'), has, within "four months after the making of the offer in that behalf by the "transferee company been approved by the holders of not less "than nine-tenths in value of the shares whose transfer is in- "volved (other than shares already held at the date of the offer "by, or by a nominee for, the transferee company or its sub- "sidiary), the transferee company may, at any time within two "months after the expiration of the said four months, give notice "in the prescribed manner to any dissenting shareholder that it "desires to acquire his shares, and when such a notice is given "the transferee company shall, unless on an application made by "the dissenting shareholder within one month from the date on "which the notice was given the court thinks fit to order other- "wise, be entitled and bound to acquire those shares on the "terms on which, under the scheme or contract, the shares of "the approving shareholders are to be transferred to the trans- "feree company. . . . " Then follows a proviso.

Sir Milner Holland points out that this is not a section which enables the holders of 90 per cent. of the issued shares of a company, or of a class of issued shares of a company, to acquire the shareholding of the 10 per cent. minority—the section expressly prescribes that the transaction must be one between companies, or rather, that the acquiring body must be a company, the subject-matter to be acquired being shares in a company—and no individual can make an offer which, even if it be accepted by 90 per cent. of the recipients of the offer, would entitle that individual to acquire compulsorily the shares of the 10 per cent. dissentient minority. And, he says, if individuals who themselves hold 90 per cent. of the shares in a company constitute a transferee company in which they are the only shareholders, it would be contrary to the policy of the section to allow an offer by that transferee company to

operate under the section, because the transferee company would be merely a screen for the 90 per cent. shareholders, there would be no independent majority exercising any sort of disinterested choice in the question of whether or not the offer should be accepted, and the transaction would be merely a device for enabling the 90 per cent. majority to acquire, through the medium of the company formed ad hoc, the shareholding of the minority.

I am bound to say that I see very great force in that argument. Whether, in such a case, if the court were fully satisfied that the price offered to the minority shareholders was a fair price to be offered for their shares, the section ought to be allowed to operate according to its tenor is, I think, a matter which it is unnecessary for me to decide today because, in my view, on the facts of this particular case, at any rate the onus must rest on Mr. Instone's clients to satisfy the court that the price offered is a fair price. In the ordinary case of an offer under this section, where the 90 per cent. majority who accept the offer are unconnected with the persons who are concerned with making the offer, the court pays the greatest attention to the views of that majority. In all commercial matters, where commercial people are much better able to judge of their own affairs than the court is able to do, the court is accustomed to pay the greatest attention to what commercial people who are concerned with the transaction in fact decide; and it has been recognised in a number of authorities to which I have been referred: *In re Hoare & Co.*,[1] a decision of Maugham J.; *In re Press Caps Ltd.*[2]; and an unreported decision of Vaisey J. given on July 22, 1959, in *In re Sussex Brick Co. Ltd.*,[3] that where there is a large majority (and, of course, a 90 per cent. majority is necessarily a large majority) of shareholders who are only concerned to see that they get what they consider to be a fair price for their shares, and who are in favour of accepting the offer, the burden is a heavy one on the dissentient shareholder to say that the offer is not one which he ought reasonably to have to accept. In *In re Sussex Brick Co. Ltd.* Vaisey J. said[3]: "I "think that the applicant"—that is, the dissentient shareholder— "is faced with the very difficult task of discharging an onus which "is undoubtedly the heavy one of showing that he, being the only "man in the regiment out of step, is the only man whose views "ought to prevail." In a case of that kind the onus must rest on the dissentient shareholder to show that the offer is not one which he ought reasonably to be compelled to accept, and that onus is a heavy onus.

This case, however, seems to me to be quite the reverse of that, because here, although as a matter of law the body making the offer must be regarded as distinct from the persons who hold shares in that body, nevertheless, as a matter of substance the

[1] (1933) 150 L.T. 374.

[2] [1949] Ch. 434; [1949] 1 All E.R. 1013.

[3] Post, p. 665, note.

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persons who are putting forward this offer are the majority shareholders, the only two shareholders in the transferee company, and they are the holders of the 90 per cent. majority shareholding, whose acceptance of that offer it is suggested binds the dissenting shareholder also to accept the offer. In a case of this kind it seems to me that the onus must clearly be on the other side, and that it must be incumbent on the majority shareholders to satisfy the court that the scheme is one with which the minority shareholder ought reasonably to be compelled to fall in.

I have referred to the evidence filed on behalf of the applicant in this case. The transferee company has filed no evidence except an affidavit which has been sworn merely for the purpose of putting in evidence the judgment of Vaisey J. in *In re Sussex Brick Co. Ltd.*[4] It is quite true that the applicant's evidence includes as an exhibit Price Waterhouse's valuation, but a valuation obtained by another party and put in evidence by a dissenting shareholder merely for the purpose of criticising it is not, in my opinion, of any assistance to the transferee company in discharging the onus that the scheme is one with which he ought to be compelled to fall in. That valuation is not attacked in the sense that it is said to be a forgery, or a fraud, or anything of that kind, but it is attacked in the sense that the applicant has made it quite clear in his evidence that he does not agree with the valuation that it contains.

In my view the onus rests on the transferee company to substantiate that valuation and to show that the proposed price is a fair price. To substantiate that valuation they should have filed evidence supporting it, which would have enabled the applicant to cross-examine whatever deponent had sworn an affidavit supporting the valuation, and the court would then have been in a position to see whether or not the valuation was one which it thought reasonable to rely on. At the present time, not only has there been no opportunity for cross-examination, but also the court is even ignorant of the instructions and information on which the valuation was made. It is perfectly true that the valuer says he has had all the information he asked for, but it does not follow that he necessarily asked for all the appropriate information.

In my view, therefore, the onus which I consider rests on the transferee company has not been discharged, and having regard to the unusual nature of this case—unusual in the sense, that the 90 per cent. majority shareholders are, themselves, in substance the transferee company—I think this is certainly a case in which the court ought to " order otherwise " within the meaning of the section. In my judgment, the applicant ought not to be compelled to sell his shares at the proposed price in these circumstances.

I propose, therefore, to declare: that the transferee company is not entitled to acquire (I do not think I need say " nor bound ")

[4] Post, p 665, note.

the shares of the applicant in the Bugle Press Ltd., or any of them on the terms of the scheme, notwithstanding that it has been approved by nine-tenths of the shareholders of Bugle Press Ltd.

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Buckley J.

In the other case I will make a similar declaration in appropriate terms in regard to that company. I order that Jackson & Shaw (Holdings) Ltd. pay the costs.

Declarations accordingly.

Solicitors: *Henry E. Goodrich; Blakeney & Co.*

K. R. A. H.

[CHANCERY DIVISION.]

NOTE.

In re SUSSEX BRICK CO. LTD.

1959
July 20, 22.

Vaisey J.

Company—Amalgamation—Scheme—Scheme for acquisition of shares by transferee company—Whether scheme unfair—Onus of proof.

ADJOURNED SUMMONS.

The applicant, Frank Cunningham, the holder of 5,500 ordinary shares of 5s. each in the Sussex Brick Co. Ltd., sought a declaration under section 209 of the Companies Act, 1948, that the respondent company, Redlands Holdings Ltd., was neither entitled nor bound to acquire his shares in the Sussex Brick Co. Ltd. on the terms of a scheme or contract dated September 16, 1958, notwithstanding that the same had been approved by the holders of nine-tenths in value of the shares whose transfer was involved.

Ralph Instone for the applicant.
John Mills for the respondent company.

VAISEY J. This matter arises out of an offer made by the respondent company, Redlands Holdings Ltd., to acquire the preference and ordinary shares of the Sussex Brick Co. Ltd., on certain terms set out in a scheme dated September 16, 1958, sent to the various shareholders, or, at any rate, to the ordinary shareholders, together with an explanatory letter. The offer, in effect, was that for every three shares in the brick company, two shares in the respondent company would be taken in lieu. The applicant was unwilling to accept that offer and he brings this summons under section 209 of the Companies Act, 1948, to establish his right to refuse to do so: he is an ordinary shareholder and he says that he does not want to have the shares which he holds in the brick company replaced by shares in Redlands Holdings Ltd.

Section 209 of the Companies Act, 1948, is a long complicated section, and subsection (1), the only relevant subsection, can be sufficiently summarised as regards its effect in the terms used by Somervell L.J. in *In re Press Caps Ltd.*[1]: "[It] deals with and confers a power "to acquire shares of shareholders dissenting from a scheme by which "one company desires to obtain the transfer to itself of the shares or

[1] [1949] 1 Ch. 434, 439; [1949] 1 All E.R. 1013, C.A.

1959

Sussex Brick Co. Ltd., *In re.*

Vaisey J.

"any class of shares in another company," and he pointed out that the section corresponds exactly with section 155 of the Companies Act, 1929.

The matter has been considered in more than one case, and the governing considerations were well stated by Maugham J. in *In re Hoare & Co. Ltd.*[2] Summarising his judgment, it really comes to this: that an applicant, taking advantage of section 209, has, in effect, to show that the scheme is to him unfair, and that is the yardstick which is accepted and adopted as the criterion which enables a shareholder to get out of the provisions of the section. I think that it is now admitted that unless this scheme is to the applicant unfair he is not entitled to act as a dissenting shareholder under the section and obtain a declaration that he is not bound to transfer his shares.

Whether one's sympathies are with the man who wants to hold on to his shares and not to have them expropriated, or whether one regards such a person as being rather troublesome and not deserving much sympathy, is a matter having nothing to do with this case. The expression "expropriation" used by Maugham J. has been questioned as being inaccurate in its connotation, but the fact remains that procedure under section 209 is for the acquiring, on terms, of the shares of a man who does not want to part with his shares, and one is not surprised that Maugham J.'s decision should emphasise that point of view.

Maugham J. said[3]: "One conclusion which I draw from that "fact"—that is, the fact that the court will not "order otherwise," i.e., allow a man to escape from his obligation—"is that the mere "circumstance that the sale or exchange is compulsory is one which "ought not to influence the court. It has been an expropriation, "but I do not regard that phrase as being very apt in the circumstances "of the case. The other conclusion I draw is this, that again prima "facie the court ought to regard the scheme as a fair one inasmuch as "it seems to me impossible to suppose that the court, in the absence of "very strong grounds, is to be entitled to set up its own view of the "fairness of the scheme in opposition to so very large a majority of "the shareholders who are concerned. Accordingly, without expressing "a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to "order otherwise in such a case as I have before me, unless it is "affirmatively established that, notwithstanding the views of a very "large majority of shareholders, the scheme is unfair. . . .

"Now the court has been quite properly asked to consider the "balance sheets of the two companies concerned, and quite fair and "reasonable contentions have been put before me on behalf of the "applicants tending to show that notwithstanding the facts with "regard to the acceptance of the offer which I have mentioned, the "offer is really not a fair one. The affidavit of Mr. Sharples on behalf "of the applicants is one which I have very carefully considered, but "I do not think that it establishes the view which he takes as a correct "one, that the transaction, looked at from the question of capital "values, is in the least unfair. It is manifest that from modern balance "sheets very little real information can be obtained as to the capital "value of assets, even treating the companies as going concerns, and "of course on the footing of a liquidation the balance sheet figures are "almost useless. But taking these companies as being sound and "solvent concerns with excellent prospects, I am not persuaded that "the offer made by Charrington was an unfair one from the point of "view of the value of the shares and cash which were offered to the "shareholders of Hoare & Co. . . .

"On the whole, I do not think I am justified in coming to the "conclusion that the applicants have established that the offer is one

[2] (1933) 150 L.T. 374. [3] Ibid. 375.

"in regard to which the court would think fit to order that the "transferee company is not entitled to acquire these shares substantially "on the terms of the original scheme. I confess I have some sympathy "with people in the position of the applicants. I am myself not quite "able to understand why the legislature should ever have passed section "155 at all, and therefore I am not at all indisposed to consider the "objections of such applicants as I have before me."

That being the undoubted law, I think that the present scheme and the present offer are undoubtedly open to criticism, and that a clever business man, a man well-versed in company law and matters which influence dealings on the Stock Exchange, could find a good many loopholes in it. That amounts to this: the scheme is open to criticism; but does that go far enough? That is the difficulty in the present case. It has not been suggested on behalf of the applicant that there has been any bad faith or any intentional misleading of the applicant, but although the scheme is open to a good deal of criticism, which might be enlarged on at great length in one or more circulars, what exactly the effect on the mind of the shareholders would have been I do not pause to inquire. That the scheme is open to criticism I have no doubt, but can it be said therefore to be unfair? I think it rather difficult to predicate unfairness in any case in which there has been perfect good faith on the side of the person who is alleged to have been unfair. I think that the applicant is faced with the very difficult task of discharging an onus which is undoubtedly the heavy one of showing that he, being the only man in the regiment out of step, is the only man whose views ought to prevail. That is the difficulty he is faced with in the present case.

I agree that certain criticisms set out in the applicant's affidavit show that a good case could be made out for the formulation of a better scheme, of a fairer scheme, of one which would have been more attractive to the shareholders if they could have understood the implications of the criticisms. I have no doubt at all that a better scheme might have been evolved, but is that enough? Is it necessary to establish the validity of such an offer as put forward in the present case? Is there any point in the scheme on which a better view might have prevailed, and rather more generous treatment might have been offered to persons whose shares are sought to be expropriated? A better and fairer offer might have been made, possibly, but I do not think that because a scheme is not 100 per cent. fair or right there is the kind of unfairness with which Maugham J. was dealing in the case to which I have referred. The mere finding of items, or details, in the scheme which are open to valid criticism, is not unfairness consistent with the spirit of that judgment.

A scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 per cent. with the highest possible standards of fairness, equity and reason. After all, a man may have an offer made to him and, although he would prefer something better, would be quite prepared to accept it because it was good enough in all the circumstances. It may be that the grounds for criticising the present scheme are not grounds of such a nature as to render the whole thing unfair in the sense in which Maugham J. used the words in the case which I have cited.

A good deal of light is thrown in the consideration of this section in *In re Press Caps Ltd.*,[4] where the test laid down by Maugham J. in *In re Hoare & Co.*[5] that where the statutory majority has accepted the offer, the onus must rest on the applicant to satisfy the court that the price offered is unfair, was approved.

[4] [1949] 1 Ch. 434.

[5] 150 L.T. 374, 375.

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So far as the Stock Exchange is concerned I have some information about the present share values. I have no information about what the present value of the brick shares is because they are no longer quoted, but there is no doubt that three shares in the brick company which were worth at the relevant date something like 21s. 3d. have now been transposed into two Redlands shares which are worth today on the Stock Exchange quotation 43s. 1d. It is a rather curious result that a man who parts under compulsion with property which all agree was worth something in the neighbourhood of 22s. now finds himself in possession of property which, according to Stock Exchange quotations, is worth nearly twice that amount, i.e., 43s. It is rather curious for him to say: "It is a very unfair bargain I struck. True, I have shares "worth twice as much as my former shares were worth, but still it is "unfair because I think greater consideration ought to have been paid "to various factors and I still say it is a very unfair scheme." The shares were less than half the value of the shares given in substitution for them, and it is a little hard to see that such a bad bargain has been driven. True, the scheme offers specific grounds for criticism, but had the matter been probed still further, and had there been some revaluations and a great deal of inquiry into the finances of the two companies, they might well have led to the conclusion I have formed that the applicant will receive twice what he is giving up in value. If I accede to his request I do not see that a very attractive prospect lies before him. If he retains his shares in the company they will not be quoted, and will probably be quite unsaleable. Ninety per cent. of the shareholders think the scheme is all right.

As regards the company's circular, I think it is only fair to say that the criticism is not so much of one or two things but that the circular is not explicit enough; that it does not go into sufficient details about the financial position of the Redlands company. There is no suggestion that there has been anything like intentional cheating or deception on the part of those promulgating this scheme and, particularly, on the part of the authors of the circular.

Without putting my own view as to how this scheme could have been improved and made a little more favourable and a little more fair, perhaps, to the ordinary shareholders, I do not think that unfairness in the sense in which it has been used in the reported cases has been established. It must be affirmatively established that, notwithstanding the view of the majority, the scheme is unfair, and that is a different thing from saying that it must be established that the scheme is not a very fair or not a fair one: a scheme has to be shown affirmatively, patently, obviously and convincingly to be unfair.

This is a difficult case, and if it goes to a higher court I would like to express my apologies for having dealt with it on somewhat vague and not very detailed lines: but, after all, if it has to be affirmatively established that the scheme is unfair, it is largely a matter of the onus of proof and whether the evidence has satisfied me.

I am not satisfied that this scheme is unfair in the sense in which Maugham J. used the words and the application ought not to succeed.

Order accordingly.

Solicitors: *Simpson, Palmer & Winder; Baileys, Shaw & Gillett.*

K. R. A. H.

[HOUSE OF LORDS.]

WELHAM . . . . . APPELLANT;

AND

DIRECTOR OF PUBLIC PROSECUTIONS . RESPONDENT.

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Feb. 22, 23, 24, 25; *Mar.* 24.

Crime—Fraud—"Intent to defraud"—Forgery—Uttering forged documents with intent to defraud—Whether economic loss necessary—Forgery Act, 1913 (3 & 4 *Geo.* 5, *c.* 27), *ss.* 4 (1), 6.

Statute—Construction—Meaning of word—Contemporary usage—Established legal interpretation before passing of Act—"Intent to "defraud"—Forgery Act, 1913, *s.* 4 (1).

Judicial Precedent—Statute—Construction—Obiter dictum on meaning of words prior to enactment—"Intent to defraud"—Forgery Act, 1913, *s.* 4 (1) (post, p. 678).

By section 4 of the Forgery Act, 1913: "(1) Forgery of any document, which is not made felony under this or any other statute for "the time being in force, if committed with intent to defraud, shall "be a misdemeanour . . ." By section 6: "(1) Every person who "utters any forged document . . . shall be guilty of an offence of "the like degree . . . and on conviction thereof shall be liable to the "same punishment as if he himself had forged the document . . ."

The appellant was tried on an indictment which included two counts which charged him with uttering forged documents, contrary to section 6 of the Forgery Act, 1913.* The appellant, as sales manager of Motors (Brighton) Ltd., had witnessed forged hire-purchase agreements on the strength of which certain finance companies had advanced large sums of money to Motors (Brighton) Ltd. The appellant's defence was that he had believed that the agreements were brought into being to enable the finance companies to lend money which they could not ordinarily do because of credit restrictions, and because by their memorandum and articles of association they could not act as moneylenders. He claimed that the purpose of the hire-purchase agreements was to make it appear that the finance companies were advancing money in the way of their business as finance companies, and he accordingly contended that he had had no intention to defraud the finance companies but

† *Present*: LORD RADCLIFFE, LORD TUCKER, LORD KEITH OF AVONHOLM, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

* Forgery Act, 1913, s. 4: "(1) "Forgery of any document, which is "not made felony under this or any "other statute for the time being in "force, if committed with intent to "defraud, shall be a misdemeanour "and punishable with imprisonment "with or without hard labour for any "term not exceeding two years. "(2) Forgery of any public document "which is not made felony under "this or any other statute for the "time being in force, if committed "with intent to defraud or deceive, "shall be a misdemeanour and "punishable with imprisonment with "or without hard labour for any term "not exceeding two years."

S. 6: "(1) Every person who "utters any forged document . . . shall "be guilty of an offence of the like "degree . . . and on conviction there-"of, shall be liable to the same "punishment as if he himself had "forged the document . . . (2) A "person utters a forged document . . . "who, knowing the same to be forged, "and with either of the intents neces-"sary to constitute the offence of "forging the said document . . . uses, "offers, publishes, delivers, disposes "of, . . . or puts off the said forged "document."

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was merely uttering the documents to mislead the relevant authority who might inspect the records to see that the credit restrictions were being observed and whose duty it was to prevent their contravention. The jury were directed that this was a sufficient intention to defraud and the appellant was convicted. He appealed on the ground that his intention was merely an intention to deceive and not an intention to defraud, which involved causing some economic loss to the person deceived:—

Held, (1) that the words "intent to defraud" in section 4 (1) of the Act of 1913, must be understood in the light of any established legal interpretation that prevailed at the date of the passing of the Act (post, pp. 675, 682), and that, on the authorities, there was no warrant for confining those words to the idea of depriving a person by deceit of some economic advantage or inflicting upon him some economic loss (post, pp. 676, 684).

Dictum of Buckley J. in *In re London and Globe Finance Corporation* [1903] 1 Ch. 728, 732; 19 T.L.R. 314 considered.

(2) That an intent to defraud existed when the false document was brought into existence for no other purpose than of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. Correspondingly, to put forward such a document with knowledge of its falsity, and with a similar intent was to commit the crime of uttering it (post, pp. 677, 685). Accordingly, the appeal must be dismissed.

Reg. v. *Toshack* (1849) 4 Cox C.C. 38; 1 Den.C.C. 492, C.C.R. applied.

Decision of the Court of Criminal Appeal, sub nom. *Reg.* v. *Welham* [1960] 2 W.L.R. 333; [1960] 1 All E.R. 260, C.C.A. affirmed.

Appeal from the Court of Criminal Appeal (Lord Parker C.J., Hilbery, Cassels, Salmon and Edmund Davies JJ.).

This was an appeal by Robert John Welham from the decision of the Court of Criminal Appeal on December 16, 1959, affirming his conviction at the Central Criminal Court on December 19, 1958, on two counts of uttering forged documents contrary to section 6 of the Forgery Act, 1913.

The facts, stated by Lord Denning, were as follows: The appellant, Robert John Welham, and two other men were charged at the Central Criminal Court with conspiracy to defraud and with uttering forged documents. Welham was acquitted of the conspiracy but convicted of the uttering and sentenced to nine months' imprisonment. He appealed to the Court of Criminal Appeal. That court dismissed his appeal. The Attorney-General gave his fiat for a further appeal.

The counts for uttering charged Welham with uttering forged documents contrary to section 6 of the Forgery Act, 1913. It is sufficient for present purposes to take the second count which was put to him on his arraignment in these words: "On January 16, "1957, with intent to defraud, you uttered a forged hire-purchase "proposal form and hire-purchase agreement purporting to be "signed by J. Murray of 4, Meynell Crescent, E.9, knowing the "same to be forged."

To that charge he pleaded not guilty. Likewise to the third

count relating to forged credit sale agreements he pleaded not guilty.

According to the evidence for the prosecution, Welham was the manager of a firm of motor dealers in Brighton called Motors (Brighton) Ltd. These dealers obtained money from finance companies in London called Consortium Finance Ltd. and Masterton Finance Ltd. They did this by submitting to the finance companies sets of documents which appeared to relate to the hire-purchase of lorries or the credit-sale of lorries. But the documents were fictitious. Take, for instance, the hire-purchase document which was the subject of count 2. The document named one "J. Murray" as the hirer of lorry No. XMT 756. But there was in fact no such lorry: and although there was such a person as Mr. Murray, he had not in fact signed the hire-purchase document nor had he authorised it to be signed in his name. His signature "J. Murray" had been forged. It purported to be witnessesd by the accused "R. J. Welham" but Welham had never witnessed it. Welham had signed the document in the place for the witness. His own signature was genuine enough but he had attested a forgery. It was on that document and others like it that the motor dealers obtained money from the finance companies. That was cogent evidence of a conspiracy to defraud the finance companies. The two other men were convicted of it. But Welham was acquitted.

Welham's defence to the conspiracy charge which, no doubt, earned him his acquittal was this: He said that he did not intend to defraud the finance companies at all. He had been brought into the matter by one Prater, a director of the motor dealers. Prater told him that they wished to borrow money from the Consortium Finance Co. The company were unable to lend money on straight loans owing to the restrictions on borrowing then in force, and also owing to the objects in their memorandum and articles: but they were ready to lend money under cover of hire-purchase documents so long as nobody outside the "immediate "circle" knew of it. The documents were bogus and were known by the finance company to be bogus, but they were necessary to cover up the loans. "The purpose was," he said, "to satisfy any "Board of Trade investigation." The jury must be taken to have accepted Welham's belief on this point: for they acquitted him on the charge of conspiracy to defraud the finance companies.

There remained, however, the counts for uttering forged documents with intent to defraud knowing them to be forged. To these counts Welham said in the first place that he did not know the documents were forged. At the time when he signed as a witness, the signature of the hirer was, he said, in blank. Take the hire-purchase document in count 2. "J. Murray" was, he said, not on it when he signed. He sent it to London to be completed: and when he got it back, the signature "J. Murray" was then filled in: and he accepted that signature as being genuine. He then sent the document forward to the finance

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company. He acknowledged that there was no such lorry as described in the document but he believed that the signature was genuine.

The next answer made by Welham to the charge of uttering was that he had no intent to defraud. There was, however, in this respect a significant difference between the count for conspiracy and the counts for uttering. The conspiracy was charged as being to defraud specified persons, namely, the finance companies: but the uttering was charged as uttering of forged documents "with intent to defraud" generally, without specifying any particular person or persons. On these counts for uttering Welham seems to have been prepared to admit that he had an intent to deceive but not that he had an intent to defraud. His position can be summed up in his answers to the last two questions addressed to him by the Common Serjeant:

"Q. I think you told Mr. Maxwell Turner . . . that you passed "these documents on to the Consortium [Finance Co.] knowing "that they were fictitious, with the object of deceiving, among "other things, the Capital Issues Committee? A. I did say that. "At that time I knew there were credit restrictions, but the "Capital Issues Committee did not mean anything to me; that "is to say, with the object of defeating the regulations.

"Q. And inducing that committee to do something which in "fact they were bound in law to prevent. A. Yes, my Lord."

The Common Serjeant appears to have taken the view, on those answers, that Welham had admitted an intent to defraud, for he told the jury: "It is not incumbent on the prosecution in "these two counts, as it is in the case of the first count, to prove "an intent to defraud any particular person, and therefore if the "prosecution have succeeded in proving against Welham that "he was a party to putting forward documents which he knew "to be forged, and he put them forward with the dishonest intention, as he himself said, of defrauding the Capital Issues "Committee, well, then, he would be guilty on those two "counts. . . . They have got to prove an intent to defraud and "Welham's own case is that the intention here in respect of these "bogus documents was to defraud the Capital Issues Committee "by deceiving them in not preventing something which it was "their duty in law to prevent."

The jury retired and returned with the question: "Does "'with intent to defraud' mean that when Welham signed as a "witness before hirer's signature, was he defrauding?"

The Common Serjeant directed them again on Welham's two defences. He told them that, in order to convict Welham, they must be satisfied that he knew Murray's signature was not genuine, and then went on to say: "I have ventured to direct you that upon "his own evidence, if that be so, these documents, like all the "others, were put forward for the purpose of pulling the wool "over the eyes of the Capital Issues Committee as he understood "it and to cover up the fact, if there should be an inquiry, that

" these big loans had been made by the hire-purchase companies " to Motors (Brighton) Ltd. . . . on his own evidence . . . there " would not be an intention to defraud because the intention to " defraud would not be the intention to defraud the hire-purchase " companies but to defraud the Capital Issues Committee by " deceiving them into taking a course of action which would lead " them into not preventing something happening which it was " their duty in law, if they knew of it, to prevent." Something appears to have gone wrong in the transcribing of the last passage, but the Common Serjeant was no doubt repeating again to the jury what he had already told them.

The jury retired again and found Welham guilty on counts 2 and 3 of uttering forged documents.

Gerald Gardiner Q.C. and *C. W. G. Ross-Munro* for the appellant.

Sir Jocelyn Simon Q.C., S.-G., J. H. Buzzard and *M. D. L. Worsley* for the Crown.

The following cases were cited in argument: *Rex* v. *Crowther* [1]; *Rex* v. *Martin* [2]; *Reg.* v. *Marcus* [3]; *Reg.* v. *Hoatson* [4]; *Reg.* v. *Heywood* [5]; *Reg.* v. *Wilson* [6]; *Reg.* v. *Toshack* [7]; *Reg.* v. *Nash* [8]; *Reg.* v. *Hodgson* [9]; *Reg.* v. *Sharman* [10]; *Reg.* v. *Moah* [11]; *In re London and Globe Finance Corporation Ltd.* [12]; *Rex* v. *Parker* [13]; *Rex* v. *Carpenter* [14]; *Rex* v. *Bennett and Newton* [15]; *Rex* v. *Secombe* [16]; *Rex* v. *Hunt* [17]; *Rex* v. *Pickup* [18]; *Rex* v. *Bassey* [19]; *Rex* v. *Kritz* [20]; *Reg.* v. *Wines* [21]; *Board of Trade* v. *Owen* [22]; *Reg.* v. *Newland* [23]; *Reg.* v. *Fowler* [24]; *Reg.* v. *Potter* [25]; *Kat* v. *Diment* [26]; *Barras* v. *Aberdeen Steam Trawling and Fishing Co.* [27]; *Robinson Brothers (Brewers) Ltd.* v. *Durham County Assessment Committee* [28]; *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell (Raymond)* [29]; *Galloway* v.

[1] (1832) 5 C. & P. 316.
[2] (1836) 1 Mood.C.C. 483, C.C.R.
[3] (1846) 2 Car. & Kir. 356.
[4] (1847) 2 Car. & Kir. 777.
[5] (1847) 2 Car. & Kir. 352.
[6] (1848) 1 Den. 284, C.C.R.
[7] (1849) 4 Cox C.C. 38; 1 Den.C.C. 492, C.C.R.
[8] (1852) 2 Den. 493, C.C.R.
[9] (1856) Dears. & B. 3, C.C.R.
[10] (1854) 1 Dears.C.C. 285, C.C.R.
[11] (1858) 7 Cox C.C. 503, C.C.R.
[12] [1903] 1 Ch. 728, 732, 733; 19 T.L.R. 314.
[13] (1910) 74 J.P. 208.
[14] (1911) 22 Cox C.C. 618.
[15] (1913) 9 Cr.App.R. 146, C.C.A.
[16] (1917) 12 Cr.App.R. 275, C.C.A.
[17] (1918) 13 Cr.App.R. 155, C.C.A.
[18] (1931) 22 Cr.App.R. 186, C.C.A.
[19] (1931) 47 T.L.R. 222; 22 Cr.App.R. 160, C.C.A.
[20] [1950] K.B. 82; (1949) 65 T.L.R. 505; [1949] 2 All E.R. 406; 33 Cr.App.R. 169, C.C.A.
[21] [1954] 1 W.L.R. 64; [1953] 2 All E.R. 1497; 37 Cr.App.R. 197, C.C.A.
[22] [1957] A.C. 602; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 11; H.L. sub nom. *Reg.* v. *Owen* [1957] 1 Q.B. 174; [1956] 3 W.L.R. 252, 739; [1956] 3 All E.R. 432, C.C.A.
[23] [1954] 1 Q.B. 158; [1953] 3 W.L.R. 826; [1953] 2 All E.R. 1067; 37 Cr.App.R. 154, C.C.A.
[24] [1956] Crim.L.R. 330.
[25] [1958] 1 W.L.R. 638; [1958] 2 All E.R. 51; 42 Cr.App.R. 168.
[26] [1951] 1 K.B. 34; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657, D.C.
[27] [1933] A.C. 402; 49 T.L.R. 391.
[28] [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79, H.L.
[29] [1949] 2 K.B. 417; [1949] 1 All E.R. 749, C.A.

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Galloway [30]; *Rex* v. *Ward* [31]; *Rex* v. *Jones and Palmer* [32]; *Rex* v. *Parkes and Brown* [33]; *Rex* v. *Fawcett* [34]; *Rex* v. *Harris* [35]; *Rex* v. *Firling* [36]; *Reg.* v. *Syed Husain* [37]; *Jan Mahomed* v. *Reg.* [38]; *Reg.* v. *Potter*. [39]

Their Lordships took time for consideration.

March 24. Lord Radcliffe. My Lords, I have had the opportunity of reading in advance the opinion that will be delivered by my noble and learned friend, Lord Denning. I agree with what he says and I share his view that this appeal must be dismissed. I propose therefore to confine what I say to expressing my opinion upon the central question of law involved, the question which has been the cause of the case reaching this House.

What is the meaning of the words "intent to defraud" which occur in section 1 and, more particularly, in section 4 (1) of the Forgery Act, 1913? In my opinion an answer cannot be supplied to that question which does not regard both the context of the Act in which they appear and the previous history of legal decisions as to the meaning of the word "defraud" when used as an element of the crime of forgery. There are, accordingly, two preliminary considerations which commend themselves as being material to this approach.

The first is that the Act itself recognises that there may be at least a significant difference between an intent to defraud and an intent to deceive. For whereas most of the offences for which punishment is prescribed are punishable whether done with intent to deceive or intent to defraud, some acts of forgery can be a crime only if done with intent to defraud (see section 2 (1) and (2) and section 4 (1)). Up till the date of this Act forgery statutes, of which there had been innumerable instances over the preceding 500 years, while often (though not by any means consistently) defining the offence explicitly in terms of "intent to defraud," had hardly ever used the phrase "intent to deceive" in connection with it. The first and only occasion on which this occurred, so far as the researches of the learned Solicitor-General have taken us, was in the Act of 1803 (43 Geo. 3, c. 139), which by section 1 dealt with the crime of forging bills of exchange, promissory notes, etc. "with intent to deceive or defraud" His Majesty or other persons. The combined phrase does not seem to have been employed again in a forgery Act, since neither of the consolidating statutes of 1830 (11 Geo. 4 & 1 Will. 4, c. 66) and 1861 (24 & 25 Vict. c. 98) reproduced the substance of section 1 of the Act of 1803 with anything more than the single phrase

[30] [1956] A.C. 299; [1955] 3 W.L.R. 723; [1955] 3 All E.R. 429, H.L.
[31] (1727) 2 Ld.Raym. 1461; 3 Ld.Raym. 358; 2 Stra. 747.
[32] (1785) 1 Leach 366.
[33] (1797) 2 Leach 775.
[34] (1793) 2 East P.C. 862, C.C.R.
[35] (1833) 1 Mood.C.C. 393, C.C.R.
[36] (1904) 18 E.D.C. 11 (S.A.).
[37] (1885) I.L.R. 7 All. 403.
[38] (1884) I.L.R. 10 Calc. 584.
[39] [1958] 1 W.L.R. 638; [1958] 2 All E.R. 51; 42 Cr.App.R. 168.

" intent to defraud." On the other hand, " intent to deceive or " defraud " did occur in other nineteenth century Acts relating to offences akin to forgery, e.g., in section 84 of the Larceny Act, 1861, and section 166 of the Companies Act, 1862. No instance, however, has been discovered of a statute defining forgery in terms of " intent to deceive " except as an alternative to the phrase " intent to defraud."

It seems fair to say then that the Act of 1913 established the first occasion upon which in legislation about forgery the two phrases " intent to defraud " and " intent to deceive " were brought into any regular combination with or dissociation from each other. While this compels us, I think, to treat them as not being synonymous with each other for the purposes of the Act, I do not conclude, on the other hand, that it requires us for the same purpose to give a more limited meaning to " defraud " than it would otherwise have had, unless not doing so would involve us in finding no independent meaning at all for the word " deceive."

The second consideration which weighs with me is that by 1913 the word " defraud," when used in connection with forgery, had been a frequent subject of judicial decision and institutional comment. On most occasions the exposition had related to forgery as a crime at common law: but forgery was also becoming increasingly a statutory crime by virtue of those various Acts which had either punished forgery without explicitly referring to intent to defraud, or had explicitly imported that intent into the offence proscribed. The Act of 1913, unlike its predecessors of 1830 and 1861, was not merely an Act consolidating a number of previous enactments on the subject of forgery. Its title declares it to be an Act for " consolidating, simplifying and amending the " Law of Forgery." In my opinion it superseded forgery as a crime at common law in the cases to which it applied, though there still remained such a crime (see section 14), just as much as it superseded the statutory offences whose constituent Acts it amended or repealed. While it did essay a definition of the act of forgery: " making a false document in order that it may be used " as genuine and . . . the counterfeiting of [certain] seals or dies " (see section 1 (1)), it did not introduce any definition of " intent " to defraud " or, for that matter, of " intent to deceive." In that state of affairs I cannot doubt that the words " intent to " defraud " in the Act must be understood in the light of any established legal interpretation that prevailed at the date of the passing of the Act.

Now I think that there are one or two things that can be said with confidence about the meaning of this word " defraud." It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines

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its meaning. This is nonetheless true because since the middle of the last century the law has not required an indictment to specify the person intended to be defrauded or to prove intent to defraud a particular person.

Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by "to defraud." It may mean to cheat someone. It may mean to practise a fraud upon someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray's New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our "angry and "defrauded young." There is nothing in any of this that suggests that to defraud is in ordinary speech confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss.

Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone (Commentaries, 18th ed., vol. 4, at p. 247) called "to the prejudice of another's right." East, Pleas of the Crown (1803), vol. 2, at pp. 852, 854, makes the same point in the chapter on Forgery: "in all cases of forgery properly so called, "it is immaterial whether any person be actually injured or not, "provided any may be prejudiced by it."

Of course, as I have said, in ninety-nine cases out of a hundred the intent to deceive one person to his prejudice merely connotes the deceiver's intention of obtaining an advantage for himself by inflicting a corresponding loss upon the person deceived. In all such cases the economic explanation is sufficient. But in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated.

I think that it is sufficient if I mention three authorities without analysing them. First, *Rex* v. *Harris*,[1] in which a forged order purporting to be a direction from a magistrate to the keeper of a county gaol to discharge a prisoner was held by all the judges on the case reserved to be capable of sustaining a conviction for forgery at common law. Secondly, in *Reg.* v. *Sharman*,[2] a forged

[1] (1833) 1 Mood.C.C. 393.

[2] (1854) 1 Dears.C.C. 285.

certificate giving false references as to employment, put forward in order to obtain appointment as a school master, was held to support a similar conviction. The indictment in that case charged "intent to obtain the emoluments and to deceive." Thirdly, there is *Reg.* v. *Moah*,[3] in which the Court of Criminal Appeal upheld a conviction for forgery at common law where a forged letter of recommendation had been delivered to a chief constable by a forger for the purpose of obtaining the situation of a police constable.

Reg. v. *Toshack*[4] seems to me to be the most explicit authority on the subject prior to 1913. Toshack had forged a testimonial over the purported signature of a master of a sailing ship in order to deceive Trinity House examiners and so obtain his master's certificate. He was tried on an indictment containing a number of counts, including one of unjustly obtaining a piece of paper, value one penny (the master's certificate), but the case as reported only dealt with the seventh and ninth counts, charging respectively that he forged the testimonial with intent to injure, deceive, prejudice and defraud the examiners, and that he did the same thing for the purpose of deceiving Trinity House. He was convicted of the offence of forgery at common law; and the conviction on these two counts being reserved for the opinion of the judges (Pollock C.B., Patteson, Wightman JJ., Platt B. and Talfour J.), their unanimous opinion delivered by Alderson B. was that the offence had been committed.

In my opinion it is clear that in connection with this offence the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. Correspondingly, to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it. That seems to me to be the essential point of the present appeal.

Inevitably, the argument in this House concentrated much attention upon what was said by Buckley J. in the course of his judgment in *In re London and Globe Finance Corporation Ltd.*,[5] when he took occasion to point out the distinction as he saw it between an intention to deceive and an intention to defraud. The passage was criticised by the appellant's counsel as being either incomplete or inaccurate as an exhaustive statement of the law on the point: on the other hand, it was put forward on behalf of the Crown as being an authoritative exposition of the meaning of "intent to deceive" and "intent to defraud" in the crime of forgery, which must be taken as adopted and read into those phrases when they occur in the Act of 1913. I think that the criticism is misconceived and I think, on the other hand, that

[3] (1858) 7 Cox C.C. 503.
[4] (1849) 4 Cox C.C. 38; 1 Den.C.C. 492.
[5] [1903] 1 Ch. 728, 732.

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the argument for the Crown goes too far: but before I say more it is convenient to set out the familiar passage in full. "To "deceive," he said, "is, I apprehend, to induce a man to believe "that a thing is true which is false, and which the person prac- "tising the deceit knows or believes to be false. To defraud is to "deprive by deceit: it is by deceit to induce a man to act to his "injury. More tersely it may be put, that to deceive is by false- "hood to induce a state of mind; to defraud is by deceit to induce "a course of action."

There is no doubt that what was said was obiter. What the learned judge was deciding in the case was whether to sanction a prosecution of Mr. Whittaker Wright under the Larceny Act, 1861, ss. 83 and 84, and the Companies Act, 1862, s. 166, at the expense of the company's funds. It was not necessary to that decision to offer a definition of either one or both of the "intents" that would be involved or to express himself in the terms of a judge directing a jury. There is no reason to suppose that he intended to do more than give a general indication of the nature of the offences that were in question and of the distinction between them. I cannot accept that a judicial utterance of this kind could ever qualify as an authoritative exposition of words employed in a subsequent statute within the doctrine laid down by this House in *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*,[6] where the meaning of the single word "wreck" was in question.

On the other hand, I do not think that what he said is any the less valuable because it does not contain an exhaustive account of the legal significance of deceit and fraud. Certainly, so far as civil liability is concerned, deceit can involve a reckless indifference to truth or falsity as well as the deliberate making of false statements; and in all cases it may involve the inducing of a man to believe a thing to be false which is true as well as to believe to be true what is false. But the learned judge was speaking of the nature of criminal intent in the limited field of activities such as wilful destruction or falsification of books and publication of false statements or accounts, and, apart from that, there would be no difficulty in enlarging upon his text if it were necessary to do so in the context of any particular case. Again, it is said and, I think, justly, that to defraud must involve something more than the mere inducing of a course of action by deceit. But these words, which are found in the last sentence of the whole passage, must be understood in the light of what had gone before. They do not qualify the description of "defraud" as "by deceit to induce a "man to act to his injury": what they do is to point the contrast between deceiving, the essence of which is to bring about a state of mind, and defrauding, the essence of which is to bring about a course of action, whether doing something or refraining from something.

[6] [1933] A.C. 402; 49 T.L.R. 391.

It is this last point which constitutes the most important element in the whole passage. It is obvious that it was at once appreciated that it expressed briefly and with felicity the significant distinction between the two kinds of intent when they were referred to together or apart in statutes dealing with criminal offences. The 1905 (23rd) edition of Archbold's Criminal Pleading and Practice incorporated Buckley J.'s words in full and they have regularly appeared in subsequent editions. By 1913 they had been cited with approval in a criminal appeal as illustrating or defining "intent to defraud" (see *Rex* v. *Bennett and Newton* [7]). They were treated as containing an authoritative distinction between "defraud" and "deceive" in *Rex* v. *Bassey* [8] and by 1953 they had become so much the established text as to be referred to by the Lord Chief Justice, Lord Goddard, as the "locus classicus, which has been cited with approval over "and over again" (*Reg.* v. *Wines* [9]). I think that it would be perverse not to recognise that ever since they were reported they have been accepted and used in the criminal courts as providing a satisfactory account of the essentials of "defrauding" on the one hand and "deceiving" on the other. I imagine that a clear phrasing of the distinction was the more welcome because in the past judges dealing with forgery as a crime at common law had not always thought it necessary to distinguish between an intent to deceive and an intent to defraud, and had sometimes spoken of the latter under the title of the former. Thus East, Pleas of the Crown, at p. 853, quotes Buller J. and Eyre B. as each having described forgery as the making of "a false instrument with "intent to deceive" in different trials, and adds the comment: "In the word 'deceive' must doubtless be intended to be included "an intent 'to defraud': and so it was decided . . ."

It was objected that, if defrauding was treated as meaning something so wide as any deceiving of another to his injury, his detriment or his prejudice, it provided a dangerously wide definition of a crime. It was said, for example, that by such a definition the writing of a faked letter to another giving him a fictitious appointment would constitute the crime of forgery. I do not know that I should regard this as so startling a result as to lead me to reconsider what seems to be the long-accepted definition of defrauding: after all, the crime in question only exists if there is the making of a false document in order that it may be used as genuine, which is itself dishonest and a cheat. Words, not being capable of infinite division for purposes of precise measurement, can only convey ideas that are to some extent general, and I think it may be that the imposition suggested does technically constitute the crime of forgery, unless the rule that lex non curat de minimis puts it out of court, or a jury concludes that there was no real intent to prejudice or injure. I suppose that, in any event, these

[7] (1913) 9 Cr.App.R. 146.
[8] (1931) 47 T.L.R. 222; 22 Cr.App.R. 197.
[9] [1954] 1 W.L.R. 64; 37 Cr.App.R. 160.

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theoretical arguments have to be tried by a certain standard of common sense, and I cannot say that in practice I should expect to see a crop of criminal prosecutions based on tricks or deceptions of this kind.

There is, I think, more weight in the criticism that if, in interpreting the Act of 1913, "intent to defraud" is given as wide an ambit as to include all deceptions to another's prejudice there is virtually no ambit left to be covered by the other statutory intent, "intent to deceive," since it is difficult to imagine an instance of a man forging a document in order that it should be used as genuine without having at the same time an intention of affecting another's conduct to his prejudice. It is difficult, but it is not impossible. There can be cases, I think, in which there is an intent to deceive and no more. *Reg.* v. *Hodgson* [10] may illustrate the kind of thing that can occur. There a diploma of the College of Surgeons had been altered by substituting Hodgson's for the genuine name: on the other hand, Hodgson had made no use of the document, so altered, except to hang it on the wall of his room and show it to two friends who inquired as to his qualifications. It was held by the court that this did not constitute forging or uttering at common law, because there was no criminal intent in what he did. It is not clear that the court had in mind any precise distinction between defrauding and deceiving and, as I have said, the distinction was not always made with regard to the crime at common law. But if a question arose under the Act of 1913 upon a similar alteration of some document falling within, say, section 3 or section 4 (2), I think that it would be hard to say that there had not been an "intent to deceive" within the meaning of the Act.

I am therefore of opinion that the judgment of the Court of Criminal Appeal, the subject of the present appeal, was clearly right. The view there taken is in accordance with what was said by my noble and learned friend, Lord Tucker, in *Board of Trade* v. *Owen*,[11] and the fuller argument in this case has not led me to think that it needs any qualification.

Lord Tucker. My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack. I have also had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend, Lord Denning, and I desire to express my agreement therewith.

Lord Keith of Avonholm. My Lords, I agree.

Lord Denning stated the facts and the direction of the Common Serjeant on the appellant's two defences (as stated above),

[10] (1856) Dears. & B. 3.

[11] [1957] A.C. 602, 622; [1957] 2 W.L.R. 351; [1957] 1 All E.R. 411; 41 Cr.App.R. 11.

and continued: My Lords, such being the direction of the Common Serjeant, these complaints were made of it:

(1) That the Common Serjeant failed to give the jury a clear direction as to the distinction between an intent to defraud and an intent to deceive.

(2) That the Common Serjeant incorrectly told the jury that on Welham's own case he had an intention to defraud.

(3) That there was no evidence that Welham had an intention to defraud.

(4) That in any case it should have been left to the jury to say whether Welham had an intention to defraud.

My Lords, I think that all these complaints depend on whether, on Welham's own evidence in the witness-box, he had an intent to defraud: for if he had, then the Common Serjeant was entitled to direct the jury as he did. There was no need for him to embark on a discussion of the difference between an intent to defraud and an intent to deceive, if the evidence did not give rise to it. And there was no need for him to leave it to them as an open question when Welham's own evidence permitted only of one answer. He said to them, in effect, what many judges have said before: "Why, even if you accept his own evidence on this "point, you may well think he had an intent to defraud."

The crucial question is, therefore, what is the meaning of the words "intent to defraud" in the Forgery Act, 1913, which were contained in the indictment. To determine this question I must set out the material sections of the Act:

"1.—(1) For the purposes of this Act, forgery is the making "of a false document in order that it may be used as genuine . . . "and forgery with intent to defraud or deceive, as the case may "be, is punishable as in this Act provided. . . .

"4.—(1) Forgery of any document, which is not made felony "under this or any other statute for the time being in force, if "committed with intent to defraud, shall be a misdemeanour . . .

"(2) Forgery of any public document which is not made felony "under this or any other statute for the time being in force, if "committed with intent to defraud or deceive, shall be a mis-"demeanour . . .

"6.—(1) Every person who utters any forged document . . . "shall be guilty of an offence of the like degree . . . and on "conviction thereof shall be liable to the same punishment as if "he himself had forged the document . . .

"(2) A person utters a forged document . . . who, knowing the "same to be forged, and with either of the intents necessary to "constitute the offence of forging the said document . . . uses, "offers, publishes, delivers, disposes of, . . . or puts off the said "forged document."

My Lords, the declared object of the Forgery Act, 1913, is "to "consolidate, simplify and amend the law relating to Forgery and

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"kindred offences": and if its language were clear and unambiguous, it would not be right to embark upon a close consideration of previous authorities in order to ascertain its meaning: see *Bank of England* v. *Vagliano Brothers* [12] by Lord Herschell. But the more I consider the phrase "with intent to defraud" in this statute, the more doubtful do I find its import. It appears to be used in contrast to the phrase "with intent to deceive," but whilst I can see there may on occasion be a distinction between these two intents, I find it extremely difficult to say where the one intent ends and other begins. Much valuable guidance is to be obtained from the dictum of Buckley J., in the *Whittaker Wright* case,[13] but this has been criticised by modern scholars. It has even been hinted that it conceals within it the fallacy of the illegitimate antistrophe, which sounds, I must say, extremely serious. These scholars seem to think they have found the solution. "To defraud," they say, involves the idea of economic loss. I cannot agree with them on this. If a drug addict forges a doctor's prescription so as to enable him to get drugs from a chemist, he has, I should have thought, an intent to defraud, even though he intends to pay the chemist the full price and no one is a penny the worse off.

Seeing, therefore, that the words of the statute are of doubtful import, it is, I think, legitimate to turn for guidance to the previous state of the law before the Act. And here I would say at once that the phrase "with intent to defraud" has been the standard usage of lawyers in defining forgery for over 160 years. In 1796 all the judges of England laid down the definition of forgery as "the false making of a note or other instrument *with "intent to defraud"* (see *Rex* v. *Parkes and Brown* [14]); and ever since that time it has been held that the very essence of forgery is an *intent to defraud*, and it must be laid in the indictment (see East, Pleas of the Crown (1803), vol. 2, p. 988; Chitty, Criminal Law (1826), vol. 3, pp. 1039, 1042). I cannot help thinking that when Parliament in section 4 (1) of the Act of 1913 used a phrase so hallowed by usage, it used it in the sense in which it had been used by generations of lawyers. It was never by them confined to the causing of economic loss. Let me prove this by taking some examples: Take the case where a man forges a reference as to character, intending to get employment by means of it. It is clear forgery: see *Reg.* v. *Sharman* [15]; *Reg.* v. *Moah*.[16] But there may well be no economic loss intended. The man may intend, if he gets the job, to render full service in return for his wages. Or the post which he seeks may be unpaid, such as a justice of the peace. But he has the intent to defraud all the same.

Take next the case where a servant steals his master's money and afterwards forges a receipt or other document so as to cover

[12] [1891] A.C. 107, 144, 145; 7 T.L.R. 333.
[13] [1903] 1 Ch. 728, 732.
[14] (1797) 2 Leach 775, 785.
[15] (1854) 1 Dears.C.C. 285.
[16] (1858) 7 Cox C.C. 503.

up his defalcations. This, too, is forgery: see *Rex* v. *Martin*.[17] He does not intend to deprive his master of anything: for he has already done that. He may not even do it so as to keep his job, because he may be under notice. What he really intends to do is to cover up his tracks so that he should not be found out. But he has the intent to defraud nonetheless.

Then there are the cases concerned with the release of prisoners. If a man forges an order or letter to the sheriff or to the governor of a prison, intending thereby to secure the release of a prisoner, he is guilty of forgery at common law: see *Fawcett's* case[18] and *Rex* v. *Harris*.[19] There is no idea of economic loss here. He has no intent to deprive the gaoler of any money or valuable thing. But at common law he is held to have an intent to defraud. Mr. Gardiner rather suggested that the reason for those decisions was that the documents were documents of a public nature. But I do not so read them. Even if they were public documents it was still essential that there should be an intent to defraud. Ever since *Ward's* case[20] in 1726 public and private documents were at common law on the same footing in this respect: see East's Pleas of the Crown, pp. 859–861. The forgery of any of them was a misdemeanour if done with intent to defraud, but not otherwise: see *Reg.* v. *Hodgson*[21] by Jervis C.J.

There remains the case of *Reg.* v. *Toshack*,[22] which is to my mind decisive. Toshack, a seaman, forged a certificate of good conduct so as to be admitted to sit for an examination for his master's certificate. He had no intention to deprive the examiners or Trinity House of any money or valuable thing. The piece of paper, value one penny, was not mentioned in the counts on which he was convicted. But he was held guilty of forgery. Alderson B. said: "It does amount to a very serious offence if "persons do forge certificates of this sort and are found to utter "them for the purpose of deceiving the Trinity House."

What is the common element in all these cases? It is, I think, best expressed in the definition given by East in his Pleas of the Crown, vol. 2, p. 852. He treats the subject, I think, better than any writer before or since: "To *forge* (a metaphorical "expression borrowed from the occupation of the smith), means, "properly speaking, no more than to *make* or *form*: but in our "law it is always taken in an evil sense; and therefore Forgery "at common law denotes a *false* making (which includes every "alteration of or addition to a true instrument), a making malo "animo, of any written instrument for the purpose of fraud and "deceit. This definition results from all the authorities ancient "and modern taken together."

That was written in 1803 but it has been always accepted as authoritative. It seems to me to provide the key to the cases

[17] (1836) 1 Mood.C.C. 483.
[18] (1793) 2 East P.C. 862.
[19] 1 Mood.C.C. 393.
[20] 2 Ld.Raym. 1461; 3 Ld.Raym. 358; 2 Stra. 747.
[21] Dears. & B. 3, 8.
[22] 4 Cox C.C. 38, 41.

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decided since it was written, as well as those before. The important thing about this definition is that it is not limited to the idea of economic loss, nor to the idea of depriving someone of something of value. It extends generally to *the purpose of fraud and deceit*. Put shortly, " with intent to defraud " means " with " intent to practise a fraud " on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.

At this point it becomes possible to point the contrast in the statute between an " intent to deceive " and an " intent to " defraud." " To deceive " here conveys the element of deceit, which induces a state of mind, without the element of fraud, which induces a course of action or inaction. Take the case of a private document. For instance, where a man fabricates a letter so as to puff himself up in the opinion of others. Bramwell B. put the instance: " If I were to produce a letter purporting to " be from the Duke of Wellington inviting me to dine, and say, " ' See what a respectable person I am ' ": *Reg.* v. *Moah*.[23] There would then be an intent to deceive but it would not be punishable at common law or under the statute, because then it would not be done with intent to defraud. Take next the case of a public document. For instance, a parish register. If a man should falsify it so as to make himself appear to be descended of noble family, for the sake of his own glorification, he would not be guilty of an intent to defraud and would therefore not be punishable at common law (see *Reg.* v. *Hodgson*[24]), but he would have an intent to deceive and he would be punishable under the present statute, as indeed he was under its predecessors, such as the Forgery Act, 1861, s. 36.

So much for the principal point under discussion. Mr. Gerald Gardiner did make a further point. He said that the intent must be to defraud the particular person to whom the document is first presented or his agent, and that it was insufficient if he intended to defraud somebody else. This is not correct. It has long been ruled that it is no answer to a charge of forgery to say that there was no intent to defraud any particular person, because a general intent to defraud is sufficient to constitute the crime. So also it is no answer to say that there was no intent to defraud the recipient, if there was intent to defraud somebody else: see *Rex* v. *Taylor*.[25]

In my judgment, section 4 (1) of the Forgery Act, 1913, only restates the requirements of the common law of forgery. The " intent to defraud " there mentioned is the same intent as was required by the common law. It is satisfactory to find that in the cases subsequent to the Act the courts have been giving it the same meaning as they did before (*Rex* v. *Bassey*[26] is particularly in point), and I am glad to find this confirmed by what my

[23] 7 Cox C.C. 503, 504.
[24] Dears. & B. 3, 8.
[25] (1779) 1 Leach 214.
[26] 47 T.L.R. 222.

noble and learned friend, Lord Tucker, said in *Board of Trade* v. *Owen*.[27]

Applying this meaning to the present case, it appears that Welham on his own evidence had an intent to defraud, because he uttered the hire-purchase documents for the purpose of fraud and deceit. He intended to practise a fraud on whomsoever might be called upon to investigate the loans made by the finance companies to the motor dealers. Such a person might be prejudiced in his investigation by the fraud. That is enough to show an intent to defraud. I think the Common Serjeant was entitled to direct the jury as he did.

I find myself in entire agreement with the Court of Criminal Appeal and I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, I agree that this appeal should be dismissed for the reasons which have been given by my noble and learned friends.

Appeal dismissed.

Solicitors: *Bellamy, Bestford & Co.; Director of Public Prosecutions.*

J. A. G.

[27] [1957] A.C. 602, 622.

[PRIVY COUNCIL.]

AUGUSTUS PATTERSON . . . . . APPELLANT;
AND
PATRICK VINCENT JOSEPH SOLOMON . RESPONDENT.

J. C.*
1960
March 21.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad and Tobago—Legislative Council—Elected member—Contract with government for or on account of public service—Competence of elector to maintain proceedings for disqualification—Reference to Supreme Court by Legislative Council only — Appeal to Privy Council—Jurisdiction—Trinidad and Tobago (Constitution) Order in Council, 1950 *(as amended by the Trinidad and Tobago (Constitution) (Amendment) Order in Council,* 1956), *ss.* 38 (3) (*e*), 40 (1).
Privy Council—Jurisdiction—Special jurisdiction of court below—Proceedings to disqualify elected member of Legislative Council—Trinidad and Tobago (Constitution) Order in Council, 1950 *(as amended), s.* 40 (1).

By section 40 of the Trinidad and Tobago (Constitution) Order in Council, 1950, as amended by the Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1956: "(1) All questions "which may arise as to the right of any person . . . (ii) to be or "remain an elected member of the Legislative Council, shall be "referred to the Supreme Court of the Colony . . ."

* *Present*: VISCOUNT SIMONDS, LORD DENNING and LORD JENKINS.

J. C.

1960

Patterson
v.
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The appellant, a registered elector of Trinidad and Tobago, sought an injunction to restrain the respondent, who was an elected member of the Legislative Council of the colony, a member of the Executive Council and the Minister of Education and Culture, from claiming to be or in any way acting as the holder of those offices on the ground that his seat in the Legislative Council had become vacant under the provisions of section 38 (3) (*e*) of the Order in Council of 1950, as amended, by reason of his having become a party to a contract with the government of the colony for and on account of the public service:—

Held, (1) that section 40 of the Order in Council of 1950, as amended, contemplated a reference to the Supreme Court by the Legislative Council itself, and that the appellant could not competently maintain the proceedings in any form.

(2) That the appellant could not escape from the consequences of that decision by dropping his claim so far as it related to membership of the Legislative and Executive Councils and confining it to seeking to restrain the respondent from acting as Minister of Education and Culture. The respondent was, until the contrary was competently determined, a member of the Legislative and Executive Councils, and it was only if he ceased to be such a member that he could no longer hold the office of Minister to which he had been appointed. Unless and until the fact of disqualification had been established in the only manner permissible, it was not possible to argue its consequences.

(3) Further, even if upon a proper reference under section 40 of the Order in Council the Supreme Court had come to a determination, whatever form it might take, no appeal would lie to Her Majesty in Council. Equally an appeal would not lie from a determination of that court upon the same subject-matter otherwise than upon such a reference.

The Order in Council created an entirely new jurisdiction in a particular court of the colony for the purpose of taking out of the Legislative Council, with its own consent, and vesting in that court the very peculiar jurisdiction which had existed in the council itself of determining the status of those who claimed to be members of the council, and the determination of that court was final and no appeal lay from it. The same principle also applied whether or not the jurisdiction vested in the particular court had previously been exercised by the legislative body.

Théberge v. *Laudry* (1876) 2 App.Cas. 102, *De Silva* (*G. E.*) v. *Attorney-General* (1949) 50 C.N.L.R. 481 and *Senanayake* v. *Navaratne* [1954] A.C. 640; [1954] 3 W.L.R. 336; [1954] 2 All E.R. 805, P.C. applied.

Appeal (No. 34 of 1958), by special leave, from a judgment of the Full Court of the Supreme Court of Trinidad and Tobago (November 13, 1957) dismissing an appeal from a judgment of the Supreme Court of Trinidad and Tobago (June 11, 1957) which had dismissed an application by the appellant for an injunction to restrain the respondent from claiming to be or in any way acting as a member of the Legislative and Executive Councils of the colony and as Minister of Education and Culture.

The following facts and the terms of the relevant Orders in Council are taken from the judgment of the Judicial Committee: This appeal arose out of proceedings instituted in the Supreme Court of Trinidad and Tobago by the appellant, a mattress maker

and registered elector in that colony. On May 31, 1957, he was granted leave by the court to issue a notice of motion for an injunction restraining the respondent from claiming to be or in any way acting as (a) Minister of Education and Culture of the government of the colony, (b) a member of the Executive Council of the colony, and (c) a member of the Legislative Council of the colony. Notice was duly served on the respondent and supported by an affidavit of the appellant in which the grounds of the relief sought were stated. They were that the seat of the respondent in the Legislative Council of the colony had become vacant under the provisions of section 38 (3) (*e*) of the Trinidad and Tobago (Constitution) Order in Council, 1950, as amended by the Trinidad and Tobago (Constitution) (Amendment) Order in Council, 1956, by reason of his having become a party to a contract with the government of the colony for or on account of the public service without first having disclosed to the legislature his intention of becoming a party to the said contract and without having first obtained from the legislature exemption from the consequences of becoming a party to such a contract. The details of the contract were then set out. It is not necessary to refer to them, for the merits of the case have not to be examined. [On December 19, 1956, soon after his appointment as Minister of Education and Culture, the respondent entered into a mortgage bill of sale with the Accountant General of the colony under which the Accountant General, acting for and on behalf of the government, lent him $3,500 (about £730) on the security of an Opel Kapitan motor-car. Repayment of the loan was to be by fixed instalments over four years.] In the courts of the colony and before the Board the issue turned on questions of jurisdiction and procedure. The remaining facts that need to be stated were that the respondent was duly returned as member of the Legislative Council of the colony for the constituency of Port of Spain South and took his seat on October 26, 1956, that on the same day he was elected to be a member of the Executive Council and was subsequently charged by the Governor with the administration of the Ministry of Education and Culture and assumed that office.

The relevant provisions of the operative Order in Council are stated in the terms of the Order in Council of 1950, as amended, where amended, by the Order in Council of 1956.

Section 4 provided that there should be an Executive Council for the colony which, subject to the provisions therein mentioned, should consist of the Governor as chairman, a Chief Minister, two ex officio members and seven elected members.

Sections 6, 7 and 8 provided for the election of the Chief Minister, for the ex officio members and for the election of the elected members, and section 9 for the tenure of office of members of the Executive Council. Section 10 provided that all questions which might arise as to the right of any person to be or remain a member of the Executive Council should be referred to the

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Governor and should be determined by the Governor acting in his discretion.

Section 20 provided that the Governor acting in his discretion might by his directions in writing declare which other departments, not including the subject of finance, might be assigned to members of the Executive Council other than ex officio members and on the advice of the Chief Minister charge any members of the Executive Council other than an ex officio member, subject as therein mentioned, with the administration of any other department or subject.

Section 29 provided that there should be a Legislative Council for the colony which should consist of 31 members, namely, two ex officio members, five nominated members and 24 elected members, with a proviso in regard to the Speaker of the Council.

Section 37 provided for disqualification for nomination or election of members. The grounds of such disqualification were numerous but need not be set out, for they were substantially repeated in section 38, which provided for the tenure of office of nominated or elected members of the Legislative Council, or, in other words, for disqualification after nomination or election.

Subsection (3) of section 38 was the immediately relevant provision. It provided that the seat of a nominated or elected member of the Council should become vacant upon a number of grounds which included (a) upon his death, or (b) if, in the case of a nominated member, he should be absent from the sittings of the Legislative Council as therein mentioned, or (c) if, being a nominated member, he was nominated as a candidate in any election of a member to the Legislative Council, or, being an elected member, was appointed as a nominated member, or (d) if he should cease to be a British subject or take such oath or do such act as therein mentioned, or (e) if he should become a party to any contract with the government of the colony for or on account of the public service, with a proviso for exemption by the Governor of any nominated member and by the Legislative Council of any elected member in the circumstances therein mentioned, or (f) if he should be adjudged or otherwise declared bankrupt under any law in force in any part of Her Majesty's dominions, or (g) if he should be sentenced by a court in any part of Her Majesty's dominions to death or imprisonment (by whatever name called) for a term exceeding 12 months, or upon divers other grounds which need not be enumerated.

Section 40—the most material clause—was as follows: " (1) " All questions which may arise as to the right of any person, " (i) not being an elected member of the Legislative Council to " be or remain a member of the Legislative Council as Speaker, " or (ii) to be or remain an elected member of the Legislative " Council, shall be referred to the Supreme Court of the Colony " in accordance with the provisions of any law in force in the " Colony. (2) All questions which may arise as to the right of " any other person to be or remain a member of the Legislative

"Council shall be referred to the Governor and shall be determined by the Governor acting in his discretion."

Section 67 provided that: "(1) Any person who . . . (*b*) shall "sit or vote in the Legislative Council after his seat therein has "become vacant or he has become disqualified from sitting or "voting therein, knowing, or having reasonable grounds for knowing that . . . his seat has become vacant . . . shall be liable to a "penalty not exceeding 96 dollars for every day upon which he so "sits or votes," and (2) that "the said penalty shall be recoverable by action in the Supreme Court of the Colony at the suit of "the Attorney-General."

Upon the motion coming before Watkin-Williams J. in the Supreme Court of the colony certain objections were taken in limine for the respondent. They were (1) that the procedure adopted by the appellant was not proper, in that he had applied for an injunction upon the footing that the procedure by way of quo warranto had been abolished in the colony, and (2) that the proceedings were not maintainable because (a) the offices held by the respondent were not subject to an order by way of injunction or quo warranto and (b) the appellant had not shown any sufficient interest entitling him to take proceedings. These objections were substantially overruled by the learned judge, who nevertheless refused the motion on the ground that the question of the right of the respondent to remain an elected member of the Legislative Council could only be entertained by the Supreme Court on a reference made to it by the Legislative Council itself and that the appellant was incompetent to bring proceedings against the respondent.

The appellant appealed to the Full Court of the Supreme Court. It is noteworthy, in view of the admission made by counsel upon appeal to Her Majesty in Council, that the same relief was sought as in the original motion. No distinction was made between the respondent's position as member of the Legislative Council, member of the Executive Council and Minister of Education and Culture.

The Full Court (Mathieu-Perez C.J., Camacho and Archer JJ.) dismissed the appeal in a judgment which the Board said was clear, cogent and exhaustive. The court found it necessary to deal only with the competence of the appellant to maintain the proceedings, and, affirming the learned judge, held that section 40 of the Order in Council contemplated a reference to the Supreme Court by the Legislative Council only, and that the appellant could not maintain the proceedings.

1960. Feb. 15, 16. *D. N. Pritt Q.C.* and *S. N. Bernstein* for the appellant.

Dingle Foot Q.C. and *Ralph Millner* for the respondent.

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The following cases, in addition to those referred to in the judgment, were cited in argument: *Darley* v. *The Queen* *; *Rex* v. *Speyer*, *Rex* v. *Cassel* †; *Strickland* (*Lord*) v. *Grima* ‡; *In re Samuel* §; *In re Macmanaway* ||; *Cooray* v. *The Queen*.¶

March 21. The judgment of their Lordships was delivered by Viscount Simonds, who stated the facts and the terms of the Orders in Council set out above, and continued: It would appear to their Lordships that the words " to be " in section 40 refer to the initial nomination or election which is dealt with by section 37, and the word " remain " to the grounds of subsequent disqualification dealt with by section 38. They further note that the Order in Council of 1950 provided that all questions as to the right of any person to be or remain an elected member of the Council should be referred to *and determined by* the Supreme Court of the colony in accordance with the provisions of any laws in force in the colony, whereas in the amending Order of 1956 the italicised words have dropped out. The explanation of this is not obvious: it is possible that it was intended to emphasise that the function of the Supreme Court is advisory rather than determinative, whereas the questions which are referred to the Governor are still to be determined by him.

Upon appeal to Her Majesty in Council the appellant abandoned his claim to relief so far as it related to the respondent's membership of the Legislative and Executive Councils, maintaining it only in relation to his office of Minister. It is that issue which their Lordships are invited by the appellant to determine.

At once, upon the opening of the appeal, counsel for the respondent took the objection that no appeal lay to Her Majesty in Council from the decision of the Supreme Court of the colony in a matter affecting membership of the Legislative Council and consequently affecting also membership of the Executive Council and the office of Minister. It was open to him to do so notwithstanding that special leave to appeal had been granted.

This objection can conveniently be examined upon the footing that the appellant's claim had been maintained in its entirety. Upon this footing it appears to their Lordships that it must be sustained. Adapting the words of Lord Cairns L.C. in *Théberge* v. *Laudry*,[1] they are of opinion that, upon a fair construction of the Order in Council, it does not provide for the decision by the Supreme Court of mere ordinary civil rights, but creates an entirely new jurisdiction in a particular court of the colony for the purpose of taking out of the Legislative Council with its own consent and vesting in that court the very peculiar jurisdiction

* (1846) 12 Cl. & Fin. 520, H.L.
† [1916] 2 K.B. 858; 32 T.L.R. 686, C.A.
‡ [1930] A.C. 285.
§ [1913] A.C. 514; 29 T.L.R. 429, P.C.
|| [1951] A.C. 161; 66 T.L.R. (Pt. 2) 808, P.C.
¶ [1953] A.C. 407; [1953] 2 W.L.R. 965, P.C.
[1] (1876) 2 App.Cas. 102, 106.

which had existed in the Council itself of determining the status of those who claim to be members of the Council. If so, it follows that the determination of that court is final and that from it no appeal lies. Nor does this rest on the validity of the assumption that apart from section 40 of the Order in Council the question could be determined by the Council itself. In *De Silva* v. *Attorney-General*[2] it was made clear that the same principle applies whether or not the jurisdiction vested in the particular court had previously been exercised by the legislative body. As was said in that case[3] the dispute is one which "concerns the "rights and privileges of a legislative assembly, and, whether "that assembly assumes to decide such a dispute or it is sub-"mitted to the determination of a tribunal established for that "purpose, the subject-matter is such that the determination must "be final, demanding immediate action by the proper executive "authority and admitting no appeal to His Majesty in Council." It is therefore unnecessary to consider whether, apart from the Order in Council, the Legislative Council could itself have determined such a dispute. It is sufficient that the dispute is of such a character that the decision of the court to which it is referred must be final. To this effect also is the decision of this Board in *Senanayake* v. *Navaratne*.[4]

If, as their Lordships hold, an appeal would not lie from a determination of the Supreme Court upon a reference under section 40 of the Order in Council, equally it cannot lie from a determination of that court upon the same subject-matter otherwise than upon such a reference. Their Lordships do not entertain any doubt upon the correctness of the decision of the Supreme Court that the appellant could not competently maintain the proceedings in any form. They only add that, if he could, no appeal would lie. They find it unnecessary to add any observations upon the somwhat cryptic words in section 40 of the Order, "in accordance with the provisions of any law in force in the "Colony." They cannot afford any assistance to the appellant.

But, as has already been said, counsel for the appellant, faced by a difficulty which he might well regard as insuperable, abandoned his claim for relief in regard to the respondent's membership of the Legislative and Executive Councils. But, while thus admitting that so far as these proceedings were concerned he could not claim that the respondent had ceased to be such a member, he nevertheless insisted that he was entitled to an injunction restraining him from acting as Minister of Education and Culture. This claim is clearly not tenable. The respondent is, until the contrary is competently determined, a member of the Legislative Council. He is, until the Governor otherwise determines under section 10 of the Order in Council, a member also of

[2] (1949) 50 C.N.L.R. 481.
[3] Ibid. 483.
[4] [1954] A.C. 640; [1954] 3 W.L.R. 336; [1954] 2 All E.R. 805, P.C.

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the Executive Council. It is only if he "ceases to be" such a member that he can no longer hold the office of Minister to which he has been appointed. The appellant cannot, by omitting a necessary link in the chain of his argument and assuming that to be proved which he cannot even try to prove, arrive at the conclusion at which he aims. But that is what he invited their Lordships to do. The disqualifying event, he urged, was an event susceptible of proof like any other event and, being proved, led automatically to disqualification, and disqualification led in its turn to incompetence to hold office. And (so their Lordships understood the argument to proceed), so long as the object of the proceedings was not disqualification but its sequel, section 40 had no application. The argument was enforced by illustrations from other proceedings in which it might be necessary to prove that a particular person was or was not at a given time a member of the Legislative Council, e.g., in order that he might qualify as a beneficiary under a will or settlement. Their Lordships cannot accept this argument. Whether the purpose of the proceedings is directly to challenge the right of a person to be a member of the Legislative Council or to challenge his right only for some ulterior purpose, he is confronted by section 40 and, if there is in fact a question to be determined, he is arrested in his argument until the Supreme Court upon a proper reference has determined it, or, perhaps it should be better said, has advised upon it. No doubt in most cases, as, for example, if the event disqualifying the person concerned is his death, such a reference would be regarded as unnecessary, and in other cases it could be merely formal. But where, as here, the proceedings are controversial, there is no escape from the explicit terms of section 40. Unless and until the fact of disqualification has been established in the only manner permissible, it is not possible to argue its consequences.

Their Lordships therefore reach these conclusions: (1) that the Supreme Court was right in deciding that the appellant could not maintain his action in the form in which it was presented to it, (2) that he cannot escape from the consequences of that decision by dropping his claim so far as it relates to membership of the Legislative and Executive Councils, and (3) that, if upon a proper reference the Supreme Court had come to a determination, whatever form it might take, no appeal would lie to Her Majesty in Council. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

C. C.

[COURT OF APPEAL.]

BLOOMFIELD v. BRITISH TRANSPORT COMMISSION.

C. A.

1960
March 18.

Sellers, Ormerod and Upjohn L.JJ.

Legal Aid—Costs—Means of aided person—Whether damages awarded to him to be taken into consideration—Payment into court of sum greater than that awarded—Plaintiff legally aided, nil contribution —Legal Aid and Advice Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*e*), 4 (3).

Where the court is asked to exercise its discretion as to costs in favour of a successful party and to make an order for costs against a legally aided person, the court may take into account a sum recovered as damages by the person in receipt of legal aid in the proceedings, for such a sum is one of "all the circumstances" to which the court is enjoined by section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949,[1] to have regard when considering what is reasonable for a legally assisted litigant to pay in costs.

Dictum of McNair J. in *Nolan* v. *C. & C. Marshall Ltd.* [1954] 2 Q.B. 42, 44–45; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389; [1954] 2 Q.B. 42; [1954] 2 W.L.R. 285; [1954] 1 All E.R. 328, C.A. approved.

APPEAL from Pilcher J.

A railway worker, then aged 21, was injured at work and claimed damages against his employers, the British Transport Commission, for the loss of his right eye. After the trial had begun the employers admitted liability, and the trial proceeded on the issue as to quantum of damages only. The trial judge (Pilcher J.) awarded the plaintiff £1,500. The plaintiff was not satisfied with that amount, and appealed. It was contended on his behalf that the conventional figure established in recent years from which any tribunal should start when considering an award of damages for the loss of an eye was about £2,000. The Court of Appeal dismissed the appeal, rejecting the submission that an appeal could be based on any so-called conventional figure.

The plaintiff had been in receipt of legal aid both on his trial and on his appeal, his contribution being assessed at "Nil." The Commission asked that they might be awarded the costs of the appeal.

Marven Everett Q.C. and *H. Tudor Evans* for the Commission. The court considering what costs should be awarded against a legally assisted litigant is required by section 2 (2) (*e*) of the Legal Aid and Advice Act, 1949,[1] to take into consideration that "his

[1] Legal Aid and Advice Act, 1949, s. 2: "(2) Where a person receives "legal aid in connection with any "proceedings— . . . (*e*) his liability "by virtue of an order for costs made "against him with respect to the pro- "ceedings shall not exceed the amount "(if any) which is a reasonable one "for him to pay having regard to "all the circumstances, including the "means of all the parties and their "conduct in connection with the "dispute."

S. 4: "(3) The regulations shall "include provision for securing that "the resources of a person seeking or "receiving legal aid shall be treated "as not including the subject matter "of the dispute."

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"liability . . . shall not exceed the amount (if any) which is a "reasonable one for him to pay having regard to . . . the means "of all the parties . . ." "Means" includes any damages which he may have recovered. This plaintiff has recovered £1,500 damages and that is a capital asset in his possession which should be available to satisfy the successful defendants' costs on the appeal. Nothing in the Act of 1949 makes an award of damages to a legally assisted person untouchable where costs are involved. In *Nolan* v. *C. & C. Marshall Ltd.*,[2] where there had been a payment into court which exceeded the amount of damages awarded, McNair J. took the view that the costs could be deducted from the award of damages, although the plaintiff was legally assisted. An appeal on quantum in that case was allowed,[3] so that the judge's view became obiter; but in *Graham* v. *C. E. Heinke & Co. Ltd.*[4] Donovan J. followed that dictum obiter.

If the power of the court on this matter is discretionary, any discretion which the court has does not override the principle that a successful party should recover his costs.

Patrick O'Connor for the plaintiff. The legal aid committee when granting a legal aid certificate to this plaintiff for the purpose of appeal excluded the award of £1,500 in considering his means.

[Upjohn L.J. They treated section 4 (3) of the Act of 1949 as applying to an appeal?]

[Sellers L.J. Section 4 (3) is hardly appropriate where the plaintiff cannot fail to obtain less than £1,500.]

The court has a complete discretion as to costs and can do what it thinks right. Both the cases cited (supra) are distinguishable from the present as cases where there had been payments into court; and the plaintiffs who chose not to take the money out could be said to have been guilty of misconduct.

[Ormerod L.J. But the basis of the decisions in those cases was that an award of damages is a capital asset?]

It is entirely a matter for the discretion of the court.

Sellers L.J. This court approves of what was said by McNair J. in *Nolan* v. *C. & C. Marshall Ltd.*,[1] accepted as it was in that case on appeal, and particularly by Birkett L.J.[2] I think the matter is open to consideration by this court. I can see

[2] [1954] 2 Q.B. 42; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389.

[3] [1954] 2 Q.B. 42; [1954] 2 W.L.R. 285; [1954] 1 All E.R. 328, C.A.

[4] [1958] 1 Q.B. 432; [1958] 2 W.L.R. 224; [1958] 1 All E.R. 365.

[1] [1954] 2 Q.B. 42; [1953] 3 W.L.R. 257; [1953] 2 All E.R. 389.

[2] [1954] 2 Q.B. 45, 46. Birkett L.J. said: "But in considering costs "under section 2 (2) (*e*), where the "words are 'shall not exceed the "'amount . . . which is a reasonable "'one for him to pay having regard "'to all the circumstances, including "'the means of all the parties . . .' "I think that if a man has recovered "£500 or £1,000 or £10,000, whatever "it might be, that is certainly one of "the circumstances of the case. It "is certainly a matter of which the "statute enjoins one to take account, "and I think that it ought to be "brought into account."

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no ground for depriving the defendants, the respondents to this appeal, of their costs, or any good ground why the full costs should not be awarded. But they will have to come out of the damages which the plaintiff has been awarded, and it is desirable that the damages should not be reduced more than necessary. This court, applying the best consideration it can to the matter, will itself assess the amount of costs as not exceeding the sum of £75. That will avoid a taxation and further expense and, I hope, do justice between the parties.

ORMEROD and UPJOHN L.JJ. concurred.

Order for costs not exceeding £75 accordingly.

Solicitors: *M. H. B. Gilmour; Moodie, Randall, Carr & Miles for Bankes, Ashton & Co., Bury St. Edmunds.*

M. M. H.

[COURT OF APPEAL.]

JONES *v.* CHALLENGER.

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Jan. 28, 29; *March* 14.
Ormerod and Devlin L.JJ., Donovan J.

Trust for Sale—Power to postpone—Matrimonial home—Husband and wife joint tenants—Divorce—Wife's application for order directing sale—Court's discretion—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 30.

Husband and Wife—Property—Matrimonial home—Divorce—Husband and wife joint tenants—Wife's right to enforce trust for sale—Law of Property Act, 1925, *s.* 30.

In 1956, a husband and wife purchased a lease, with about 10 years to run, of a house which they then occupied as the matrimonial home, the purchase-money being provided by the parties equally. The lease was assigned to them as trustees to sell the same with power to postpone the sale upon trust for themselves as joint tenants. In February, 1959, the husband obtained a divorce from the wife on the ground of her adultery. After the decree the wife, who had left the house, remarried, while the husband continued to live there and refused to agree to the sale of the lease. The wife then applied to the county court for an order under section 30 of the Law of Property, 1925,[1] that as co-trustee with her the husband should concur in offering the house for sale. The county court judge held that in exercising his discretion under section 30, it would not be reasonable to order a sale so as to turn the husband out of his house. On appeal:—

Held (*per* Ormerod and Devlin L.JJ.), (1) that when property was required by husband and wife jointly for the purpose of

[1] Law of Property Act, 1925, s. 30: "If the trustees for sale refuse "to sell . . . any person interested "may apply to the court . . . for an "order directing the trustees for sale "to give effect thereto, and the court "may make such order as it thinks "fit."

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providing a matrimonial home, neither party had a right to demand the sale of the property while that purpose still existed, for that might defeat the object behind the trust; but with the end of the marriage that purpose was dissolved and the duty to sell was restored; it was then for the court to look at all the circumstances and consider, not whether it was reasonable for the husband to continue to live in the house, or for the wife to receive her share of the trust property in cash, but whether it was inequitable for the wife, once the matrimonial home had gone, to want to realise her investment (post, p. 701).

(2) That there was no way in which the court's discretion could be exercised except by an order to sell because the conversion of the property into a form in which both parties could enjoy their rights equally was the prime object of the trust (post, p. 700).

In re Mayo [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440; *In re Buchanan-Wollaston's Conveyance* [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302; *In re Hyde's Conveyance* (1952) 102 L.J. 58; *Stevens* v. *Hutchinson* [1953] Ch. 299; [1953] 2 W.L.R. 545; [1953] 1 All E.R. 699; *Bull* v. *Bull* [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253, C.A. applied.

Cobb v. *Cobb* [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696 distinguished.

Per Donovan J. The language of section 30 conferred a complete discretion on the court, and the county court judge did not commit any error of law which vitiated the manner in which he exercised his discretion; but justice required that, if the husband wished to continue to live in the house, the wife should be paid the value of her interest therein, whereupon she should cede her share of the joint tenancy to him (post, p. 704).

Appeal from Judge Temple Morris sitting at Bargoed County Court.

The applicant, Mrs. Margaret Jane Jones, and the respondent, Leonard Godfrey Challenger, were formerly husband and wife and, on March 7, 1956, while they were still married, they purchased for £375 the lease of No. 10, Bailey Street, Deri, Bargoed, Glamorgan. At the time of the purchase, the lease had about 10 years to run. The assignment of the lease was granted to the purchasers as trustees to sell the same with power to postpone the sale thereof upon trust for themselves as joint tenants. The money which went to buy the lease was provided by the parties equally and they were, accordingly, beneficiaries in equal shares.

Shortly after the purchase of the lease, the marriage broke up and in 1957 the husband filed a petition for divorce on the ground of the wife's adultery and cruelty. A decree nisi was given to the husband on the ground of the wife's adultery, and on February 9, 1959, the decree was made absolute. In March, 1959, the wife, who had left No. 10, Bailey Street, remarried. She did not want to live in No. 10, Bailey Street, but wanted her share of its value in cash. The husband did not want to sell. He had throughout continued to live in the premises and wished to continue to do so. He regarded it as his house and did not wish to go into lodgings. There was some prospect that he might marry again but it was quite indefinite, the woman in question being married and no proceedings having been instituted.

On May 13, 1959, the wife applied in the Bargoed County Court for an order under section 30 of the Law of Property Act, 1925, that the husband as co-trustee with her of the premises should concur with her in offering the property for sale, or alternatively, that the property should be sold by order of the court. On August 5, 1959, her application was dismissed. The wife appealed.

Hywel ap Robert for the wife.
Phillip Wien for the husband.

The following case was cited in argument, in addition to those referred to in the judgments: *In re Ball.*[2]

Cur. adv. vult.

March 14. ORMEROD L.J. I have had an opportunity of reading the judgment about to be delivered by Devlin L.J. in this case. I am in full agreement with it, and there is nothing I can usefully add.

DEVLIN L.J. read the following judgment, in which he stated the facts, referred to section 30 of the Law of Property Act, 1925, and continued: The county court judge reviewed the cases in which this section has been considered, and came to the conclusion that he had a complete discretion to do what was reasonable in the circumstances. He said: "I think it would "not be reasonable to order a sale at this moment; the effect "would probably be to put the respondent out. He is there alone, "he has nowhere to go. He is in his own home. His half-share "is in it. The applicant's half-share is quite safe in it. All the "circumstances must be examined; the applicant has chosen her "new life, and is living in her new home with her husband. It "may well be in the future, possibly the very near future, the "situation will change, but at this moment I think this applica-"tion is premature. Today, I think the attitude of the respondent "is reasonable."

I do not think that on any view the application can properly be described as premature. The marriage broke up three years ago, and applications to divide up the property of a husband and wife are frequently made under the Married Women's Property Act, 1882, s. 17, while the marriage is still alive. This marriage is irretrievably finished, and the application was not made until two months after the decree absolute had been pronounced. I think that the wife is entitled to know where she stands. Apart from the uncertain prospect of the husband's remarriage, there is no likelihood that the circumstances will change. If circumstances do not change, the effect of the judge's order must be that the husband can continue to use the house as his home for so

[2] [1930] W.N. 111.

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long as he wants or until the lease expires. The value of the leasehold must be diminishing, and, if the lease runs its course, the wife may lose all the money she put into it.

There does not appear to be any case in which an order under section 30 has been made where the trust property consists of what was formerly the matrimonial home. The county court judge had no clear authority to guide him in arriving at his decision, and neither have we. After careful consideration of the authorities and some hesitation, I have come to the conclusion that the judge applied the wrong test, and that the question is not whether it is reasonable or unreasonable that the husband should be allowed to remain in the house.

At the front of his argument on behalf of the wife Mr. ap Robert put *In re Mayo*.[1] In this case Simonds J. said[2]: "The "trust for sale will prevail, unless all three trustees agree in "exercising the power to postpone." If that dictum governs this case, Mr. ap Robert must succeed. But he felt a difficulty in pushing his argument to this extent because of what was said by Lord Greene M.R. in *In re Buchanan-Wollaston's Conveyance*,[3] where he laid down the principle more widely, and said[4] that the court must ask itself "whether or not the person applying "for execution of the trust for sale is a person whose voice should "be allowed to prevail."

The apparent difference between these two dicta is, I think, explained when the different facts in the two cases are considered. *In re Mayo*[5] was a simple uncomplicated case of a trust for sale of freehold property, where the beneficiaries were brother and sister, and where there was no suggestion that either of them were intended to or even wished to occupy the property. Simonds J. was applying the simple and fundamental principle that in a trust for sale there is a duty to sell and a power to postpone; and, accordingly, one trustee may call upon the others to perform the duty, but all must be agreed if they are to exercise the power.

But this simple principle cannot prevail where the trust itself or the circumstances in which it was made show that there was a secondary or collateral object besides that of sale. Simonds J., in his judgment in *In re Mayo*,[6] said that if there were mala fides, the position would be different. If it be not mala fides, it is at any rate wrong and inequitable for one of the parties to the trust to invoke the letter of the trust in order to defeat one of its purposes, whether that purpose be written or unwritten, and the court will not permit it. In *In re Buchanan-Wollaston's Conveyance*[7] four owners, who each had separate but neighbouring properties, combined to buy a piece of land which they desired to keep as an open space. The land was conveyed to them as

[1] [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440.
[2] [1943] Ch. 302, 304.
[3] [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302.
[4] [1939] Ch. 738, 747.
[5] [1943] Ch. 302.
[6] Ibid.
[7] [1939] Ch. 738.

joint tenants and consequently a statutory trust for sale came into existence by virtue of section 35 of the Law of Property Act, 1925. The parties then entered into a covenant in which they agreed in effect to preserve the land as an open space. One of the parties subsequently sold his property and then applied against the opposition of the others to have the piece of land sold. The application was refused and it is plain from the judgment that in such circumstances the court has a complete discretion to do what is right and proper, and will not allow the voice of the man who is in breach of his obligation to prevail.

Three other cases were cited as supporting this wider principle. In *In re Hyde's Conveyance* [8] two brothers jointly purchased property for occupation by a company in which they were both interested, and for the erection of a factory thereon. Subsequently they quarrelled and one brother applied for an order under section 30 for the sale of the property. The company was still a going concern and the applicant had abandoned a petition for its winding up; he had also refused an offer from the other brother based on the full market value of the property as settled by an independent valuer. The application was refused. Danckwerts J. appears to have been satisfied that the applicant was acting out of spite, and said that he was endeavouring to use the trust for sale to defeat the purpose for which the land had been acquired.

In *Stevens* v. *Hutchinson* [9] a husband and wife held property, which was in fact the matrimonial home, on trust for sale as tenants in common in equal shares. A judgment creditor of the husband applied for an order under section 30, which was refused by Upjohn J. on the ground that the creditor was not a person interested. But the judge went on to say that the creditor could, in any event, have no better right than the husband, and that the husband could not have obtained an order which would have turned the wife out of the matrimonial home. This means, as Mr. Wien rightly submits, that the judge would clearly have exercised a discretion in favour of postponing the sale. The case shows, I think, that where property is acquired by husband and wife for the purpose of providing a matrimonial home, neither party has a right to demand the sale while that purpose still exists; that might defeat the object behind the trust, and the court must do what is right and proper in all the circumstances. The case is no authority for the view that the same wide discretion exists when the house is no longer the matrimonial home and the purpose has failed.

Bull v. *Bull* [10] is a case in which the joint occupation was not matrimonial. The house was owned jointly by a mother and son but the son had provided the greater part of the purchase price. The son gave his mother notice to quit, but this court held that

[8] (1952) 102 L.J. 58.
[9] [1953] Ch. 299; [1953] 2 W.L.R. 545; [1953] 1 All E.R. 699.
[10] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.

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as a tenant in common she could not be ejected. Denning L.J. said that the son could apply under section 30, and the court, in order that there might be a sale with vacant possession, could turn the mother out if it was right and proper to do so. I think that this dictum must be considered on the footing that the house was bought for the purpose of providing a home for mother and son and that, as the mother was still residing there, that purpose had not been brought to an end.

In each of these four cases, *In re Buchanan-Wollaston's Conveyance*,[11] *In re Hyde's Conveyance*,[12] *Stevens* v. *Hutchinson*[13] and *Bull* v. *Bull*,[14] there was a trust for sale because there was a joint tenancy, and the joint tenancy had been created for a particular purpose. In the first case this purpose was expressed, and in the other three cases the object of the joint tenancy was clear from the circumstances in which it was created. I see no inconsistency between these four cases and *In re Mayo*,[15] in which no collateral purpose was manifest. There is, as I have said, something akin to mala fides if one trustee tries to defeat a collateral object in the trust by arbitrarily insisting on the duty of sale. He should have good grounds for doing so and, therefore, the court will inquire whether, in all the circumstances, it is right and proper to order the sale.

In the case we have to consider, the house was acquired as the matrimonial home. That was the purpose of the joint tenancy and, for so long as that purpose was still alive, I think that the right test to be applied would be that in *In re Buchanan-Wollaston's Conveyance*.[16] But with the end of the marriage, that purpose was dissolved and the primacy of the duty to sell was restored. No doubt there is still a discretion. If the husband wanted time to obtain alternative accommodation, the sale could be postponed for that purpose, but he has not asked for that. If he was prepared to buy out the wife's interest, it might be proper to allow it, but he has not accepted a suggestion that terms of that sort should be made. In these circumstances, there is no way in which the discretion can properly be exercised except by an order to sell, because, since they cannot now both enjoy occupation of the property, that is the only way whereby the beneficiaries can derive equal benefit from their investment, which is the primary object of the trust.

It is said that it is hard on the husband that he should have to give up the house which it was his wife's choice and not his to abandon. So it is. But wherever there is a joint occupation, whether it is matrimonial or otherwise, and it is brought to an end, it may involve hardship and inconvenience on the person who would have preferred it to go on. If the wife had died and left her share under the trust to a stranger, I think that the house would obviously have had to be sold. The position is the same

[11] [1939] Ch. 738.
[12] (1952) 102 L.J. 58.
[13] [1953] Ch. 299.
[14] [1955] 1 Q.B. 234.
[15] [1943] Ch. 302.
[16] [1939] Ch. 738.

if the marriage is ended by divorce, for the court is not under section 30 concerned with the reasons for the ending of the marriage or the rights and wrongs of it; it can only take note that the object of the trust, so far as it required the preservation of the realty, has been fulfilled.

I think that the result must be the same whether the test to be applied is derived from the language used in *In re Mayo* [17] or from that used in *In re Buchanan-Wollaston's Conveyance*.[18] Let it be granted that the court must look into all the circumstances; if when the examination is complete, it finds that there is no inequity in selling the property, then it must be sold. The test is not what is reasonable. It is reasonable for the husband to want to go on living in the house, and reasonable for the wife to want her share of the trust property in cash. The true question is whether it is inequitable for the wife, once the matrimonial home has gone, to want to realise her investment. Nothing said in the cases which I have cited can be used to suggest that it is, and, in my judgment, it clearly is not. The conversion of the property into a form in which both parties can enjoy their rights equally is the prime object of the trust; the preservation of the house as a home for one of them singly is not an object at all. If the true object of the trust is made paramount, as it should be, there is only one order that can be made.

It is, I think, desirable to distinguish the position that may arise when an application is made under the Married Women's Property Act, 1882, s. 17, because we were referred to *Cobb* v. *Cobb*,[19] a case decided under that Act. It was a case in which a husband and wife owned a house in equal shares. Matrimonial proceedings were begun but both parties continued to live in the house. The husband applied under section 17 for an order for the sale of the house, which this court refused. The house was still the matrimonial home and the court had a complete discretion. The judgment of Denning L.J.[20] shows that the question of sale can be dealt with somewhat differently in applications under that section, the marriage being still alive. If the court thinks it proper to give one party or the other the right to reside in the house after the marriage is over, it is not then necessarily interfering with the equal division of property held in equal shares. If there is other property to be divided, an overall equality may be reached; or if there is not, the necessary adjustment may be made on the settlement of alimony or maintenance. So long as in the end the division is in the correct proportion, each party gets his or her rights, and the question of whether one party shall have the enjoyment of one particular piece of property, such as the house, can properly be decided simply by what seems best to the court and most reasonable. But this can only be done as part of matrimonial proceedings. The order made in this case

[17] [1943] Ch. 302.
[18] [1939] Ch. 738.
[19] [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696.
[20] [1955] 1 W.L.R. 734.

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is tantamount to requiring the wife to contribute towards the upkeep of the husband's home, and it is too late for that now.

For these reasons, I think that the appeal should be allowed, and that an order should be made in the terms set out in the application.

Donovan J. (read by Ormerod L.J.). I need not repeat the history of the case leading up to the application to the county court judge for an order under section 30 of the Law of Property Act, 1925, that the trust for sale should be enforced. That trust was contained in the assignment of the lease to the wife and the husband, and was expressed as follows: "The purchasers "[i.e., the wife and husband] shall hold the property upon trust "to sell the same with power to postpone the sale thereof, and "shall hold the net proceeds of sale and other money applicable "as capital, and the net rents and profits thereof until sale upon "trust for themselves as joint tenants."

The language of section 30 could hardly be more apt to confer a complete discretion on the court which considers an application under the section. The court is, inter alia, to make "such order "as it thinks fit." The discretion must, of course, be exercised judicially, and the principles which govern its exercise are those set forth in this court in *In re Buchanan-Wollaston's Conveyance*.[21] Lord Greene M.R. there said[22]: "It seems to me that "the court of equity, when asked to enforce the trust for sale, "whether one created by a settlement or a will or one created by "the statute, must look into all the circumstances of the case "and consider whether or not, at the particular moment and in "the particular circumstances when the application is made to it, "it is right and proper that such an order shall be made."

This is what the county court judge did in the present case. Accordingly, if his conclusion is to be reversed or varied, it must be shown that he misdirected himself in law, or misunderstood or ignored some important relevant fact, or omitted to deal with the application in its entirety.

Counsel for the wife quoted one phrase used by the judge in support of a contention that he misdirected himself upon a crucial matter. He said, among other things: "The applicant's half-"share is quite safe." In its context that seems to me to mean no more than this, namely, that the husband could not alienate the wife's share of the joint tenancy without her knowledge or consent; and as a proposition of law that is correct. The phrase cannot mean (as the wife contended) that the judge had forgotten that the joint tenancy was of a wasting asset, because only a moment or two before he had said so in his judgment.

Nor do I think that the judge made the reasonableness of the husband's attitude the touchstone of his decision not to order a sale. He had to consider all the circumstances and the

[21] [1939] Ch. 738. [22] Ibid. 747.

reasonableness of the attitude of both parties were among the circumstances to be taken into account. The judge did say: "I "think it would not be reasonable to order a sale at this "moment," and he says this immediately after referring to *In re Buchanan-Wollaston's Conveyance*,[23] where he says: "a sale "was not ordered because it would have been unreasonable." The expression actually used in the case cited was "right and "proper": but the judge was here clearly using the word "reasonable" merely as a synonym for "right and proper," because he also says in his judgment: "I can only make an order "for sale if satisfied that it is, and these are the important words, "'right and proper to do so.'"

It seems to me, therefore, that the judge did address his mind to the right question.

The reference to the application being premature was no more than another way of saying that at the moment the judge thought it would not be right and proper to order a sale, leaving the way open for a renewed application should the circumstances of either party change. This seems to be a reference to the husband's contemplated remarriage, and if another woman were let into the enjoyment of the wife's property rights this might well be regarded as a circumstance calling for a different decision. But whether it would or would not, cannot alter the existing circumstances, and it was upon those that the judge reached his decision. They included the following: The wife had another house of her own where she was living with her new husband; the husband was still living in the disputed house which he had originally bought jointly with the wife as a home, which purpose, so far as he was concerned, was continuing. It was true that the wife was obtaining no benefit from the house, but the benefit she had originally contemplated, namely, the right to live in the house, was one which she herself had voluntarily abandoned.

The question now before the court on this part of the case is not whether it would have reached the same conclusion itself; but whether the county court judge committed some error of law which vitiates the manner in which he exercised his discretion. In my view there is no evidence of any such error. The fact which looms so large in this case, namely, that the property is a wasting asset, is, of course, of great importance; but unless there is to be a rule that in all such cases a sale must be ordered, it remains a matter of discretion.

We were, however, told at the Bar that as an alternative it was argued before the judge that if he refused to order the sale of the house, at least he ought to put the husband upon terms as a condition of his continuing to occupy it.

In his judgment the county court judge does not deal with this claim at all, and does not purport to exercise any discretion whatever in respect of it. This court must, therefore, do so.

[23] [1939] Ch. 738.

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It is clear that the wife does not want the house to be sold merely for the sake of a sale; nor so far as the evidence discloses does she want to turn the husband out of the house for the mere sake of doing so. She made her wish quite plain during the course of her evidence when she said: "Give me my half and he can do what he likes with the rest."

In the circumstances, the question is whether a proper exercise of discretion under section 30 requires that the wife should be paid something now by the husband in respect of her half-share. The facts that bear upon this problem are, first, that the wife provided half the money for the purchase of the house; secondly, that it is a wasting asset getting less in value year by year and, perhaps, even month by month; and, thirdly, that even if the wife broke up the marriage, it is no reason by itself for depriving her altogether of her property rights, whether temporarily or otherwise.

I think that justice requires that the wife should be paid the value of her interest in the property if the husband wishes to continue to live there, and that the wife should thereupon cede her share of the joint tenancy to the husband. To this end I think the house should be independently valued as at the date when the wife lodged her application under section 30 in the county court, and that the husband should pay the wife the amount of the value so found. If, of course, the parties can agree the value in default of a valuation, so much the better. We have not seen the head lease, and it may be that there is liability for dilapidations under it when the lease runs out. It would, no doubt, be proper to take account in the valuation of the wife's share of the liability for such dilapidation up to the date when she left the house and went to live elsewhere.

The result of disposing of the matter in this way will be to give the parties what they really want: the wife the money value of her interest; and the husband, the right to continue to live in the house without all the disturbance and hazards of a forced sale.

I would therefore allow the appeal to the extent necessary to make such an order.

Appeal allowed in terms of judgment of Devlin L.J., with costs in Court of Appeal and below.

Solicitors: *Parlett, Kent & Co. for Norman Morgan & Davies, Cardiff; W. H. Williams, Caerphilly.*

[PRIVY COUNCIL.]

CLIFFORD W. L. CALLWOOD . . . APPELLANT;

AND

ELSE E. CALLWOOD . . . . . RESPONDENT.

J. C.† 1960 *Mar.* 21.

ON APPEAL FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES.

Conflict of Laws — Immovable property — Devolution — Will — Danish community of property law — Whether applicable by Danish law extraterritorially to immovable property—Whether Danish law or lex situs to be applied by English law.

Evidence—Foreign law—Onus of proof—Affidavit agreeing with United States court on point not in issue.

The question whether the system of community of property between spouses in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned.

In re De Nicols, De Nicols v. *Curlier (No. 2)* [1900] 2 Ch. 410; 16 T.L.R. 461, H.L. and *Chiwell* v. *Carlyon* (1897) 14 S.C.(A.S.) 61 considered.

The testator at the date of his marriage to the respondent in 1905, and thereafter down to his death in 1917, was domiciled in the Danish Island of St. Thomas in the Virgin Islands where (after cession of the Danish Virgin Islands to the United States of America in 1917) Danish law remained in force until 1921. The marriage had the effect under Danish law of subjecting the property of either spouse to the Danish system of community of property between spouses, and by a joint will of the testator and the respondent the latter was, inter alia, given the right, if she survived the testator, of retaining their joint estate undivided with their children. There was vested in the testator at the time of his death Great Thatch Island in the British Virgin Islands, and the appellant, the only son of the testator and the respondent, was in 1948 granted a lease of that island by a man purporting to act as agent for the respondent. Although the lease was admittedly invalid as not having been executed in compliance with the formalities required by law, the appellant remained in possession.

The respondent thereupon began this action claiming a declaration that by virtue of the joint will the island was her property. The appellant pleaded that the will was ineffective so far as it related to real property in the British Virgin Islands, that the testator died intestate as regards Great Thatch Island, which devolved on the appellant as his heir-at-law. The only evidence of Danish community of property law, which was given by affidavit by an attorney practising in the Island of St. Thomas, was to the effect that the law as stated in the opinion of a court in the United States of America on a question between the same parties was "the law on "this question" (*Callwood* v. *Kean* (1951) 189 F. 2d 565):—

Held, that that mode of providing evidence of foreign law was to be strongly deprecated. The discussion of the Danish law of

† *Present*: LORD TUCKER, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST.

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community in *Callwood* v. *Kean* (supra) was not concerned with the question in the present case, namely, whether in the eye of Danish law the property of spouses to which the rules of community attached included immovable property not situated in Danish territory but in that of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community.

The onus of proving that the Danish law had that extra-territorial effect was on the respondent, and there was nothing in the judgment in *Callwood* v. *Kean* (supra) which could be regarded as evidence that the Danish system of community in force in the Island of St. Thomas applied in the eye of Danish law to land situate in foreign territory. The respondent had, accordingly, failed to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law (post, p. 716).

Quaere, whether, had the respondent proved that, it would have been proper in the circumstances of this case to resolve the conflict between English and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e., English law) in accordance with the general rule (post, p. 718).

Judgment of the Federal Supreme Court of the West Indies reversed.

Appeal (No. 16 of 1959), by special leave, from a judgment of the Federal Supreme Court of the West Indies (Appellate Jurisdiction) (Hallinan C.J., Rennie and Archer JJ.) (July 22, 1958), dismissing, save as to the quantum of damages, an appeal from a judgment of the Supreme Court of the Windward Islands and Leeward Islands (Lewis J.) (June 14, 1957).

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of a dispute concerning the ownership of Great Thatch Island in the British Virgin Islands. The rival claimants were the plaintiff (now respondent) Else E. Callwood, the widow of Richard Edward Clifford Callwood (hereinafter called the testator), and the defendant (now appellant) Clifford W. L. Callwood, the only son of the plaintiff and the testator. The testator was born in 1862 in Tortola, one of the British Virgin Islands, and was accordingly a British subject by birth. He retained his British nationality all his life, but at the age of 14 he went to live in the Island of St. Thomas in the Virgin Islands, which was then a Danish colony under Danish law, and lived there until 1913, when he went to live in Germany, where he remained until his death in 1917. He married the plaintiff in London in 1905, and it was common ground that at the time of his marriage and thereafter down to his death he was domiciled in St. Thomas.

Great Thatch Island had formerly belonged to the testator's father, on whose death intestate in 1902 it devolved upon the testator as his heir-at-law under the English law of inheritance then in force with respect to freehold land. At the time of the testator's death Great Thatch Island was still (to use a neutral expression) vested in him.

There were two children of the testator's marriage to the plaintiff, namely, a daughter Waldfriede, who was born in 1906

and died in 1939, and the defendant, who was born in 1908, and who as the only son of the testator became on the testator's death entitled as his heir-at-law to any freehold property devolving on the intestacy of the testator under the English law of inheritance then in force.

No settlement of the property of either spouse was made on their marriage, and in view of this and of the testator's domicile in the Island of St. Thomas it was common ground that (it might be with exceptions not relied on before the Board as material in the present case) the marriage had the effect under Danish law of subjecting to the Danish system of community of property between spouses (which appeared to have been wholly or partially codified by a Danish Royal Ordinance of May 21, 1845) all movable property wherever situate, and all immovable property situate in St. Thomas, belonging to either spouse at the time of the marriage or subsequently acquired during, or in certain circumstances after the termination of, the marriage.

It was also common ground that, with the important qualifications mentioned below, the application of the Danish system of community in any given case had the effect of making the joint property divisible on the death of either spouse between the surviving spouse and the children of the marriage. But this general proposition was qualified under the Ordinance of 1845 (a) by the reservation to the husband, should he be the survivor, of the right to retain the whole of the joint property undivided until his death or remarriage, with power to dispose (within certain limits) of capital as well as income, thereby postponing and (to the extent of any legitimate expenditure of capital) defeating the interests of the children; and (b) by the reservation to the husband of a power to confer by will on the wife if she survived him the same right to retain the whole joint property undivided until her death or remarriage.

By way of assertion and exercise of the right and testamentary power so reserved to the testator by the Ordinance of 1845 he and the plaintiff on April 25, 1911, made a joint will which provided (inter alia) as follows:

"Paragraph 1

"I, Richard Edgar Clifford Callwood, reserve the right "accruing to me as husband in accordance with Royal Ordinance "of 21st May, 1845, Paragraph 18, Section 1, say to retain, if I "am the survivor, our whole joint estate undivided with our joint "children, as long as I do not marry again.

"Paragraph 2

"I, Richard Edgar Clifford Callwood, do hereby give and grant "to my said wife, Mrs. Else E. Callwood, if she is the survivor, "the same right as mentioned sub Paragraph 1 of retaining our "joint estate undivided with our joint children as long as she "does not marry again.

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"As however both of us consider it to be the benefit and "welfare of all concerned, that the said right of retaining our joint "estate undivided should be given me, Mrs. Else E. Callwood, "under certain restrictions, I Richard Edgar Clifford Callwood "and I, Mrs. Else E. Callwood do hereby decide, that the said "right is given with the following restrictions.

"It shall be obligatory for me, Mrs. Else E. Callwood, imme- "diately at the death of my husband to deposit all cash money, "bonds, shares and securities, belonging to the joint-estate and "only to draw the interest of same. In case of unforeseen events, "which will make it necessary to withdraw the money or to make "a change of the securities, this can only be done with the con- "sent of Mr. Jakob Peiffer, living at Biebrich of Rhein, or in the "case of his death with the consent of Mr. Otto Zwanziger of "Biebrich of Rhein or the person to whom the surviving of these "gentlemen may transfer the said authority. . . ."

Paragraph 2 went on to require the plaintiff to pay or provide for certain annuities as therein mentioned and concluded as follows: "Finally, if Mrs. Else E. Callwood's retaining of our "joint estate should cease only $\frac{1}{3}$ say one third part of our "whole joint estate should accrue to me, Mrs. Else E. Callwood, "while the balance of $\frac{2}{3}$ say two third parts shall accrue to our "joint children share and share alike, as their paternal inherit- "ance."

Paragraph 3 contained provisions with respect to 13 properties in the town of Charlotte Amalie on the Island of St. Thomas, all recorded in the name of the testator's sister Mrs. Peiffer "but of "which the greater part belongs to us" (sc. to the testator and the plaintiff as part of their joint estate). According to a list of these properties given in paragraph 3 one of them, known as No. 38 Dronningensgade, Charlotte Amalie, belonged beneficially to the testator and Mrs. Peiffer in equal shares, two others belonged beneficially as to one-third to Mrs. Peiffer and as to two-thirds to the testator, and the whole beneficial interest in the remaining ten belonged to the testator, but it was clear that the beneficial interests attributed to the testator were regarded by paragraph 3 as part of the joint estate. Put very shortly, the effect of the provision of paragraph 3 with respect to these properties was that Mrs. Peiffer should convey the legal title to the plaintiff but should take a beneficial life interest in all of them upon certain conditions.

It was to be observed that the will contained no specific reference to Great Thatch Island, and therefore only purported to deal with it if it could be considered as included in the general references to "our whole joint estate" and "our joint estate" contained in the will.

The Danish Virgin Islands were ceded to the United States of America on March 31, 1917, but Danish law remained in force there until July 1, 1921.

On or about August 14, 1948, one Osmond Kean purporting

to act as agent for the plaintiff granted to the defendant a lease of Great Thatch Island for 25 years from that date at the yearly rent of $50. This lease was admittedly invalid because (assuming that Osmond Kean had authority to grant such a lease) it was not executed under seal and was not recorded in the Register of Titles of the Presidency of the Virgin Islands as required by law. The defendant, however, entered into possession of Great Thatch Island on the strength of that invalid lease and had remained in such possession ever since without payment of rent.

In those circumstances the plaintiff by writ dated April 5, 1955, commenced the present action in the Supreme Court of the Windward Islands and Leeward Islands, claiming a declaration that Great Thatch Island was by virtue of the joint will of herself and the testator the property of the plaintiff; possession of Great Thatch Island; and damages for use and occupation.

The trial judge ordered the defendant to give possession of Great Thatch Island to the plaintiff, and to pay damages of $2,880

The Federal Supreme Court affirmed that decision, but reduced the damages to $840.

1960. Feb. 1, 2, 3, 4, 8. *J. G. Foster Q.C.*, *Mark Littman* and *C. A. Brodie* for the appellant.

J. G. Le Quesne and *Mervyn Heald* for the respondent.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Nelson* (*Earl*) v. *Bridport* (*Lord*) [1]; *In re Hoyles* [2]; *Duncan* v. *Lawson* [3]; *In re Miller* [4]; *In re Berchtold* [5]; *Beaudoin* v. *Trudel* [6]; *Freke* v. *Lord Carbery* [7]; *In the Goods of Morgan.* [8]

March 21. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: The question whether so far as immovable property is concerned the Danish system of community in the eye of Danish law extended also to immovable property (such as Great Thatch Island) belonging to one of the spouses but situated outside St. Thomas, and in the territory of a foreign sovereign state, whose own laws did not include the Danish or any other system of community of property between spouses, is a cardinal issue in the present appeal.

On April 23, 1951, judgment was given in the United States Court of Appeals in *Callwood* v. *Kean,*[1*] which was an action originally brought by the plaintiff against her former agent, Osmond Kean, for an account of the proceeds of the sale of No. 38, Dronningensgade, but which, on the intervention of the

[1] (1846) 8 Beav. 547.
[2] [1911] 1 Ch. 179; 27 T.L.R. 131, C.A.
[3] (1889) 41 Ch.D. 394; 5 T.L.R. 402.
[4] [1914] 1 Ch. 511.
[5] [1923] 1 Ch. 192.
[6] [1937] 1 D.L.R. 216.
[7] (1873) L.R. 16 Eq.Cas. 461.
[8] (1866) L.R. 1 P. & D. 214.
[1*] (1951) 189 F. 2d 565.

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present defendant, developed into a contest as to the title to such proceeds.

It appears that after the testator's death Mrs. Peiffer as contemplated by paragraph 3 of the will (and with the concurrence of her husband who predeceased her) made over to the plaintiff all the 13 properties in Charlotte Amalie, and in particular No. 38, Dronningensgade, retaining in all of them a life interest which she continued to enjoy down to her death on July 11, 1947. It further appears that No. 38, Dronningensgade was sold in 1946 by Osmond Kean, purporting to act as attorney for both the parties to the present action. In these circumstances the question which was raised for decision between the present plaintiff and defendant in the United States Court of Appeals (on appeal from the District Court of the Virgin Islands) was in effect whether the entire net proceeds of sale of No. 38 were, as contended by the plaintiff, her absolute property, or, as contended by the present defendant, belonged as to the half-share acquired by the plaintiff from Mrs. Peiffer to the plaintiff absolutely, and as to the other half-share formed part of the joint estate and were subject, accordingly, to the provisions of the Danish law of community and of the joint will made by the testator and the plaintiff under those provisions. The United States Court of Appeals decided this question in the sense contended for by the present defendant, in substance affirming the decision of the District Court. Their Lordships have thought it right to refer at some length to the subject-matter of this earlier litigation in view of the use which, as will shortly appear, was made in the present action of the exposition of the Danish law of community contained in the judgment of the Court of Appeals, directed though it was to the destination under that law of the proceeds of sale of immovable property admittedly situated in territory subject to that law, and in no way concerned with the question whether in circumstances such as those of the present case the Danish system of community in force in the Island of St. Thomas at the material time was in the eye of Danish law applicable to immovable property situated in British territory and subject to English law.

By her statement of claim in the present action the plaintiff alleged (inter alia) (1) that she was the widow of the testator; (2) that the testator was the owner (on the death of his father intestate in 1902) of Great Thatch Island, and continued as such owner until the date of his death in 1917; (3) that by the joint will it was agreed by the plaintiff and the testator that she should have the right to retain their joint estate in accordance with the Royal Danish Ordinance of May 21, 1845, Chapter 18, section 1, under the Danish laws then in force in the Island of St. Thomas; and (4) that the plaintiff had elected in accordance with the said law to retain Great Thatch Island as her property, and not to divide the same with her son, the defendant. The plaintiff went on to allege the facts already mentioned concerning the invalid lease, and concluded by claiming the relief already described.

By his defence (paragraph 2) the defendant made no admission of any right in the plaintiff to Great Thatch Island as her property and alleged: (i) that the will of the testator was ineffective in so far as it related to real property situate in the British Virgin Islands and, consequently, the testator died intestate as regards Great Thatch Island; and (ii) that on the death of the testator Great Thatch Island devolved on the defendant, who was the only child (sc. son) of the testator. By paragraph 3 he admitted the facts alleged concerning the invalid lease, but said he entered into it in the mistaken understanding that the plaintiff was entitled to Great Thatch Island for life.

The case was tried at first instance by Lewis J. The only evidence of Danish law before the court consisted of an affidavit of a Mr. James August Bough, an attorney and counsellor at law practising in the Island of St. Thomas, and the judgment of the United States Court of Appeals already mentioned, to which reference was made in such affidavit. Omitting formal parts, the affidavit was in these terms:

"1. I am an attorney and counsellor at law, and have practised as such in the Virgin Islands of the United States of America from the year 1934, except between 1946 and 1954 when I served with the Department of Trusteeship of the United Nations, at New York City. The Virgin Islands of the United States of America were up to March 31, 1917, a colony of Denmark, and it was common practice for persons to be married there under the Danish law of community property. In my practice the question as to what is the Danish law as to community property has often arisen.

"2. I have read carefully the opinion of the court delivered by Maris J. in the United States Court of Appeals for the Third Circuit in the case of *Callwood* v. *Kean* No. 10310, of January 29, 1951. I can state categorically that the law on this question is as stated in that opinion. The copy of the joint will of Richard Edgar Clifford Callwood and Else E. Callwood, printed in said judgment is a true and correct copy of the joint will under which the plaintiff Else E. Callwood claims in this action."

Their Lordships strongly deprecate this mode of providing evidence of foreign law. The discussion of the Danish law of community in the United States Court of Appeals was directed to the particular matter in hand, viz., the destination in view of that law of the proceeds of sale of a particular piece of immovable property admittedly situated in territory which at the material time was Danish territory and accordingly subject to Danish law. The judgment of the United States Court, accordingly, provides no answer to the vital question whether in the eye of Danish law the property of spouses to which the rules of community attached on their marriage included immovable property such as Great Thatch Island, not situated in Danish territory but in the territory of a foreign sovereign state whose own law with respect to

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immovable property so situated did not include the Danish or any other system of community. The judgment of the United States court was likewise not concerned with, and therefore expressed no opinion upon, the rights of spouses subject to the Danish system of community as regards the enjoyment or disposal of the joint property during the continuance of the marriage.

Their Lordships think it desirable to quote at some length from the discussion of the Danish law of community contained in the judgment of the United States court delivered by Maris J., inasmuch as the views therein expressed, as approved by Mr. Bough, provide the only evidence of the Danish law of community adduced in the case. The learned judge says this [2]: "Since the "will involves the title to real estate in St. Thomas it is to be "construed in accordance with the rules of law in force in that "island when the will went into effect on January 17, 1917, the "date of the testator's death. At that time the law in force in "St. Thomas was that of Denmark. The Danish law in force "when the island was one of the Danish West Indies remained "in force, after the change of sovereignty, until July 1, 1921, "when it was superseded by the Code of Laws of the Municipality of St. Thomas and St. John which substituted for the "Danish law rules of law based upon the common law of England "as understood in the United States.

"Under the Danish law from very early times husband and "wife held their property in community, unless otherwise provided by marriage settlement. Moreover one of the provisions "of the Danish law was that upon the death of a spouse the "surviving spouse could, under certain circumstances, continue "to hold their entire joint estate in community until his or her "death or remarriage, thereby postponing the rights of children "or other heirs in the community property. This right appears "to have been established by, and certainly was recognised by, "the Ordinance of May 21, 1845, which was in force in the "Danish West Indies. Section 18 of that Ordinance, referred "to in the will here in question, provides that a husband after "the death of his wife is not obligated to divide the property "with their common children, whether they have attained their "majority or not, so long as he does not remarry unless marriage "contracts or other binding determinants create the necessity "for such a division. The section further authorises the husband "by testamentary disposition to confer on his wife the same "right to retain the whole property undivided. Section 19 of "the Ordinance stipulates that the right of the surviving spouse "to remain in community property as authorised by section 18 "ceases when the spouse remarries.

"It will be observed that the right thus given by the Danish "law to a husband by his will to authorise his widow to remain "in possession of their community property or joint estate was

[2] 189 F. 2d 565, 573.

" exercised by the testator here who, by paragraphs 2 and 3 of " the will, expressly authorised his wife, the plaintiff, to retain " the whole of their joint estate undivided and to the exclusion " of their children until her remarriage. It appears that under " the Danish law a surviving spouse who thus retained possession " of the community property was entitled to sell or mortgage it " or otherwise to deal with and dispose of it as absolute owner, " although perhaps under a duty to compensate their children as " heirs for any undue diminution in the aggregate value of their " inheritance. Accordingly, if the testator here had not imposed " upon the plaintiff the restrictions upon alienation to which " we have already referred, and the validity of which we will " presently discuss, she would unquestionably have had the right " to sell, mortgage or otherwise dispose of the real estate in St. " Thomas belonging to the joint estate of the testator and herself " and also the right to take possession of and invest or otherwise " dispose of the proceeds, being responsible at the most merely " to compensate their children for any undue diminution, as the " result of gifts made by her, in the value of their share of the " joint estate upon her remarriage or death or the earlier division " of the property.

" The rights thus given by the Danish law to the surviving " spouse who retains the joint estate in community cannot be " described in terms of common law concepts since those rights " are quite foreign to the common law. Specifically they cannot " be described as those of trustee and beneficiary, as the district " court suggested in its opinion. Nor is it necessary for us to " attempt to classify them under the common law. It is suffi- " cient to note the rights which the Danish law conferred upon " a widow under these circumstances and to point out that these " rights vested in the plaintiff upon the death of the testator with " respect to the property in St. Thomas which they held in " community, subject only to such restrictions as the testator by " his will validly imposed upon her."

And Maris J. says [3]: " As we have said, under the Danish law, " a surviving spouse retaining possession of the community pro- " perty is ordinarily entitled to sell or mortgage it or otherwise to " deal with it as absolute owner. In the present case, however, as " we have seen, the testator by his will placed definite restrictions " upon the right of the plaintiff as surviving spouse to deal with " the property. Thus he provided that it might only be sold or " mortgaged with the consent of Jacob Peiffer or Otto Zwanziger " and then only in case of unforeseen events which might make " it necessary for the plaintiff to use principal or to make a " change in the properties in which the joint estate was invested. " Moreover he provided that she should deposit in banks to be " designated by Jacob Peiffer or Otto Zwanziger all money and " securities belonging to the joint estate, including the proceeds " of the sale of any properties."

[3] 189 F. 2d 565, 577.

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And again[3]: "It appears that under the Danish law a husband who by his will conferred upon his surviving wife the right to possession of the community property had also the right to stipulate that she could dispose of that property only with the consent of an individual who in Danish is called a 'Tilsynsvaerge' which may perhaps best be rendered in English as 'guardian.'"

And[4]: "Accordingly when the testator named Jacob Peiffer and Otto Zwanziger in his joint will as persons whose consent was required to the sale or other disposition of the joint property by his widow he was exercising a right which the law then in force in St. Thomas gave to him. His appointment of these individuals successively to assume the duties of guardian for his widow was accordingly entirely valid."

Their Lordships have thought it sufficient to cite these passages from the text of the judgment, as representing the conditions drawn by the court from the sources referred to in the supporting footnotes, to which (and the full judgment as reported) reference may be made.

Before Lewis J. at first instance counsel for the plaintiff put the essence of his case in this way: he said (see Record, p. 9): "Plaintiff's case briefly is that her rights arise under the joint will and that under that joint will Great Thatch Island was devised to her notwithstanding it was not specifically mentioned therein. Paragraph 1 of joint will refers to 'whole joint estate.'"

Counsel for the defendant, on the other hand, stated his leading argument thus (Record, p. 10): "Plaintiff must satisfy court as to the meaning of the words 'joint estate' in Danish law, and secondly show that Thatch Island fell within this expression. Evidence as to what Danish law was at the relevant date in regard to community of property is insufficient. The affidavit of James August Bough is inadequate in this point."

In the course of his judgment Lewis J. said (at p. 21): "... in the absence of any evidence by the defendant to contradict or put in issue Mr. Bough's opinion I find as a fact that the plaintiff and the testator held their property in community when they were married as it has been admitted by both sides that there was no marriage settlement which provided otherwise."

At p. 23 he said: "... it" (i.e., Great Thatch Island) "is property which accrued to the testator before his marriage to the plaintiff and would form part of the community property unless specifically excluded therefrom by a marriage settlement."

At p. 24 he said: "It is admitted that there was no marriage settlement and as Great Thatch Island was owned by the testator at the date of his marriage it would, in the absence of any evidence to the contrary, form part of the joint estate, and I accordingly hold that it does form part of the joint estate.

[3] 189 F. 2d 565, 577. [4] Ibid. 578.

" Counsel for the defendant has argued that it is for the plaintiff " to show that the words ' our whole joint estate ' in paragraph 1 " of the will included joint estate elsewhere than in St. Thomas. " These words are in my opinion sufficiently comprehensive to " include all property held by the testator and the plaintiff at the " time of their marriage wherever it may be situate and I find " as a fact that the expression ' our whole joint estate ' included " Great Thatch Island although it is not specifically mentioned " in the will."

The learned judge went on to hold (at pp. 24 and 25) that the joint will was in a form apt to include land in the British Virgin Islands under the Wills Act, c. 26, there in force, and at p. 25 expressed his conclusion on the question of title in these terms: " In the result I am of the opinion that the plaintiff is entitled " under the provisions of the will to retain Great Thatch Island " as owner to the exclusion of the defendant and I accordingly " declare that she is the owner thereof."

He accordingly made an order upon the defendant to give up possession of Great Thatch Island on September 30, 1957, and to pay mesne profits at the rate of $40 per month for the six years ending on that date.

On appeal by the defendant to the Federal Supreme Court of the West Indies (Sir Eric Hallinan C.J., Rennie and Archer JJ.) that court in a judgment delivered by Hallinan C.J. on July 21 and 22, 1958, in which the other members of the court agreed, accepted Lewis J.'s conclusions both as to inclusion of Great Thatch Island in the joint estate and the efficacy of the joint will, and dismissed the appeal, save that the mesne profits were reduced to a total of $840, representing $80 per annum for a period of 10 years. The learned Chief Justice (at p. 33) observed: " I consider that the trial judge had sufficient evidence before " him to hold that the joint will comprised and destined the lands " in question."

From that judgment the defendant has now appealed to this Board. Mr. Foster, appearing for the defendant, based his argument in support of the appeal primarily on the submission that there was no evidence on which it could be held that the property to which the Danish system of community attached on the marriage of the testator and the plaintiff included in the eye of Danish law Great Thatch Island, situated as it was in British territory and subject to English law.

If that submission is well founded, the present appeal must, in their Lordships' opinion, clearly succeed. The plaintiff's case is that according to Danish law Great Thatch Island formed part of the joint property to which the Danish system of community attached on the marriage of testator and the plaintiff, and devolved on the death of the testator in accordance with that system to the exclusion of the lex situs in the shape of English law. It is for her to prove that in this matter of community the Danish law as it stood in the Island of St. Thomas at the material time

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arrogated to itself this extraterritorial effect. The question is one of fact to be proved by evidence, and the onus is upon the plaintiff to prove it. As their Lordships have already observed, the only evidence of the Danish law of community adduced by the plaintiff consists of the judgment of the United States Court of Appeals as approved by Mr. Bough in his affidavit. Their Lordships are satisfied that there is nothing in this judgment which can be regarded as evidence that the Danish system of community in force in the Island of St. Thomas at the material time applied in the eye of Danish law to land situate in foreign, or, in particular, British, territory. It is true that in various parts of the judgment general references are to be found (for example) to "the "property," "the entire joint estate" and "the community "property" without qualifying words restrictive of their locality; but this, in their Lordships' opinion, is not enough. The law of one country concerning the devolution of land cannot, and prima facie is not intended to, affect the devolution of land situated in the territory of another. The learned judges in the United States Court of Appeals were not directing themselves to the application of the Danish community system in the case of land situated outside Danish territory, and their Lordships find it impossible to assume that, if the question whether Great Thatch Island was according to Danish law to be regarded as part of the testator's and the plaintiff's joint estate under the Danish system of community had been before the United States court, it would have been answered in the affirmative.

It is to be observed that in *De Nicols* v. *Curlier* (*No. 2*),[5] where Kekewich J. held that the contract imputed by the French system of community to spouses domiciled in France and marrying without any express contract (as to which see *De Nicols* v. *Curlier* (*No. 1*)[6] had the same effect as an express contract in like terms, and was enforceable in England against freehold and leasehold property situated there, the learned judge had before him expert evidence to the effect that the term "immeubles" was not confined to immovables in France, but applied equally to immovables in other countries. He said[7]: "The difficulty "which arose was whether the term comprised immovables "abroad—that is, beyond France. The words of the Code are, "apparently, wide enough to cover all, wherever situate, and, if "it could be treated as an English instrument which the court "is competent to construe, it would be impossible to avoid the "conclusion that this is its real meaning. But to arrive at a "conclusion respecting the construction of the Code in this parti-"cular is beyond the competence of the court. It is a matter "of fact with which the court can only deal according to the "testimony of those qualified to give it."

If the learned judge's view as to the construction which an

[5] [1900] 2 Ch. 410; 16 T.L.R. 461.

[6] [1900] A.C. 21; 16 T.L.R. 101, H.L.

[7] [1900] 2 Ch. 410, 414.

English court would place on the French code if competent to construe it turned merely on the absence of any express restriction of its provisions to immovables situated in France, their Lordships take leave to doubt its correctness, but they entirely agree with the learned judge in holding that the question whether the French code did on its true construction include immovables outside France was a question of French law and as such "a matter of "fact with which the court could only deal according to the "testimony of those qualified to give it."

Again, in *Chiwell* v. *Carlyon* [8] the first question put by Stirling J. for the opinion of the Supreme Court of the colony was whether certain immovable property in England fell within the community created under the law of the colony by the marriage of spouses domiciled in the colony; and the Supreme Court of the colony held that this question should be answered in the affirmative.

These cases indicate that the question whether the system of community in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned. True it is that in *De Nicols* v. *Curlier* (*No. 2*) [9] the French system and in *Chiwell* v. *Carlyon* [10] the Cape of Good Hope system were proved to extend to immovables situated in another country, but this, of course, affords no evidence at all on the question whether the Danish system of community in force in the Island of St. Thomas during the period material to the present case purported to include immovables situated in other countries.

Mr. Le Quesne, for the plaintiff, contended that there were concurrent findings of fact by both courts below to the effect that the community here in question included immovables situated in the territory of a foreign state, such as Great Thatch Island.

Their Lordships cannot agree. It appears to their Lordships that both courts erroneously regarded the judgment of the United States court, as approved by Mr. Bough in his affidavit, as affording evidence that the Danish system of community in force in the Island of St. Thomas during the material period included Great Thatch Island notwithstanding that it was situated in the territory of a foreign country. For the reasons already stated, their Lordships are of opinion that the affidavit and judgment afforded no such evidence. It further appears to their Lordships that basing themselves on this, as their Lordships think erroneous, view of the evidence, the courts below went on to hold that inasmuch as the community property according to the relevant Danish law included Great Thatch Island, the general references in the joint will to "our whole joint estate" and "our joint estate" must be construed, accordingly, as including Great Thatch Island,

[8] (1897) 14 S.C.(S.A.) 61.
[9] [1900] 2 Ch. 410.
[10] 14 S.C.(S.A.) 61.

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a conclusion from which, had there been evidence that according to the relevant Danish law the community property did include Great Thatch Island, their Lordships would not have been disposed to dissent. The next step in the reasoning of the courts below appears to have been that inasmuch as the joint will was in point of form and execution adequate to pass land situated in British territory (a matter which their Lordships are content to assume in favour of the plaintiff without deciding it) the joint will should be recognised by English law as effectively entitling the plaintiff to the beneficial interest it purported to give her in Great Thatch Island as part of the joint estate. This seems to their Lordships to be an over-simplification of the problem. Even if there had been proof of the inclusion of Great Thatch Island in the joint estate according to the relevant Danish law, and granting the adequacy of the joint will, in point of form and execution, to create with respect to Great Thatch Island, as part of the joint estate, the beneficial interest which it purported to confer on the plaintiff, there would still have remained the difficult question whether it would have been proper in the circumstances of this case to resolve the conflict between English law and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e., English law) in accordance with the general rule: see, for example, *Welch* v. *Tennent*.[11] Their Lordships are much indebted to counsel for their full and careful argument on this question; but as it appears to their Lordships that the case is concluded against the plaintiff by her failure to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law, no useful purpose would be served by debating it further.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgments of the Supreme Court of the Windward Islands and Leeward Islands and of the Federal Supreme Court of the West Indies should be set aside, and that the action should be dismissed.

The respondent must pay the costs in the courts below and the costs of this appeal.

Solicitors: *Herbert Smith & Co.; Zeffertt, Heard & Morley Lawson.*

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[11] [1891] A.C. 639, H.L.

[COURT OF APPEAL.]

COMPAGNIE ALGERIENNE DE MEUNERIE *v.* KATANA SOCIETA DI NAVIGATIONE MARITTIMA, S.P.A.

C. A.

1959
Nov. 17, 18, 19.
1960
Feb. 29.

Hodson and Ormerod L.JJ.; Gorman J.

Contract—Implied term—Performance dependent on permission of third party—Obtaining of permission solely within power of promisor—Knowledge of parties at time of contract that permission might be needed—Whether warranty by promisor to be implied.

Shipping—Charterparty—Implied term—Vessel chartered to load goods from Syrian port and proceed to Algeria—Vessel required special permission to load—Not within knowledge of charterers—Syrian authorities prohibited export of grain to Algeria—Whether term as to obtaining permission to be implied—Time within which to be obtained.

Shipping—Seaworthiness—Charterparty—Approach voyage—Whether term as to seaworthiness to be implied.

Ships' Names—The Nizetti.

On September 23, 1954, the Syrian legislature, by decree, made certain provisions prohibiting trade with Israel, and as a result vessels which had called at Israeli ports were refused permission to anchor at Syrian ports, although such permission might be granted if their owners offered sufficient guarantees to the authorities against non-repetition of infringements of the boycotting provisions.

By a charterparty dated May 17, 1956, it was agreed that the *S.S. Nizetti* should "proceed to Lattakia [Syria] or so near as she "may safely get" and load a full cargo of wheat and then "proceed to one or two ports in charterers' option out of Philippe-"ville, Alger or Oran." The ship was stated to be "now trading and "expected ready to load under this charter about May 24, 1956."

During February, 1955, the *Nizetti* had discharged cargo at Haifa, Israel. Thereafter she passed through the Suez Canal four times and on each occasion the master signed a declaration of future non-co-operation with Israel. At the date of the charterparty the shipowners knew that the *Nizetti* had called at Haifa and that the master had made declarations of future non-co-operation with Israel, but the charterers neither knew nor ought to have known that.

The *Nizetti* arrived at Lattakia under the charterparty on May 28, 1956, but was refused free pratique. On May 30, the master made a declaration of non-co-operation with Israel, but was still refused permission to load. On June 2, the Syrian authorities prohibited the export of grain to Algeria as from June 3. On June 5 the *Nizetti* sailed from Lattakia without having loaded. The charterers claimed damages alleging breach of the charterparty.

The trial judge held (inter alia) that since it lay solely within the power of the owners, and outside the power of the charterers, to obtain the permission to load, a term had to be implied in the charterparty to give business efficacy to the contract that the shipowners would at least exercise reasonable diligence to obtain the permission; and further that, since the owners knew, and the charterers neither knew nor ought to have known, that at the date of the charterparty that permission might be needed, there was an implied warranty by the shipowners not only that they would use due diligence to obtain, but that they would in fact obtain, whatever permission was necessary within a reasonable time, but that such reasonable time had not expired when this embargo took effect on June 3, 1956.

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Compagnie Algerienne de Meunerie v. Katana Societa di Navigatione Marittima, S.P.A.

On appeal from that decision:—

Held, (1) that the implied warranty of seaworthiness did not operate on the approach voyage, and it never attached at all under this charterparty (post, pp. 724, 727, 728).

Cohn v. *Davidson* (1877) 2 Q.B.D. 455 and *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.* [1927] 1 K.B. 743; 43 T.L.R. 272, C.A. applied.

(2) That the obligation to carry out the voyage with reasonable dispatch was performed.

(3) That the warranty sought to be implied by the judge was erroneous in principle, since it could not be said in the circumstances that both parties must have intended that it should be a term, or inferred what their attitude might have been had they known all the facts (post, pp. 724, 728, 730).

Per Hodson L.J. There was no necessity for the additional warranty implied by the judge in order to give business efficacy to the contract, the warranty "expected ready to load" was sufficient (post, p. 724).

Per Ormerod L.J. That had such a warranty been implied there would not have been a breach of it by the time the charterparty was frustrated on June 5, 1956 (post, p. 728).

Comptoir Commercial Anversois v. *Power, Son & Co.* [1920] 1 K.B. 868, C.A. applied.

Decision of Diplock J. [1959] 1 Q.B. 527; [1959] 2 W.L.R. 366; [1959] 1 All E.R. 272 affirmed for different reasons.

Appeal from Diplock J.

The following statement of facts is taken substantially from the judgment of Hodson L.J.: The charterers, Compagnie Algerienne de Meunerie, by a charterparty in the "Gencon" form, dated May 17, 1956, chartered from the shipowners, Katana Societa de Navigatione, S.P.A., the Italian *S.S. Nizetti*, stated to be "now trading and expected ready to load under this charter "about May 24, 1956." It was agreed "that the said vessel shall "proceed to Lattakia [Syria] or so near thereto as she may safely "get and lie always afloat and there load a full and complete "cargo of 2,750 (two thousand seven hundred and fifty) metric "tons, 5 per cent. more or less, quantity in master's option to "be declared on giving notice to shippers. Wheat in bulk, "charterers to supply up to 5 per cent. of bagged cargo, as "demanded by the master for safe stowage . . . and being so "loaded the vessel shall proceed to one or two ports in charterers' "option out of Philippeville, Alger or Oran."

Clause 11 provided: "Laydays not to commence before "May 24 and should the vessel not be ready to load (whether in "berth or not) on or before May 31, 1956, charterers have the "option of cancelling this contract, such option to be declared, if "demanded, at least 48 hours before vessel's expected arrival at "port of loading . . ."

On November 23, 1954, in pursuance of the boycott of Israel by Arab States, the Republic of Syria, by legislative decree, decreed that foreign vessels should not be allowed to anchor in Syrian ports if they had previously called at an Israeli port, but

there was a discretion to remove the ban if owners of such vessels promised not to co-operate in future with Israel.

The charterers had simultaneously with the charterparty made a contract of sale with a French Government organisation which controlled the import of grain into French North Africa, and to fulfil this contract they had made a contract with a grain supplier in Beirut to purchase at Lattakia 5,000 tons of Syrian grain, 2,750 tons of which was to be shipped on the *Nizetti*.

In February, 1955, the *Nizetti* had discharged at Haifa in Israel. Between February, 1955, and May, 1956, she had passed four times through the Suez Canal, and on each occasion the master had signed a declaration of future non-co-operation with Israel. The vessel was not substantially delayed on any of those occasions. Of those matters within the owners' knowledge, the charterers did not know at the date of the charterparty.

The vessel anchored in the roads at Lattakia at noon on May 28, 1956, and moved to a closer anchorage at 1500 hours the same day. After she had moved, her log book was seen by a Syrian police officer and the master was told that free pratique would not be granted.

On May 29, 1956, the charterers heard of the trouble and informed the owners, who cabled the master giving him instructions to sign a declaration of future non-co-operation with Israel. The master, being forbidden to land, did not receive the cable till the next day, May 30, 1956, and was never given free pratique. On May 30, 1956, he was permitted to land, received the cable and made the necessary declaration.

The Syrian Government had been considering the prohibition of the export of grain to French North Africa, and in the latter part of May 29, 1956, they imposed an embargo. This was released on May 31, 1956, in respect only of vessels which had already begun to load. On June 2, 1956, the government imposed a total and final embargo which took effect from June 3, 1956. On June 5, 1956, the vessel sailed from Lattakia without having loaded anything. The charterers had had their cargo ready to load on May 28, 1956, when the vessel arrived off Lattakia.

The charterers claimed damages for breach of the charterparty, their claim being for the loss of profit on the transaction to purchase grain for shipment to North Africa, and for the loss of the money which they had been required to deposit in North Africa which had been forfeited on non-fulfilment of that contract.

On a special case under section 21 (1) (*b*) of the Arbitration Act, 1950, Diplock J.,[1] reversing the decision of the umpire, held that the charterers had failed to establish any breach of warranty on the part of the shipowners before the charterparty was frustrated on June 3 by the embargo.

The charterers appealed from that decision. The findings of the umpire are set out in the report of the hearing before Diplock J.,[2]

[1] [1959] 1 Q.B. 527; [1959] 2 W.L.R. 366; [1959] 1 All E.R. 272.

[2] [1959] 1 Q.B. 529.

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and the ratio decidendi of Diplock J. is referred to in the judgment of Hodson L.J.

John Megaw Q.C. and *R. A. MacCrindle* for the charterers.
Ashton Roskill Q.C. and *J. F. Donaldson* for the owners.

The following cases, in addition to those cited in the judgment, were referred to in argument: *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food* [3]; *Ian Stach Ltd.* v. *Baker Bosley Ltd.* [4]; *Owners of S.S. Istros* v. *F. W. Dahlstroem & Co.* [5]; *Evera S.A. Comercial* v. *North Shipping Co. Ltd.* [6]; *Peter Cassidy Seed Co. Ltd.* v. *Osuustukkukauppa I.L.* [7]; *Ströms Bruks Aktie Bolag* v. *Hutchison* [8]; *Royal Greek Government* v. *Minister of Transport* [9]; *A/S D/S Heimdal* v. *Questier & Co. Ltd.* [10]; *Universal Cargo Carriers Corporation* v. *Citati (No. 2)* [11]; *Louis Dreyfus & Cie.* v. *Parnaso Cia. Naviera, S.A.* [12]; *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* [13]; *Victoria Laundry (Windsor)* v. *Newman Industries Coulson & Co.* [14]; *Kopitoff* v. *Wilson* [15]; *The Arpad* [16]; *White* v. *S.S. "Winchester" Co.* [17]; *M'Andrew* v. *Adams* [18]; *Louis Dreyfus & Co.* v. *Lauro* [19]; *Wilson* v. *Rankin* [20]; *New York and Cuba Mail S.S. Co.* v. *Eriksen & Christensen* [21]; *Kwei Tek Chao* v. *British Traders etc. Ltd.* [22]; *Pavia & Co. S.P.A.* v. *Thurman-Nielsen.* [23]

Cur. adv. vult.

Feb. 29. Hodson L.J., having stated the facts as set out above, read the following judgment: The charterers' contention is that, but for the defect of which the owners knew and they did not, the vessel would have gone through to the loading berth on May 28, 1956, in the normal course of events, and would have loaded before the final embargo on June 3, having been stopped from May 29 to 31. It is contended that the defect was one which put the owners in breach of their implied warranty of seaworthiness; alternatively, in breach of their implied warranty that the ship shall commence and carry out the voyage contracted for with reasonable diligence; these two undertakings being implied in all

[3] [1959] 3 W.L.R. 665; [1959] 3 All E.R. 434.
[4] [1958] 2 Q.B. 130; [1958] 2 W.L.R. 419; [1958] 1 All E.R. 542.
[5] [1931] 1 K.B. 247.
[6] [1956] 2 Lloyd's Rep. 367.
[7] [1957] 1 W.L.R. 273; [1957] 1 All E.R. 484.
[8] [1905] A.C. 515; 21 T.L.R. 718, H.L.
[9] (1949) 82 Lloyd's Rep. 228.
[10] (1949) 82 Lloyd's Rep. 452.
[11] [1958] 2 Q.B. 254; [1958] 3 W.L.R. 109; [1958] 2 All E.R. 563, C.A.
[12] [1959] 1 Q.B. 498; [1959] 2 W.L.R. 405; [1959] 1 All E.R. 502.
[13] [1959] A.C. 133; [1958] 2 W.L.R. 688; [1958] 1 All E.R. 725, H.L.
[14] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997, C.A.
[15] (1876) 1 Q.B.D. 377, D.C.
[16] [1934] P. 134; 50 T.L.R. 505, C.A.
[17] (1886) 23 Sc.L.R. 342.
[18] (1834) 1 Bing.N.S. 29, D.C.
[19] (1938) 60 Lloyd's Rep. 94.
[20] (1865) L.R. 1 Q.B. 162.
[21] (1922) 27 Com.Cas. 330.
[22] [1954] 2 Q.B. 459; [1954] 2 W.L.R. 365; [1954] 3 W.L.R. 496.
[23] [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492, C.A.

contracts of carriage by sea in the absence of express stipulation to the contrary.

The judge rejected these submissions but held that, since it lay solely within the power of the owners and outside the power of the charterers to obtain the permission to load, a term must be implied in the charterparty to give business efficacy to the contract that the shipowners would at least exercise reasonable diligence to obtain the permission. He further held that, since the owners knew, and the charterers neither knew nor ought to have known, at the date of the charterparty that permission might be needed, there was an implied warranty by the shipowners not only that they would use due diligence to obtain, but that they would in fact obtain, whatever permission was necessary within a reasonable time, and decided that such reasonable time had not expired when this embargo took effect on June 3. Accordingly, he held that the charterers had failed to establish any breach of warranty on the part of the owners before the charterparty was frustrated on June 3 by the embargo. The charterers maintain that the term implied by the judge is not stringent enough. The owners, while content to accept the finding in their favour, contend that in any event no special warranty should be implied, for the situation was covered by the obligation of the owners to provide the vessel "expected ready to load . . . about May 24, 1956," and by the undertaking admittedly implied to carry out the voyage with reasonable diligence.

So far as seaworthiness is concerned, the contention is that this is a case of a vessel suffering from a fault not found in normal vessels analogous to a defective boiler which made her unfit for the voyage. Comparison was made with *Levy* v. *Costerton*.[1] There, a ship was stipulated "being tight, staunch, and strong, "and well and sufficiently manned, tackled, apparelled and fur- "nished with everything needful and necessary for . . . the "voyage." It was held that a bill of health was a thing within the meaning of that covenant, and that the shipowners were in breach of that covenant having performed the voyage with some delay consequent upon the absence of a bill of health.

Reliance is also placed on *Ciampa* v. *British India Steam Navigation Co. Ltd.*,[2] where it was held that the ordinary perils to which cargo may be exposed may include such treatment of the ship and cargo (for example, fumigation) as by the local laws of a port of call the cargo shipped may be exposed to. In that case the ship, to the knowledge of the owners but not of the charterers, was foredoomed to inability to carry the contractual cargo and the vessel was held to have been unseaworthy when she took on her cargo of lemons at Naples.

This is an entirely different case and compares rather with *Cunningham* v. *Dunn*,[3] where the facts were not dissimilar, and Bramwell L.J. said[4]: "However, the counsel for the plaintiff

[1] (1816) 4 Camp. 389, N.P.
[2] [1915] 2 K.B. 774.
[3] (1878) 3 C.P.D. 443, C.A.
[4] Ibid. 447.

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" contended, that the charterparty contained an implied warranty " that the ship should be presented to the plaintiff in such plight " and condition that she might lawfully take on board the " proffered cargo. I know of no authority supporting such a " proposition."

It cannot be said on the facts of this case that, as in *Ciampa* v. *British India Steam Navigation Co. Ltd.*,[5] the voyage was foredoomed to failure by reason of any lack of seaworthiness. In any event this warranty would not avail the charterers since there is no express warranty, and the implied warranty according to the authorities attaches not on the approach voyage but when the vessel sails with her cargo. See *Cohn* v. *Davidson*,[6] and the judgment of Scrutton L.J. in *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.*[7] as to various stages of a voyage. The time of sailing with the cargo was never reached.

So far as the undertaking to carry out the voyage with reasonable dispatch is concerned, that obligation was performed. She was never an arrived ship, and all her approach voyage was carried out with reasonable diligence. A short measure of delay may be involved in the situation where a master had to make a declaration of non-co-operation before being allowed to load, but it is not true to say that the voyage was foredoomed to failure. It would be otherwise if the delay involved up to the time the vessel became an arrived ship were so great as to defeat the commercial purpose of the voyage.

There remains the express obligation contained in the words " expected ready to load." If this statement is not made honestly and on reasonable grounds, the charterer has his remedy: see *Sanday & Co.* v. *Keighley, Maxted & Co.*,[8] *per* Lord Sterndale M.R., and *Monroe Brothers Ltd.* v. *Ryan.*[9] The case was not presented as one in which there was a breach of this obligation, no doubt because the master had had no serious trouble before having made, and had accepted, declarations of non-co-operation with Israel. Accordingly, the expectation of the owners was honestly held and based on reasonable grounds. If, on the other hand, there had been serious trouble and delay on earlier occasions by reason of the obstruction of the Syrian authorities, this factor could not have been ignored, and the " expected " date would not have been given on reasonable grounds.

There is no business necessity, in my judgment, for such an additional warranty as that implied by the judge. The obligation " expected ready to load " is sufficient for business efficacy. The implied warranties as set out in Scrutton on Charterparties and Bills of Lading (11th ed., at p. 95) have stood for many years, and it must be rarely necessary for any further implication to be made.

It is said that the necessity for the implication arises from

[5] [1915] 2 K.B. 774.
[6] (1877) 2 Q.B.D. 455.
[7] [1927] 1 K.B. 743, 754; 43 T.L.R. 272, C.A.
[8] (1922) 38 T.L.R. 561, C.A.
[9] [1935] 2 K.B. 28; 51 T.L.R. 361, C.A.

the knowledge of the owners denied to the charterers as to the defect of their ship. No doubt knowledge as a surrounding circumstance is an aid to construction, but I do not see how the knowledge can assist to imply a term of the kind which the judge thought necessary, since it is impossible to say what action they would have taken if they had known of the defect. The shipowners would, no doubt, say they had never had any trouble, and the charterers might have accepted the risk.

The warranty sought to be implied amounts to an implied warranty that the ship had never called at an Israeli port. If it is put in this way I think the owners' submission is right that the implication is erroneous in principle. In the language of Scrutton L.J. in *Comptoir Commercial Anversois* v. *Power, Son & Co.*[10]: " . . . it must be such a necessary term that both parties " must have intended that it should be a term of the contract, " and have only not expressed it because its necessity was so " obvious that it was taken for granted." The warranty sought to be implied does not, in my judgment, pass the test.

It was found by the umpire that the owners made their declaration of non-co-operation within a reasonable time. He found, in effect, that if the *Nizetti* had been allowed to load on arrival it would have been stopped by the temporary embargo late on May 29, and loading would have been resumed on May 31 when the temporary embargo was lifted from the ships which had begun to load before the temporary embargo was imposed. In that event she could, on his findings, have loaded a full cargo before the final embargo was imposed. On these findings, it was the embargo which frustrated the contract between the parties and there was no breach by the owners, for, but for the embargo, the Syrian authorities would have allowed the vessel to load within such time as would not have frustrated the contract.

I would dismiss the appeal.

ORMEROD L.J. The judge in his judgment says[11]: " The " question, therefore, is whether at any time before the beginning " of June 3, 1956, the owners were guilty of any breach of war- " ranty and, if so, what damage did that breach cause." To answer this question involves consideration of the obligations, express and implied, imposed on the owners by the charterparty. There was in the first place the obligation contained in the words " now trading and expected ready to load under this charter about " May 24, 1956." It was not contended by the appellants that there had been a breach of this warranty. The *Nizetti* had discharged cargo at the Israeli port of Haifa in February, 1955, but on four subsequent occasions between that date and May, 1956, she had passed through the Suez Canal. Each time the master had signed a declaration of non-co-operation with Israel and the ship had been allowed to proceed on her voyage without any

[10] [1920] 1 K.B. 868, 899, C.A.

[11] [1959] 1 Q.B. 527, 539; [1959] 2 W.L.R. 366; [1959] 1 All E.R. 272.

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substantial delay. It was reasonable to expect, therefore, that there would be no delay from this cause in carrying out the proposed voyage, and that the expectation was "one made "honestly and upon reasonable grounds": see *Sanday & Co.* v. *Keighley, Maxted & Co.*[12]

There was no express warranty of seaworthiness in the charterparty. In the circumstances there was an implied warranty of seaworthiness, and in addition an implied warranty that the ship would commence and carry out the voyage contracted for with reasonable diligence. The judge, however, was of the opinion that there should be implied into the charterparty a further warranty. He says[13]: "In the absence of such knowledge [that "is, that the *Nizetti* had called at an Israeli port] on the part of "the charterers at the time the charterparty was entered into, "I am prepared to hold, although I do not think that any of the "cases cited really assists me in this, that there was an implied "warranty by the shipowners not merely that they would use due "diligence to obtain, but that they would in fact obtain whatever "permissions to carry cargoes were necessary under the Syrian "Law of 1954." And then after considering the time factor he went on to say[14]: "It seems to me that the highest at which "the warranty on the part of a shipowner may be put is that he "will (a) exercise due diligence to obtain, and (b) will in fact "obtain, within a reasonable time, any permission to load the "vessel which is required under the Syrian law in force at the "time when the charterparty was entered into." The judge held that there had been no breach of this warranty up to the time when the contract became impossible of performance because of the embargo imposed by the Syrian authorities, as a reasonable time had not expired and the owners were therefore entitled to succeed.

It was contended on behalf of the charterers that there was an implied warranty of seaworthiness in relation to a vessel proceeding to the port of loading. This contention, however, is not in accordance with the authorities. Seaworthiness is well understood to mean the measure of fitness which the particular voyage or particular stage of the voyage requires: see *Cohn* v. *Davidson*,[15] where it was held that the implied warranty of seaworthiness attaches at a time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her destination. Field J. said: "Now nothing can be clearer than "that upon such a policy [the ordinary marine policy] the war-"ranty of seaworthiness for the voyage . . . is a warranty that "the ship is or shall be seaworthy for the voyage at the time of "sailing on it."

In *A. E. Reed & Co. Ltd.* v. *Page, Son & East Ltd.*[16] Scrutton

[12] 38 T.L.R. 561, C.A.
[13] [1959] 1 Q.B. 540.
[14] Ibid. 540, 541.
[15] 2 Q.B.D. 455, 461.
[16] [1927] 1 K.B. 743, 754.

L.J. said: " . . . she need not be fit for the voyage before it " commences, and when she is loading in port."

It seems clear from these and other authorities which were cited to us that in the absence of express warranty of seaworthiness there is an implied warranty which does not come into operation until the vessel sets sail on her voyage. Seaworthiness, of course, means more than that the ship is " tight, staunch and " strong." It means that she must be fitted with everything necessary for the intended voyage and to carry the specified cargo or cargoes. In *Levy* v. *Costerton* [17] a ship was warranted " being " tight, staunch, and strong, and well and sufficiently manned, " tackled, apparelled and furnished with everything needful and " necessary for . . . the voyage." The shipowners had failed to obtain a necessary bill of health and were held to be in breach of their warranty in consequence.

Again, in *Ciampa* v. *British India Steam Navigation Co. Ltd.* [18] it was necessary for a ship carrying a cargo of lemons from Naples to London, which had previously called at Mombasa, where there was plague, to be fumigated when calling at the port of Marseilles. The cargo was in consequence damaged, and the shipowners were held liable on the ground that the ship was unseaworthy. The facts which brought about the necessity of fumigating arose and were known to the shipowners before the voyage started, and the purpose of the voyage was thereby foredoomed to failure. The present case is a very different one. It could not be said that the voyage was foredoomed to failure, nor was it expected that when the ship commenced to load there would be any factor which rendered her unfit for the voyage. She had called at the Israeli port of Haifa in the previous year, but the owners had no reason to anticipate any difficulty or delay in obtaining the necessary permission to load from the Syrian authorities. In any event, the question of whether the ship was seaworthy does not arise. If the implied warranty does not begin to operate until the ship sets sail on her voyage, it never attached to this ship at all.

It was further submitted by the charterers, and accepted by the owners, that in a charterparty such as the one in this case there is an implied warranty that the vessel will proceed with all reasonable speed to the place of loading and load with all reasonable dispatch. It would seem difficult to contend that there was a breach of this warranty in view of the finding of the arbitrator in paragraph 15 (1) of the case stated, where he found that " The vessel began the approach voyage to Lattakia in due " time and proceeded there with due dispatch," and (3), " The " respondents [the owners] and the master acted with reasonable " diligence with regard to the making of the declaration of future " non-co-operation with Israel." But it was contended that if there was some defect in the vessel not found normally in vessels

[17] 4 Camp. 389, N.P.

[18] [1915] 2 K.B. 774.

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of this class by reason of which the vessel was prevented from presenting herself for loading, there would be a breach of the implied warranty. It was put alternatively that there must at least be implied a term that a fact of this kind known to the owners and not known to the charterers will not cause any delay in the loading. I find it difficult to see how the first part of this contention can succeed. It appears to be an extension of the implied warranty for which there is no authority. The real question, in my judgment, is whether there should be implied a term that the necessity for obtaining the consent to load would not cause any delay in the loading.

Are the circumstances in which the contract was entered into between the parties sufficient to justify the inclusion of a term not normally implied? In *Comptoir Commercial Anversois* v. *Power, Son & Co.*[19] Scrutton L.J. said: " . . . it must be such a " necessary term that both parties must have intended that it " should be a term of the contract, and have only not expressed " it because its necessity was so obvious that it was taken for " granted." As in this case the charterers were not aware of the call at Haifa, it is difficult to see how they could have intended such a term to be implied. In any event it is impossible to say what their attitude might have been had they known all the facts. They might, of course, have insisted on an express term being included in the contract, but they might equally well have taken the view that the risk of delay was negligible, and that the ship would be allowed to proceed on the master signing the declaration of non-co-operation as on the four previous occasions. It could not be said in these circumstances that the necessity for the term proposed by the charterers was so obvious that it was taken for granted. It follows that I would come to the conclusion, as did the judge, that the appeal should be allowed. I come to the conclusion, however, for a different reason. Had I been of the opinion that the warranty which I have already cited from his judgment should be implied, I should have agreed with him that there had been no breach of it by the owners. In my judgment, however, the circumstances do not warrant such an implication. The warranty implied in the words " expected ready to load " is sufficient. Had the owners had difficulty in the past, by reason of the ship's call at Haifa in 1955, in obtaining permission to proceed on the respective voyages, or had they had reason to expect that there would be serious delay for this same reason when the ship arrived at Lattakia, there might well have been a breach of this warranty. Such, however, was not the case.

I would dismiss the appeal.

Gorman J. In my view, there is no express warranty of seaworthiness or fitness for the contemplated voyage. The implied warranty of seaworthiness does not arise until the vessel sails

[19] [1920] 1 K.B. 868, 899, C.A.

with her cargo and not on the approach voyage. In this case this time was never reached and the implied warranty of seaworthiness never attached to the vessel.

The umpire found, in paragraph 15 (7) of his reasons, that at the time of the negotiation and execution of the charterparty the owners knew that the vessel had called at an Israeli port during February, 1955, and knew, or ought to have known, of the existence and effect of Legislative Decree No. 68 and of the instruction relating thereto. He also found that the owners also knew that, on previous occasions, the master had made declarations of future non-co-operation with Israel, and that the charterers did not, at the time of the negotiation and execution of the charterparty, know that the vessel had called at an Israeli port, or that the master had been required to make the aforesaid declarations. It was contended by the charterers that in such circumstances the ship was subject to a defect which made her unfit for the contemplated voyage. In my view, there was not, in this case, as contended, such a breach of warranty, within the authorities. In any case, any such warranty would not attach to the vessel on the approach voyage to the place of loading, and the warranty, if existing, did not attach to the vessel at any time. The judge had rejected the contention of the charterers.

There was an implied warranty that the ship would proceed with all due diligence to the place of loading. In the award, the umpire made the following findings of fact: 15 (1): "The vessel "began the approach voyage to Lattakia in due time and pro- "ceeded thence with due dispatch. . . . (3): The respondents "[owners] and the master acted with reasonable diligence with "regard to the making of the declaration of future non-co-opera- "tion with Israel."

This warranty is a warranty to proceed with reasonable dispatch; it is not an absolute obligation. There may always arise impeding factors or circumstances, but the existence of these is not necessarily a breach of the warranty. In my view, on the findings of the umpire, there has not been proved to have taken place a breach of the warranty to proceed with reasonable dispatch. The judge had rejected the contention of the charterers that the owners were in breach of the implied warranty of due diligence.

It was, however, contended by Mr. Megaw, on behalf of the charterers, that, in the circumstances of this case, the owners were guilty of breach of a warranty to be implied that the vessel would not be delayed by a special defect in the vessel known to the owners and not to the charterers. The judge said in his judgment [20]: "... I am prepared to hold, although I do not think "that any of the cases cited really assists me in this, that there was "an implied warranty by the shipowners not merely that they "would use due diligence to obtain, but that they would in fact

[20] [1959] 1 Q.B. 540.

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"obtain whatever permissions to carry cargoes were necessary "under the Syrian Law of 1954 which was in force at the time "that the charterparty was entered into and applicable to vessels "of the category into which the *Nizetti* as they, the ship-"owners, knew, but as the charterers neither knew nor ought to "have known, fell." The judge also held that if such a warranty was to be implied, there was a time factor to be considered and that, when the final embargo took effect on June 3, 1956, a reasonable time for the obtaining of such permissions had not expired and there was therefore no breach by the owners of any such implied warranty. Mr. Ashton Roskill, for the owners, contended that, in the circumstances of this case, there was no room for such an implied warranty. He referred to Scrutton L.J. in *Comptoir Commercial Anversois* v. *Power, Son & Co.*[21]: "... "it must be such a necessary term that both parties must have "intended that it should be a term of the contract, and have "only not expressed it because its necessity was so obvious that "it was taken for granted." In my view, Mr. Roskill was right, and there is no room, in law, for the introduction of the further warranty as suggested by Mr. Megaw and as found by the judge.

In my view there was no breach of contract under the charterparty by the owners, and I agree that this appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Ince & Co.; Edward Thompson & Hauser.*

I. G. R. M.

[21] [1920] 1 K.B. 868, 899.

[CHANCERY DIVISION.]

In re NEELD, DECD.

1960
Feb. 24, 25, 26; *March* 1, 2, 3, 4.
Cross J.

CARPENTER *v.* INIGO-JONES AND OTHERS.

[1959 N. No. 674.]

Name and Arms Clause—Condition subsequent—Uncertainty—Direction to take and "use upon all occasions" surname.

Name and Arms Clause—Public policy—Unlikelihood of clause applying to married woman.

Will—Construction—Omission—Filled by reference to words in subsequent clause—Name and arms clauses.

Administration—Time when beneficiary entitled to payment—Income—Residue—Specific devise—When beneficiary "entitled to actual "receipt of yearly" income.

By his will dated January 12, 1952, a testator devised certain specifically named freehold properties upon trust for his grandson,

Ian Spencer Horne, for life with remainder to his sons in tail male, with remainder to the daughter of the testator, and on her death upon the trusts of his residuary estate. By clause 17 he directed that any person, other than his daughter, "who . . . shall "become entitled to the actual receipt of the yearly rents and "profits" of those properties "and who shall not then use the "surname of Inigo-Jones," or, if an infant, within one year of attaining 21 years, "take upon himself and use upon all occasions "the surname of Inigo-Jones only and quarter the arms of Inigo-"Jones with his or her own family arms and shall within the space "of one year next after the period hereinbefore prescribed apply for "and endeavour to obtain a proper licence from the Crown or "take such other means as may be requisite to enable him or her "to take use and bear the surname of Inigo-Jones only and arms of "Inigo-Jones and in case any of the said persons . . . shall refuse "or neglect or discontinue to take or use such surname and "arms . . . after the expiration of the said space of one year the "use and estate hereby limited . . . shall absolutely cease," and the properties should devolve as though the person concerned, being a tenant for life, were dead, or being tenant in tail, were dead and without heirs: that provision was not to apply if the properties devolved on any person entitled to the residuary estate.

By clause 14 the testator devised and bequeathed his net residuary estate, in the events which happened, to his brother, Ralph Christopher Inigo-Jones, with remainder to the son of his brother, with remainder to another brother and to his son in tail male, with remainder to the sons and daughters of his daughter in tail general with an ultimate remainder for the persons entitled under the Administration of Estates Act, 1925. Clause 14 also provided that "the name and arms clause contained in the will of Joseph Neeld "shall be applicable to this my will so far as my residuary estate is "concerned and shall apply to any person taking the income of my "net residuary estate." That clause provided that "every person "who under the trusts of this my will shall become entitled to the "actual receipt of the yearly rents and profits" of the property thereby devised "and who shall not then use the surname of 'Neeld' "and bear the arms of 'Neeld' and the respective husbands of . . . "females shall within the space of one year next after he or she "shall so become entitled as aforesaid or if an infant . . . within "the space of one year" of attaining 21 "take upon himself "or herself and use upon all occasions the name of 'Neeld' only "and quarter the arms of 'Neeld' with his or her own family "arms and shall within the space of one year next after the periods "hereinbefore prescribed apply for and endeavour to obtain an Act "of Parliament" or take such other requisite steps "to enable him "or her to use and bear the surname of 'Neeld' only and arms of "'Neeld' and in case any of the said persons shall refuse or neglect "or discontinue to take or use such surname and arms" or to take the requisite steps "after the expiration of the said space of one "year the use and estate hereby limited to the person who or whose "husband shall so refuse neglect or discontinue as aforesaid . . . "shall absolutely cease" and the property should devolve as though the person concerned, being a tenant for life, were dead, or being a tenant in tail, were dead and without heirs.

The testator died on October 3, 1956, leaving estate comprising both realty and personalty. His will was proved on October 30, 1957, and in 1958 his widow began proceedings under the Inheritance (Family Provision) Act, 1938. Neither the brother nor the grandson of the testator had taken any steps to change their names but the executor had paid £800 to the grandson at his request on

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account of the rents received by them from the specifically devised properties. In the course of administration, before any assents had been made or the net residue ascertained, the executor took out a summons to determine, inter alia, whether the Inigo-Jones and the Neeld name and arms clauses were valid and binding on the testator's grandson and brother respectively, or whether they were void for uncertainty or as being contrary to public policy, and, if valid, whether the interests had determined:—

Held, (1) that the Inigo-Jones clause was substantially a reproduction of the Neeld clause, so that if it were not intelligible as it stood words could be added from the Neeld clause to make it so, and that, on their construction, only one period of 12 months within which the name and arms must be taken was intended by each clause, and discontinuance of the specified name and arms at any time, even after the end of the 12 month period, would work a forfeiture.

(2) (a) That the words "discontinue to . . . use" referred back to the earlier words "use on all occasions," and meant that the beneficiary must use the surname on all occasions when he would ordinarily use a surname, and that, accordingly, neither clause was void for uncertainty (post, p. 738).

In re Drax (1906) 22 T.L.R. 343 followed.

(b) That the fact that a devise was invalid so far as it applied to married women and their husbands was not a sufficient reason for holding it totally void as applied to males and spinsters, and that as the beneficiaries under the Inigo-Jones clause were exclusively male and it was only in remote and improbable contingencies that the Neeld clause would affect females, neither clause was contrary to public policy. Both clauses therefore were valid and binding (post, p. 739).

In re Kersey [1952] W.N. 541 distinguished.

(3) That a life tenant entitled to a composite gift of residuary realty and personalty subject to the payment of debts and legacies did not become entitled to the residue of the income of the net residuary estate until the residue had been ascertained in due course of administration, and that since the net residue had not yet been ascertained, the 12 month period had not begun to run against the brother of the testator and there was no forfeiture (post, p. 740).

(4) That a life tenant of realty specifically devised by a will made since the passing of the Land Transfer Act, 1897, had a vested interest in the yearly rents and profits and became equitably entitled to them as they accrued as from the date of the death of the testator; that notwithstanding the possibility of defeasance by the payment of debts or the satisfaction of the widow's application under the Inheritance (Family Provisions) Act, 1938, the grandson became "entitled to the actual receipt of the yearly rents and "profits" within the meaning of clause 17 on the testator's death, and that, accordingly, more than 12 months having elapsed since that date, there had been a forfeiture of his interest (post, pp. 741 et seq.).

In re Varley (1893) 68 L.T. 665 applied.

In re Simson [1950] Ch. 38; 65 T.L.R. 721; [1949] 2 All E.R. 826 considered.

ADJOURNED SUMMONS.

The testator, Lionel William Neeld, made his will on January 12, 1952. By clause 3 of his will he devised certain freehold property, described as West and East Foscote farms and woodlands, and a freehold residence, Crowdown, on the following

trusts: As to the Foscote farms and woodlands, on trust for his grandson, Ian Spencer Horne, during his life and after his death on trust for his first and other sons successively in tail male and upon failure of such issue on trust for his daughter, Mrs. Margaret Evelyn Whiting, for life and on her death on trust for her other sons in tail male and on failure of such issue on the trusts of his residuary estate: As to the residence Crowdown, on trust for his daughter, Mrs. Margaret Evelyn Whiting, during her life and after her death on trust for his grandson, Ian Spencer Horne, during his life and after his death on trust for his first or other sons successively in tail male and on failure of such issue on trust for the other sons of Mrs. Whiting in tail male and upon failure of such issue upon the trusts of his residuary estate.

Clause 17 was in the following terms: "I expressly direct "that any person (with the exception of my daughter the said "Margaret Evelyn Whiting) who under the trusts of this my "will shall become entitled to the actual receipt of the yearly "rents and profits of the Foscote farms and woodlands and or "to Crowdown and who shall not then use the surname of Inigo-"Jones or if an infant shall so become entitled then within the "space of one year next after he or she shall have attained the "age of twenty-one years take upon himself and use upon all "occasions the surname of Inigo-Jones only and quarter the arms "of Inigo-Jones with his or her own family arms and shall within "the space of one year next after the period hereinbefore pre-"scribed apply for and endeavour to obtain a proper licence from "the Crown or take such other means as may be requisite to "enable him or her to take use and bear the surname of Inigo-"Jones only and arms of Inigo-Jones and in case any of the said "persons (with the exception only of my daughter the said "Margaret Evelyn Whiting) shall refuse or neglect or discontinue "to take or use such surname and arms and to take such means "as may be requisite for the purpose of taking or using the same "then after the expiration of the said space of one year the use "and estate hereby limited to the person who shall so refuse "neglect or discontinue as aforesaid and also the limitation here-"inbefore contained to the use of the said trustees their executors "administrators and assigns during the life of such person in "case he or she shall be tenant for life of the said Foscote farms "and woodlands and or Crowdown shall absolutely cease and "immediately thereupon the said Foscote farms and woodlands "and or Crowdown shall go over to the uses and in the manner "to and in which the same would have gone if the person who "shall so refuse or neglect or discontinue as aforesaid being "tenant for life of the Foscote farms and woodlands and or "Crowdown were then actually dead or being tenant or tenants "in tail male were then dead without heirs inheritable under "the same entail but I direct that this provision shall not apply "if the Foscote farms and woodlands and or Crowdown shall

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" devolve on any person then entitled to my residuary estate as " hereinbefore appearing."

By clause 14 of his will the testator devised and bequeathed his net residuary estate upon trust, in the events which happened, to his brother, Ralph Christopher Inigo-Jones, during his life, with remainder to Ralph William Inigo-Jones for life, with remainder to the sons of Ralph William Inigo-Jones in tail male, and on the failure of such issue upon trust for his brother Henry Richmond Inigo-Jones for life, with remainder to John Richmond Inigo-Jones during his life, with remainder to the sons of John Richmond Inigo-Jones in tail male, with remainder to the sons of Mrs. Whiting in tail male, with remainder to her sons successively in tail general, with remainder to her daughters in equal shares and as tenants in common in tail general; if there were a failure of issue of any daughter of Mrs. Whiting, then her share, both original and accruing, was to be held on trust for the other daugthers equally as tenants in common in tail general; if all except one of the daughters should die without issue, or if there were only one daughter, then, as to the whole of the premises, on trust for that daughter in tail general with an ultimate remainder for the persons who would be entitled to the testator's estate under the Administration of Estates Act, 1925, if he had died intestate domiciled in England without leaving a wife surviving him. Clause 14 continued " provided expressly that the name and arms " clause contained in the will of the said Joseph Neeld [from " whom the testator had inherited the Grittleton Estate] shall " be applicable to this my will so far as my residuary estate is " concerned and shall apply to any person taking the income of " my net residuary estate."

The name and arms clause in the will of Joseph Neeld was in the following terms: " Provided also that every person who " under the trusts of this my will shall become entitled to the " actual receipt of the yearly rents and profits of the said manors " and other freehold premises hereinbefore devised and who shall " not then use the surname of ' Neeld ' and bear the arms of " ' Neeld ' and the respective husbands of such of them as are " or shall be females shall within the space of one year next after " he or she shall so become entitled as aforesaid or if an infant " shall so become entitled then within the space of one year next " after he or she shall have attained the age of 21 years take " upon himself or herself and use upon all occasions the surname " of ' Neeld ' only and quarter the arms of ' Neeld ' with his or " her own family arms and shall within the space of one year " next after the periods hereinbefore prescribed apply for and " endeavour to obtain an Act of Parliament or a proper licence " from the Crown or take such other means as may be requisite to " enable him or her to take use and bear the surname of ' Neeld ' " only and arms of ' Neeld ' and in case any of the said persons " shall refuse or neglect or discontinue to take or use such sur- " name and arms and to take such means as may be requisite for

" the purpose of taking or using the same then after the expira-
" tion of the said space of one year the use and estate hereby
" limited to the person who or whose husband shall so refuse
" neglect or discontinue as aforesaid . . . shall absolutely cease
" and immediately thereupon the said manors and freehold pre-
" mises shall go over to the uses and in the manner to and in
" which the same would have gone if the person who or whose
" husband shall so refuse neglect or discontinue as aforesaid and
" being tenant for life of the said manors and freehold premises
" were then actually dead or being tenant or tenants in the
" tail male or in tail general were then dead and without heirs
" inheritable under the same entail."

The testator died on October 3, 1956, survived by his widow, and leaving residuary estate comprising both realty and personalty. He had one child, his daughter, Mrs. Margaret Evelyn Whiting, who was the mother of Ian Spencer Horne, who had three infant children, Anthony Lionel Spencer Horne, Randall Horne and Melaine Margaret Lilian Horne. The testator had two brothers, Ralph Christopher Inigo-Jones, the father of Ralph William Inigo-Jones, and Henry Richmond Inigo-Jones, who had a son, John Richmond Inigo-Jones, neither of the latter being parties to the summons.

The testator's will was proved on October 30, 1957, and in 1958 his widow began proceedings under the Inheritance (Family Provision) Act, 1938. In 1958 the executor paid £800 to Ian Spencer Horne at his request on account of the rents received from the specifically devised properties. Ian Spencer Horne had not taken the name and arms of Inigo-Jones, nor had Ralph Christopher Inigo-Jones taken the name of Neeld, and before the net residue had been ascertained or any assents made the surviving executor took out a summons for the determination, inter alia, of the following questions: 1 (a) Whether the provisions in clause 14 of the testator's will incorporating the name and arms clause in the will of Joseph Neeld was binding on the defendant Ralph Christopher Inigo-Jones or whether it was void for uncertainty or as being contrary to public policy; (b) if it were valid and binding, whether the prescribed periods commenced with the date of the testator's death or the date of an assent to the defendant; (c) if the prescribed periods began with the date of the testator's death whether, in the events which had happened, the interest of the defendant in the testator's residuary estate had determined. 2 (a) Whether the provisions in clause 17 as to the assumption of the name and arms of Inigo-Jones were binding on the defendant Ian Spencer Horne, or whether they were void for uncertainty or as being contrary to public policy; (b) if they were valid and binding, within what period the defendant was bound to comply with them; (c) if the period began with the date of the testator's death, whether the interest of the defendant in the Foscote farms and woodlands had determined.

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N. S. S. Warren Q.C. for the executor.

John Bradburn for Ralph Christopher Inigo-Jones and Ralph William Inigo-Jones, the first and second defendants.

J. L. Knox for Ian Spencer Horne, the third defendant.

R. S. Lazarus Q.C. and *T. A. C. Burgess* for Ian Spencer Horne, the third defendant, his three infant children, the fourth, fifth and sixth defendants, the infant children of the third defendant, and Margaret Evelyn Whiting, the seventh defendant.

W. J. C. Tonge for Celia Kathleen Mary Neeld, the eighth defendant, a legatee.

The following cases, in addition to those referred to in the judgment, were cited in argument on questions 1 (a) and 2 (a): *In re Litchfield* [1]; *In re Fry.*[2]

February 26. Cross J. The first two questions in this originating summons relate to the validity and the effect of the name and arms clauses contained in the will, dated January 12, 1952, of Lionel William Neeld who died on October 3, 1956.

The testator's name was originally Inigo-Jones but he changed it to Neeld in 1941 on inheriting the Grittleton Estate which was settled by the will of Joseph Neeld made on May 28, 1855. The testator had only one child, a daughter, Mrs. Margaret Evelyn Whiting, the seventh defendant; and the third defendant, Ian Spencer Horne, is her son by her first marriage. He has three children, two of whom are sons, who are the fourth, fifth and sixth defendants. The testator had two brothers, Ralph Christopher Inigo-Jones, the first defendant, who has a son, Ralph William Inigo-Jones, who is the second defendant, and another brother, Henry Richmond Inigo-Jones, who has a son, John Richmond Inigo-Jones.

[His Lordship read the provisions of the will set out above, observed that under the settlement of the specifically devised property in clause 3 the successive beneficiaries, apart from the daughter, Mrs. Whiting, were exclusively male, and that under the trusts of clause 14 there was a remote possibility of female issue of the daughter becoming entitled to the property, and continued:] It is clear that clause 17 is substantially a reproduction of the "Neeld" name and arms clause with the substitution of Inigo-Jones for Neeld. But after the words "the surname of "Inigo-Jones" in clause 17 there are no words corresponding to the words "and bear the arms of 'Neeld' and the respective "husbands of such of them as are or shall be females shall within "the space of one year next after he or she shall so become "entitled as aforesaid" which appear in the Neeld name and arms clause. The omission of the reference to husbands is, of course, reasonable enough, since there are no female beneficiaries under clause 3 other than Mrs. Whiting, who is expressly excluded

[1] (1911) 104 L.T. 631.

[2] [1945] Ch. 348; 61 T.L.R. 449; [1945] 2 All E.R. 205.

from the operation of the name and arms clause. But Mr. Lazarus has argued that the omission of the other words makes clause 17 unintelligible and that I cannot supply the missing words. On the other hand, Mr. Bradburn has argued that the clause is in fact intelligible as it stands, and I think that this is so. But, in any case, it seems to me that it is quite obvious what the missing words are and that I can supply them from the Neeld clause. In *In re Murray* [1] Evershed M.R. pointed out [2] that it would not be right for the court to read words into a forfeiture clause in order to effect a forfeiture if it felt any doubt as to the words which should be read in and that it could and should do so only if it felt no doubt. Here, supposing that in fact it is necessary to read words in to make sense of the clause, I have not the least doubt what the words are. Another point of difference between the two wills which has been relied on is that whereas in the Neeld clause the plural "periods" is used, in the phrase referring to the obtaining of an Act of Parliament or licence from the Crown, in clause 17 the singular "period" is used. It was suggested that the use of the plural in the Neeld clause made it uncertain whether the beneficiaries had one or two years within which to take the name and arms in question. In my judgment, it is clear that only one period of 12 months is referred to in either clause. The use of the plural in the Neeld clause can readily be explained because in the case of adults the one-year period runs from the date of their becoming entitled in possession, whereas in the case of infants it runs from the attainment of 21. Therefore, in my judgment, it is just as sensible and accurate to use the plural as the singular, and I do not think this difference between the two clauses is really material.

A further question of construction which was the subject of some discussion is whether a forfeiture under these clauses is only caused by a discontinuance of user within the one-year period or whether a discontinuance at any time would work a forfeiture. The former construction would be so ridiculous that even apart from authority I think that I would have held that the clause covered a discontinuance at any time although the words "or "immediately after such discontinuance as aforesaid, as the case "may be," which appear in Davidson's Precedents, 2nd ed. (1861), vol. 4, at p. 337, do not appear after the words "after the "expiration of the said space of one year" in these clauses. But in *In re Drax*,[3] where the name and arms clause was in substantially the same terms as the clauses which I have to consider, this very point was raised, and Swinfen Eady J. held that discontinuance of user at any time even after the one-year period would work a forfeiture.

I must therefore now consider whether either clause, as I have construed it, is invalid. The authorities on the subject are in a most unsatisfactory state. Name and arms clauses in much the

[1] [1955] Ch. 69; [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129.

[2] [1955] Ch. 69, 79, 80.

[3] (1906) 22 T.L.R. 343.

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same form as these were of frequent occurrence in the nineteenth century settlements of landed estates and no one challenged their validity. Recently, however, partly, I think, because of the decisions of the Privy Council in *Sifton* v. *Sifton*[4] and of the House of Lords in *Clayton* v. *Ramsden*,[5] which emphasised the necessity for certainty and precision of language in defeasance clauses, and partly, I think, because a name and arms clause seems to be a relic of a bygone age, judges of first instance have sometimes held void a clause which judges of an earlier period would probably have regarded as free from ambiguity and unquestionable.

Examples are the decision of Vaisey J. in *In re Bouverie*,[6] Wynn-Parry J. in *In re Wood's Trusts*[7] and Danckwerts J. in *In re Kersey*.[8] On the other hand, in *In re Murray*[9] to which I have referred, Upjohn J. held that a name and arms clause in a somewhat unusual form was valid, and the Court of Appeal, although it reversed his decision by reason of some ambiguity in the particular words of that clause, pointedly refrained from expressing either approval or disapproval of the three other decisions to which I have referred.

The position, therefore, is that if the clauses before me are indistinguishable from those considered in those three cases, then I ought to hold them void. On the other hand, I have no encouragement from the Court of Appeal to extend those cases to cover clauses which are distinguishable from those which were there considered.

The first objection to these clauses which is taken is that the words "use" and "discontinue to use" are not sufficiently precise. In *In re Bouverie*[10] Vaisey J. held that the word "disuse" was not of the high degree of certainty and precision which was required in a condition subsequent and in *In re Wood's Trusts*[11] Wynn-Parry J. held that if the word "disuse" was too vague, the phrase "discontinue to use" must also be too vague. But here the wording is not "use" simpliciter but "use upon all "occasions." I think that the later words "discontinue to use" obviously refer back to the earlier phrase and mean "discontinue "to use on all occasions." Even apart from authority I should have no doubt that the expressions "use upon all occasions" and "discontinue to use on all occasions" were sufficiently certain, but, in fact, in my judgment, this point, too, is covered by the decision of Swinfen Eady J. in *In re Drax*.[12] There the words in question were "take upon . . . herself and use in all deeds and "writings to which . . . she shall be a party or which . . . she shall "sign, and upon all other occasions the surnames of Erle and

[4] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435, P.C.

[5] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16, H.L.

[6] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[7] [1952] Ch. 406; [1952] 1 T.L.R. 1670; [1952] 1 All E.R. 740.

[8] [1952] W.N. 541.

[9] [1955] Ch. 69.

[10] [1952] Ch. 400.

[11] [1952] Ch. 406.

[12] 22 T.L.R. 343.

"Drax." Swinfen Eady J. held that those words meant that the surname must be used on all occasions when a surname is ordinarily used. He pointed out that, of course, that would not compel the beneficiaries to use a surname when he or she would ordinarily use a christian name.

Mr. Bradburn submitted to me that I ought to draw a distinction between that case and this case. There the words were "use in all deeds . . . and upon all other occasions," so that an ejusdem generis construction might be possible, whereas here the words were "use upon all occasions." But that, in my judgment, is altogether too great a refinement. I do not think Swinfen Eady J. would have come to any different conclusion in that case if the words had been simply "upon all occasions." In this case, as in that, I think it means that the beneficiary must use the surname on all occasions when he ordinarily would use a surname.

The second objection which is taken to the validity of clause 14 of the will is based upon the decision of Danckwerts J. in *In re Kersey*.[13] There the beneficiary who was immediately affected by the clause was a married woman, and the clause extended to husbands of married women and purported to require them to change their names. Danckwerts J. held that a provision requiring the husband of a married woman to change his name under penalty of his wife losing some property was contrary to public policy. Of course, I would follow that decision without hesitation if I thought it applied to this case, but here the beneficiary who is immediately affected is the first defendant, Ralph Christopher Inigo-Jones, and it is only in very improbable and remote contingencies that any female can possibly be affected at all. I do not think the fact that a clause may be invalid so far as it applies to married women and their husbands is any sufficient reason for holding it totally void even as applied to males or spinsters.

In this connection I observe that the clause in *In re Murray* [14] which Upjohn J. held to be valid applied to married women although the beneficiary who was actually affected at the time was a male. Upjohn J. evidently did not consider that the circumstance that the clause extended to a married woman was any objection to its application to the facts before him. It is true that the Court of Appeal [15] reversed the judgment, but they did that on quite different grounds, and there is no suggestion in their judgment that Upjohn J. was wrong in not holding the whole clause void because of its possible application to married women.

I have no particular affection for name and arms clauses. If some higher court is prepared to say that nowadays no such clauses are capable of having any legal effect, I shall not shed any tears, but I could not take so robust a course myself even if I wanted to do so. I have to be satisfied that the particular clauses before me, reasonably construed, are open to some real,

[13] [1952] W.N. 541.
[14] [1955] Ch. 69.
[15] [1955] Ch. 69.

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not fanciful, objection on the ground either of uncertainty or of public policy. So far as concerns uncertainty, the cases of *In re Bouverie* [16] and *In re Wood's Trusts* [17] are plainly distinguishable, whereas the case of *In re Drax*,[18] in my judgment, is indistinguishable. I can see no real uncertainty in this clause, and, as I have said, I am not prepared to hold that the Neeld clause is wholly bad on grounds of public policy because of the remote possibility of a married woman becoming entitled to an interest in the residuary estate. Therefore, I shall declare that these clauses are valid.

Argument was then heard on question 1 (b). The case cited in argument is referred to in the judgment.

Cross J. The question which now arises is whether Ralph Christopher Inigo-Jones has forfeited his life interest in the residuary estate by failing to take the name and arms of Neeld within one year from the testator's death. Under clause 14 of the will the testator devised and bequeathed all the residue of his estate both real and personal subject to the payment out of his personal estate or in case of deficiency thereof out of his real estate of his funeral and testamentary expenses and debts and the legacies and the annuities bequeathed by the will or any codicil thereto and all death duties upon trust for Ralph Christopher Inigo-Jones for life. On the death of the testator all his property both real and personal vested in the surviving executor.

The administration of the estate is not yet completed and so far no payment on account of income has been made to the first defendant. In due course, after the administration has been completed, the executor will execute an assent in favour of the first defendant in respect of the residuary realty and an assent in respect of the residuary personalty in favour of the trustees but all that is in the future. The proviso in clause 14 which introduces the name and the arms clause provides that the clause contained in the will of Joseph Neeld shall be applicable to the testator's will. The opening words of the Neeld clause are: "Provided also that every person who under the trusts of this "my will shall become entitled to the actual receipt of the yearly "rents and profits of the said manors and other freehold premises "hereinbefore devised and who shall not then use the surname "of 'Neeld.' . . ." Applying that clause mutatis mutandis to the gift of residue, I think that an obligation is imposed on the first defendant to take the name and arms within one year from the time when he becomes entitled to receive the income of the residuary estate. The question is, has he yet so become entitled? I think not.

Mr. Lazarus has referred me to *In re Varley*,[1] where the testator specifically devised certain real property to his trustees

[16] [1952] Ch. 400.
[17] [1952] Ch. 406.
[18] 22 T.L.R. 343.
[1] (1893) 68 L.T. 665.

upon trust to receive rents and to permit his wife to reside in the mansion house, and subject thereto to stand possessed of the estate in question in trust for a certain life tenant with remainder over. He directed that every person who, under the foregoing trusts, should become entitled as tenant for life or in tail to the actual possession of the rents and profits of the E. estate, and who should not then use and bear the name of Varley, should within one year after he should so become entitled take upon himself and use the name of Varley together with his or her own family surname. North J. held that the year in question began to run against the life tenant of the specifically devised property on the death of the testator. But that was a case of a specific devise before the Land Transfer Act, 1897, and I do not think that the same considerations apply to a composite gift of residuary realty and personalty subject to the payment of debts, legacies and so on. In such a case I do not think that the life tenant of residue can be said to be entitled to the income of the net residuary estate until the residue has been ascertained in due course of administration and the necessary assents made.

The following cases, in addition to those referred to in the judgment, were cited in argument on question 2 (b) and (c): *In re Edwards* [2]; *Leslie* v. *Rothes (Earl)* [3]; *Andrew* v. *Andrew*.[4]

March 3, 1960. CROSS J. read the following judgment: By the two name and arms clauses contained in clauses 14 and 17 of his will the testator provided that Ian Spencer Horne and Ralph Christopher Inigo-Jones must make up their minds whether or not to comply with the conditions imposed within a year from the time when they should respectively become entitled under the trusts of the will to the actual receipt of the rents and profits or income of the properties in which they were respectively given life interests.

The property of which Ralph Christopher Inigo-Jones was given the income for his life is described by the testator in clause 14 as being the net residuary estate. The net residue has not yet been ascertained and being non-existent cannot produce any income. When the administration is completed Ralph Christopher Inigo-Jones may become entitled to be paid by the executor some sum in respect of income received by the executor during the administration period, but such income is not income to which he has any legal or equitable title as it accrues: *Corbett* v. *Inland Revenue Commissioners*.[1] Accordingly, as I have already said, I do not think that there can as yet be any question of Ralph Christopher Inigo-Jones having forfeited his life interest by failure to comply with the name and arms clause.

The position of Ian Spencer Horne is very different, since he

[2] [1910] 1 Ch. 541; 26 T.L.R. 308.
[3] [1894] 2 Ch. 499, C.A.
[4] (1875) 1 Ch.D. 410, C.A.

[1] [1938] 1 K.B. 567; 54 T.L.R. 279; [1937] 4 All E.R. 700; 21 T.C. 449, C.A.

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is given an equitable life interest in possession in the Foscote farm and woodlands under a specific devise. There can, I think, be no doubt that had the law remained the same as it was before the Land Transfer Act, 1897, he would have become on the death of the testator entitled to the actual receipt of the rents and profits of the properties in question within the meaning of the name and arms clause: *In re Varley*.[2] The legal estate would have passed on the death of the testator to the trustees under the specific devise, and the life tenant would have at once acquired a right in equity to be paid the rents and profits. It is true that the creditors of the testator could have taken administration proceedings for the purpose of making the specifically devised realty available for the payment of their debts, but this possibility would not have prevented the equitable life tenant from becoming on the death entitled to the actual receipt of the rents and profits.

The question which I have to decide is whether the same result ensues today in view of the changes which have been made in the law since *In re Varley* [2] was decided. On the death of the testator in 1956 the legal estate in the specifically devised property vested in the executor who could have sold it, if necessary, for the payment of debts. Ian Spencer Horne is a tenant for life within the meaning of the Settled Land Act, 1925, and subject to the executor's rights and powers for the purpose of administration the executor must, when required to do so, execute a vesting assent in his favour: section 6 (*b*) and section 8 (3) (*a*) of the Settled Land Act, 1925. The fact that all estate duty payable on the testator's death in respect of the property has not yet been paid does not justify the executor refusing to execute an assent if reasonable arrangements can be made for indemnifying him against any liability for them: section 8 (3) (*b*) of the Settled Land Act, 1925, and section 36 (9) and (10) of the Administration of Estates Act, 1925. It is not suggested that there was ever any likelihood of the specifically devised property being required for the purpose of paying debts, but it is said that there are two circumstances which have hitherto made it impossible for Ian Spencer Horne to insist on having a vesting assent made in his favour. The first is, that until I answered question 3 of this summons, the executor did not know what property was included in the specific devise. The second is that there is pending an application under the Inheritance (Family Provision) Act, 1938, by the widow of the testator who takes no benefit under his will, and that it is possible that the court may make some provision for her out of the rents of the specifically devised property—indeed, theoretically at least, a provision for her which would absorb the whole of the rents.

The first point does not appear to me to be of any substance. The fact that there was some doubt as to the extent of the devise would not, I should have thought, have disentitled Ian Spencer

[2] (1893) 68 L.T. 665.

Horne from having an assent made in his favour in respect of the property which was undoubtedly comprised in it. The second point, however, is of more weight. Under section 3 (1) of the Inheritance (Family Provision) Act, 1938 (as amended by the Intestates' Estates Act, 1952), where an order is made under the Act the will is to be deemed to have had effect as from the deceased's death subject to such variations as may be specified in the Act, and in *In re Simson*[3] Vaisey J. stated that when an application under this Act was pending executors ought to be cautious in parting with assets to the beneficiaries since the court might subsequently wish to have resort to such assets for the purpose of making provision for the applicant. I think that Vaisey J. was probably thinking rather of the payment of legacies of capital sums than of the execution of a vesting assent in respect of settled real estate. But Mr. Lazarus was disposed to agree in all the circumstances that Ian Spencer Horne has not yet become entitled to require a vesting assent to be executed in his favour, and I am prepared to assume that this is so.

The question then narrows itself to this: does a life tenant of realty specifically devised by a modern will only become entitled to the actual receipt of the yearly rents and profits within the meaning of such a clause as this when he becomes entitled to require the executor to execute a vesting assent in his favour, or does he become entitled on the death as he would have become entitled under the old law? In my judgment, the modern property legislation has not altered the position as radically as Mr. Knox has contended. On the death of the testator the position of Ian Spencer Horne with regard to the rents of the specifically devised property was totally different from that of Ralph Christopher Inigo-Jones with regard to the income of residue. Ian Spencer Horne became equitably entitled to the rents as they accrued and were received by the executor. It is true that his title to them was not indefeasible. They might be needed to pay debts or to satisfy some provision to be made under the Inheritance (Family Provision) Act, 1938, if any application under that Act were made, but subject to these possibilities of defeasance he had a vested interest to the rents as from the death; his title to them was not contingent. Mr. Knox relied strongly, of course, on the words "actual receipt" in the name and arms clause in support of the view that nothing short of a present right to insist on the rents being paid to him will start the period running. It hardly lies in the mouth of Ian Spencer Horne to say that he was not entitled to require payment of the rents to himself since by letter of February 3, 1958, addressed to the executor's solicitors, his solicitors demanded payment of the rents collected by the executor which they said were due to their client, and in response to that demand the executor paid over £800 on account of such rents.

[3] [1950] Ch. 38, 42; 65 T.L.R. 721; [1949] 2 All E.R. 826.

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However, in any case, I think that Mr. Knox lays too much stress on the adjective "actual." Apparently this word only came to be added by conveyancers to the words "possession" or "receipt "of the rents and profits" in order to preclude the suggestion that a title in reversion might be included as well as a title in possession: see *In re Petre's Settlement Trusts.*[4] If the words here had been not "who is under the trusts of this my will "entitled to the actual receipt of the rents" but "who is in actual receipt of the rents" the position might possibly have been different: *In re Duncombe.*[5] But in the phrase with which I have to deal, I do not think that the word "actual" does more than show that only life tenants who under the trusts of the will have a title in possession to the rents are affected by this clause. It appears from *In re Varley*[6] that the existence of a mortgage, the interest on which absorbs all the rents, would not preclude the life tenant in possession from being entitled to "actual possession "and receipt of the rents" within the meaning of this clause. If, therefore, I awarded the widow an annual sum which absorbed all these rents, that would not prevent Ian Spencer Horne from being "entitled to the actual receipt of the yearly rents" within the meaning of this clause. It would be very curious if the fact that the executors are not obliged to make an assent pending the hearing of the application can alter the position if the making of an order in the widow's favour would not itself do so.

[On March 23, 1960, his Lordship dismissed the widow's application under the Inheritance (Family Provision) Act, 1938, on the ground that the testator had made reasonable provision for the widow.]

Orders accordingly.

Costs and expenses of the trustee and costs of all the other parties on a common fund basis out of the residuary estate.

Solicitors: *Church, Adams, Tatham & Co. for Carpenter & Carpenter, Bath; Mawby, Barrie & Letts for Bell, Pope & Bridgewater, Southampton; Arthur Taylor & Co. for Titley, Long & Co., Bath; Collyer-Bristow & Co. for Wood & Awdry, Chippenham.*

M. G. T.

[4] [1910] 1 Ch. 290, 296.
[5] [1932] 1 Ch. 622, C.A.
[6] 68 L.T. 665.

[COURT OF APPEAL.]

BURTON *v.* WEST SUFFOLK COUNTY COUNCIL.

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Mar. 10, 11.

[1956 B. No. 2101.]

Sellers, Ormerod and Upjohn L.JJ.

Highway — Nonfeasance of local authority — Inadequate drainage — Drainage works carried out by highway authority — Insufficient work done—Accident caused thereby—Whether misfeasance or nonfeasance.

In March, 1954, the defendants, as the highway authority, carried out certain drainage work to a road which improved its condition, but which was inadequate to prevent flooding when the road was subject to heavy rain. It was the practice of the roadman employed by the defendants to put out red flags by day and red lights by night whenever there was flooding which could be dangerous to vehicles. In December, 1954, after heavy rain and flooding but when the water had subsided, a patch of ice formed on that part of the road which tended to keep damp because of inadequate drainage. Had the drainage been adequate, there would not have been any ice. The red flags and red lights, which had been on the road while there was flooding, were removed by the roadman when the water had subsided.

The plaintiff was driving his car along the road when it ran on to the patch of ice causing it to skid and crash into a tree. The plaintiff was injured and the car was damaged. In an action by the plaintiff for damages:—

Held, (1) that, even where a highway authority had carried out drainage work, failure to provide adequate drainage by not doing sufficient work was an act of nonfeasance for which the highway authority was not liable.

Aliter if the work done had been negligently performed or created a new danger (post, pp. 747, 752, 753).

McClelland v. *Manchester Corporation* [1912] 1 K.B. 118; 28 T.L.R. 21 distinguished.

Dictum of Cassels J. in *Drake* v. *Bedfordshire County Council* [1944] K.B. 620, 626; 60 T.L.R. 304; [1944] 1 All E.R. 633 questioned.

(2) That there was no duty on the defendants to warn the plaintiff of the danger of ice being on the road, and, therefore, the plaintiff's claim failed (post, pp. 750, 751, 753).

Sheppard v. *Glossop Corporation* [1921] 3 K.B. 132; 37 T.L.R. 604, C.A. applied.

APPEAL from Salmon J., sitting at Ipswich.

Shortly before 9 p.m. on December 11, 1954, the plaintiff, Peter Smith Burton, was driving his Wolseley motor-car along the Cambridge to Haverhill Road when he ran on to a patch of ice which caused the car to skid off the road into a tree. The car was damaged and the plaintiff was injured.

The ice had formed across the road for a distance of about 58 feet at the lowest part of the road in a position where flooding frequently took place at a time of heavy rain. The land sloped from the south to the road, and as the road had a camber the water generally collected on the south side of the road, but the passage of vehicles and the percolation of some of the water kept the north side of the road damp too.

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When flooding took place so as to be a danger to vehicles, it was the practice of the roadman employed by the defendants, the West Suffolk County Council, to put out red flags by day and red lights by night. There was heavy rain on December 8 and 9, 1954, and on the three days—December 8, 9, and 10, 1954—red flags and red lights had been exhibited on account of the flooding, but by the morning of December 11, 1954, the day of the accident, the water had subsided, and the experienced roadman thought that the flags and lights were no longer necessary.

A slight frost had set in early on December 11, 1954; at 6 a.m. the temperature was 31·3 degrees, at 9 a.m. 30·4 degrees, but by noon it had risen to 38 degrees. In the evening, the temperature had fallen to 30·7 degrees at 6 p.m. and 32·1 degrees at 9 p.m. The ice, which was on the road at the time of the accident, was described as a paper-thin coating. It was not, therefore, due to any appreciable flooding on that day, but it was on a part of the road which tended to keep damp from the water, which ran off the adjoining land, and had no adequate outlet through road drains.

The plaintiff brought this action to recover damages for the injuries he had sustained and for the damage to the car against the defendants as the highway authority responsible for the road.

The judge found that the road drainage to have been inadequate and this finding was not challenged. Since 1954, better drainage has been effected by the carrying out of additional work. In the course of his judgment, the judge said: "No one can be "certain, but, in my view, the strong probability is that if the "road had been properly drained at the time there would have "been no ice at this point where the accident occurred when the "plaintiff passed."

The judge also found that the plaintiff was driving at a reasonable speed on the crown, or just over the crown, of the road, and that he was in no way to blame for the skid or its consequences as no reasonable, prudent driver would have been able to contrive it. Judgment was, however, entered for the defendants, because the judge held that no misfeasance on the part of the defendants had been established. The plaintiff appealed.

Stephen Chapman Q.C. and *Andrew Phelan* for the plaintiff.
Martin Jukes Q.C. and *D. Hill-Smith* for the defendants.

The following cases were cited in argument, in addition to those referred to in the judgments: *Baxter* v. *Stockton-on-Tees Corporation* [1]; *Thompson* v. *Bradford Corporation and Tinsley* [2]; *Shoreditch Corporation* v. *Bull* [3]; *Breen* v. *Tyrone County Council* [4]; *Russell* v. *Men of Devon*.[5]

[1] [1959] 1 Q.B. 441; [1958] 3 W.L.R. 275; [1958] 2 All E.R. 675, C.A.
[2] [1915] 3 K.B. 13.
[3] (1904) 90 L.T. 210; 20 T.L.R. 254, H.L.
[4] (1908) 42 Sc.L.T. 250.
[5] (1788) 2 T.R. 667.

SELLERS L.J. stated the facts and continued: The question to be determined is, has the plaintiff established liability on the defendants? It appears that the defendants took over this highway in 1922. They did not construct the road. They contend, rightly, that they are not liable for nonfeasance.

The plaintiff has sought to rely on the defendants' liability in damages for active misfeasance by which the highway was made dangerous. The submission was, in effect, that if a highway authority undertakes the repair of a road but does not complete it sufficiently and adequately so that its condition still left a danger to road users, then that is misfeasance.

The only repair work relied on was that in March, 1954, when the defendants did some drainage work on the part of the road in question. The judge has found that the defendants improved the drainage. Precisely what they did is not clear, but it served to take some of the water off the road, and so made the road somewhat less liable to flooding and less unsafe than it had been before. There was clearly nothing which the defendants did then which created any danger actual or potential. Such work as was done was properly done. All that can be said is that enough was not done, which seems to be a clear case of nonfeasance.

Mr. Chapman's skilful and, if I may so, bold argument was based mainly on observations of Lush J. in *McClelland* v. *Manchester Corporation*,[1] from which I will cite only one short passage. Lush J., a great authority on the common law, said[2]: "If a highway authority, therefore, leaves a road alone and it "gets out of repair, there is, of course, no doubt that no action "can be brought, although damage ensues. But this doctrine has "no application to a case where the road authority have done "something, made up or altered or diverted a highway, and have "omitted some precaution, which, if taken, would have made "the work done safe instead of dangerous. You cannot sever "what was omitted or left undone from what was committed or "actually done, and say that because the accident was caused by "the omission therefore it was nonfeasance." The views of Lush J. in that case were incorporated by him in the later case of *Moul* v. *Thomas Tilling Ltd.*,[3] where in the course of a judgment given in the Divisional Court on appeal from the county court, Lush J. said[4]: "If the damage was caused—I may use "the words I used in *McClelland's* case[5]—because they chose to "do nothing at all to the road, they are not liable. I endeavoured "to make it clear in that case that it may be true to say that "damage resulted through the highway authority doing work "badly, although the immediate cause of the accident was their "omission to take some steps which they ought to have taken. "A highway authority make up a road, and, to make it safe, a

[1] [1912] 1 K.B. 118; 28 T.L.R. 21.
[2] [1912] 1 K.B. 118, 127.
[3] (1918) 88 L.J.K.B. 505; 34 T.L.R. 473, D.C.
[4] 88 L.J.K.B. 505, 508.
[5] [1912] 1 K.B. 118.

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" certain thing requires to be done; they do not do that thing, and " the road is unsafe in consequence—in one sense it is true to " say that the accident happens through that omission to take " the necessary steps, but in truth and in substance through their " not properly completing the work they have done. In a case " like that they are guilty of misfeasance, notwithstanding it was " an omission to do a certain act which was the immediate cause " of the accident. That is all I meant to say, and what I thought " I said, in *McClelland's* case." Then there was a passage at the very end of the judgment which was relied on in argument[6]: " I wish to guard myself against saying that, if a highway autho- " rity choose to make up or repair a road, or a section of a road, " there may not be a case of liability if they leave one spot, one " part of the road which they do repair, in a dangerous condition. " The case put during the argument as an illustration, that, if a " highway authority do choose to maintain a road in repair and " do work on that road, a case may arise in which it may be " necessary to consider whether, if, deliberately leaving one hole " open and confining their repair to another, doing one half of the " road and not the other, they can shelter themselves under this " doctrine that it is a case of mere nonfeasance as regards the " hole they do not repair. I express no opinion in regard to that, " because this case was not put on any such ground. I do not " see how it could have been. I have only added this, because I " did not wish it to be thought that, in my opinion, it necessarily " follows that a road authority is justified in making up one half " of a road and leaving the other half in a dangerous condition."

McClelland v. *Manchester Corporation*,[7] on which reliance was placed, and the observations particularly of Lush J., were referred to in the course of the judgments in *Sheppard* v. *Glossop Corporation*.[8] Bankes L.J. said[9]: " *McClelland's* case was decided by " Lush J. on the same principle, although I think the headnote " to the report does not sufficiently explain the decision. The " defendants in that case had taken over an existing highway at " the end of which there was a kind of ravine. They had made " up the road and had placed lights in it. There was apparently " beyond the ravine another street, and they had made up this " street also and placed lights in it. The jury came to the con- " clusion that by so making up the two streets with the ravine " intersecting them the defendants had in effect set a trap for " passers-by, and that by lighting the streets at night they had " made the trap more dangerous because a passenger seeing a " continuous row of lights would assume that there was no " interruption of the highway. In answer to questions put by the " learned judge the jury found that the road as made up and " constructed was a danger to persons lawfully using it; that the " ravine which was unfenced was a hidden trap to persons using

[6] 88 L.J.K.B. 505, 509.
[7] [1912] 1 K.B. 118.
[8] [1921] 3 K.B. 132; 37 T.L.R. 604, C.A.
[9] [1921] 3 K.B. 132, 140.

" the road." That is the decision in the *McClelland* case,[10] and it was on those facts a clear case of misfeasance.

The only other authority relied on was *Drake* v. *Bedfordshire County Council.*[11] Cassels J. decided that case, and it turned mainly on another point. In so far as Cassels J. found misfeasance, the facts—perhaps not fully reported—do not seem to me to establish any active creation of a danger. I entirely agree with what Salmon J. said with regard to it.* Salmon J. doubted the correctness of the dictum in *Drake's* case that the failure to repair the fencing was a misfeasance.

Lush J.'s observations have, apparently, never been applied in the way argued by Mr. Chapman, and they could be, as it appears on their face, very far-reaching. There is an authority in this country, that of Morris J., in *Wilson* v. *Kingston-upon-Thames Corporation,*[12] and an Irish case before Lord MacDermott C.J. of *Quinn* v. *Ministry of Commerce,*[13] which are both authorities contrary to the view expressed by Lush J. In the *Kingston Corporation* case, a similar argument was advanced by counsel and was treated by Morris J. in this way[14]: " [Counsel " for the plaintiff] submitted that if he has shown that some " repairs were done at that point, but that those repairs were done " badly, then the defendants should be liable, because, had " the repairs been done properly, the accident would not have " happened. He further relied on *McClelland* v. *Manchester* " *Corporation.*[15] That authority has, however, to be read in " the light of the observations made by the Court of Appeal in " *Sheppard* v. *Glossop Corporation.*" [16] Morris J. held that the lack of repair of the highway arose from nonfeasance and not from misfeasance in repairing the road negligently, and, therefore, there was no liability.

The kindred case which came before the courts in Northern Ireland arose from circumstances where the plaintiff after dark was riding a pedal-cycle on the main road leading from Newry to Dublin, and he was thrown from his bicycle owing to the presence of a pothole in the carriage way. In the course of his judgment, which turned on other matters as well as this particular point, Lord MacDermott C.J. said[17]: " In this respect the case is very

[10] [1912] 1 K.B. 118.

[11] [1944] K.B. 620; 60 T.L.R. 304; [1944] 1 All E.R. 633.

* The following is the relevant passage of Salmon J.'s judgment: " . . . in that case [*Drake's* case] it " was held justly, that the hole in " the railings or the failure to repair " the railings was misfeasance and " not nonfeasance and, secondly, that, " in any event, as the action was " brought against the contractors, and " they had been negligent, they could " not claim the immunity of the high- " way authority. It follows, there- " fore, that the first point, which was " alluded to by Cassels J., was not " necessary for his decision. I am " bound to say that, if it had been, " I should have had grave doubts as " to whether I should have been able " to follow it."

[12] (1948) 64 T.L.R. 553; [1948] 2 All E.R. 780; affirmed [1949] 1 All E.R. 679, C.A.

[13] [1954] N.Ir.R. 131.

[14] 64 T.L.R. 553; [1948] 2 All E.R. 780, 782.

[15] [1912] 1 K.B. 118.

[16] [1921] 3 K.B. 132.

[17] [1954] N.Ir.R. 131, 136.

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"much on all fours with that of *Wilson* v. *Kingston-upon-Thames* "*Corporation*.[18] There an asphalt road had been repaired on two "occasions by the highway authority, the second repair being of a "temporary nature and consisting of putting tar-macadam into "the hole. This wore or worked out and the plaintiff whilst "cycling over the hole was thrown and severely injured. Morris "J. held that this was nonfeasance. In the course of his "judgment he said[19]: 'The injury to the plaintiff was not caused "'by the exercise on the part of the defendants of their duty to "'repair. It was not because they effected some temporary "'repair . . . that this accident happened. The accident hap-"'pened because the roadway was out of repair. Were I to "'accede to the submission made on behalf of the plaintiff, I "'would be not merely straining but also going in the face of "'the established law on this matter.' I respectfully agree and "am quite unable to discern any material distinction between that "case and the present one."

I feel no doubt that this court would be going in the face of the established law on this matter if we accepted the plaintiff's argument, and like the judge, I have no hesitation in rejecting it.

The second point regarding the failure to exhibit red lights avails the plaintiff no better. The roadman seems to have been right when he concluded that there was no flooding and no necessity for lighting. There was no evidence that the defendants ever gave warning of a frosty or icy road in any way. But if the defendants did fail to assist road users in a way which was their practice (although I am not sure what the lights would convey to one unfamiliar with the road), there was no duty on them to light or give warning.

In *Sheppard* v. *Glossop Corporation*[20] a similar point had been taken in regard to lighting. Scrutton L.J. said[21]: "Mr. Eastham "admitted that the appellants were not bound in the first "instance to light the borough at all. Then if they have once "begun to light, are they bound to continue? Mr. Eastham "answered, Yes. I am unable to agree. It is left to their "discretion to light or not to light; therefore they need not light "at all; if for a time they light they may discontinue either "wholly or partially in point of time or in point of space, and "the mere discontinuance is no breach of duty. That is, of "course, subject to this; that if they place an obstruction in the "highway they must by lighting or warning, or by watchmen or "fences or other reasonable means, guard against the danger they "have themselves created." That case was considering the position under the Public Health Act, 1875, but those observations fit the present case and I can see no breach of duty in respect of that matter brought home against the defendants.

I would dismiss the appeal.

[18] 64 T.L.R. 553.
[19] 64 T.L.R. 553; [1948] 2 All E.R. 780, 782.
[20] [1921] 3 K.B. 132.
[21] Ibid. 145.

ORMEROD L.J. I agree, and I would add only a few words. Mr. Chapman, in the course of his argument, made two submissions. His first and main submission was that the defendants, as a highway authority, were liable in this case because they were guilty of misfeasance. The second was that they were liable because the roadman had been guilty of negligence on the day of the accident by failing to put out warning flags or lamps, and the defendants were thereby liable.

The second submission was argued before the judge, but he made no reference to it in his judgment, and it may well be that he did not attach importance to it. The evidence was that this particular piece of road was liable to flood after heavy rain, and the defendants had caused warning flags or lamps to be put in the road when it was flooded. On the days previous to the accident the road had been flooded and flags and lamps had been put out. But on the day of the accident when the roadman left his work at mid-day the floods had gone, and, apart from a little dampness in the road, it was in a normal condition, and the roadman had, in consequence, decided not to put out any warnings. I find it difficult to see any breach of duty in these circumstances. The defendants had been in the habit of warning road users of floods, but there is no evidence that it was their practice to put out warnings in time of frost, and, in my judgment, there was no duty upon them to do so.

As to the first point, Mr. Chapman based his submission on the evidence that in 1954 the defendants had done some work on the road by making further inlets for surface water from the road to the drains, which work was inadequate to prevent flooding in time of heavy rain. He submitted that in these circumstances they were guilty of misfeasance. He agreed, of course, that, if a highway authority does nothing to remedy a defect in a road, there is no civil liability. A highway authority cannot be made liable in a civil action for nonfeasance. But he argued that if an authority sets out to do something to a highway, be it effecting a repair or curing a danger, then it is no longer a nonfeasant authority, but, if it does badly that which it sets out to do, either by omission or commission, then it is liable.

To apply that submission to the facts of the present case, Mr. Chapman argued that, once the highway authority began to improve or attempt to improve the drainage on the road by constructing additional inlets, they became liable for misfeasance if in the final result the drainage was inadequate. It was not suggested that the work was badly done or that it added an additional danger to the road in any way. Indeed, it was admitted that the additional drainage had effected some improvement.

The case upon which Mr. Chapman relied particularly was *McClelland* v. *Manchester Corporation*,[22] and particularly the passage from the judgment of Lush J.[23] which reference has

[22] [1912] 1 K.B. 118.

[23] Ibid. 127.

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already been made by my Lord. The facts of that case were very different, and there seems no doubt that, on the facts as found by the jury, a danger on the road had been created, and that was a case where the local authority was guilty of an act of misfeasance. That was the view of the case taken by this court in *Sheppard* v. *Glossop Corporation* [24]: see *per* Bankes L.J.,[25] to which reference has already been made.

There can be no doubt that if the defendants, to use the words of Lush J. in the *McClelland* case,[26] had omitted some precaution which, if taken, would have made the work done safe instead of dangerous, the defendants would have been liable. But there is no evidence that the work done was dangerous; the contrary is the case.

I think the rule is clear. If a highway authority does work on a road by way of repair or reconstruction it must be done properly, and in such a way as not to cause a danger on the road. That does not mean, in my judgment, that in a case like the present one, where some work has been done and done properly to improve the drainage of the road, the defendants should be held liable for failing to do further work which would result in further improvement of the drainage, although without further work the road may still be liable to flooding. To hold otherwise would, in my judgment, be extending the rule as to misfeasance to a point far beyond that established by authority. I would dismiss the appeal.

Upjohn L.J. I agree. The facts are not in dispute. The section of the road in question was liable to flooding after heavy rain. The defendants as the highway authority did some drainage work upon the road with a view to improving the conditions there. The works, which they did, were properly carried out in the sense that they were executed in a proper and efficient manner, and those works in themselves constituted no danger whatever to users of the road. The works, apparently, did improve conditions in the road from the point of view of flooding, but they did not cure it. The road was still liable to flood after heavy rain and the drainage was properly described as still inadequate.

Mr. Chapman's argument was really this, that, if a highway authority undertake to improve dangerous conditions in a road, they will be liable for misfeasance if they do not by their works substantially cure the danger. Thus, in this case, to make the road safe and no longer liable to flooding, the authority should have put in more surface drains, and, in particular, a surface drain in the lowest part of the road. This they did not do, and so it is argued that they are liable for misfeasance.

I am quite unable to accept the argument that this is a misfeasance on the part of the highway authority. By drainage works

[24] [1921] 3 K.B. 132.
[25] Ibid. 140.
[26] [1912] 1 K.B. 118, 127.

in themselves proper, the authority decreased the danger on the road, but they had not made it a completely safe road in times of heavy rain. They had done nothing improper, and have brought no dangers to users of the road which were not there before. It would be a most extraordinary situation if a highway authority, by improving dangerous conditions in a road, thereby assume an obligation to make the road completely safe from, for example, flooding. The judge said that he would require very clear authority to persuade him that the law would work in such a ridiculous fashion, and I agree with him.

I am satisfied that there is no such authority. True it is that Lush J. used some wide words in *McClelland* v. *Manchester Corporation*,[27] which have already been read by Sellers L.J. But it must be remembered that those words must be read in reference to the facts of that case, and the facts of that case were really very plain. The corporation had by its works created a trap for users of the road. Lush J.'s observations must also be read in the light of the observations (to which reference has already been made) of Bankes and Scrutton L.JJ. in the later case of *Sheppard* v. *Glossop Corporation*.[28]

In my view, properly understood, Lush J.'s words do not afford any support for the argument in the present case, which seems to me entirely contrary to principle.

On Mr. Chapman's second point that the defendants were in breach of duty in failing to put out lamps and flags in accordance with their usual practice, it seems to me clear that they were under no such duty: see *Sheppard* v. *Glossop Corporation*.[28] But, in fact, their practice was only to warn against flooding, and on the night in question there was no flooding on the road.

I agree that this appeal should be dismissed.

Appeal dismissed, with costs.

Solicitors: *Ward, Bowie & Co. for Rustons & Lloyd, Newmarket; Berrymans.*

N. P.

[27] [1912] 1 K.B. 118, 127.

[28] [1921] 3 K.B. 132, 140, 147, 148.

[PRIVY COUNCIL.]

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HONG GUAN & CO. LTD. . . . . APPELLANTS;

AND

R. JUMABHOY & SONS LTD. . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Sale of Goods—Exceptions clause—Contract "subject to shipment"—Construction—Sufficient goods shipped to fulfil contract—Insufficient to meet all vendors' other contracts—Allocation to buyers with "definite" contracts—Purported cancellation of "subject to shipment" contract—Whether effective.

Privy Council—Jurisdiction—Point of law not taken below—Alternative submission on construction of contract—Point which could not be met by further evidence (post, p. 763).

Damages—Market value—Proof—Evidence of compromises in other disputes relating to market value of similar goods (post, p. 764).

In November, 1950, the respondents, importers of cloves into Singapore, contracted to sell to the appellants 50 tons of second grade Zanzibar cloves, December shipment, "subject to force "majeure and shipment." The respondents did in fact ship in December a quantity of cloves sufficient to fulfil the contract, though not sufficient to meet all their commitments to other buyers. They alocated the cloves among the latter, and delivered none to the appellants, to whom they wrote "your shipment was not effected by "the Zanzibar suppliers. Your contract was made subject to . . . "shipment . . . Please consider your contract as cancelled." On a claim by the appellants for damages for breach of contract of sale:—

Held, that "subject to shipment" was to be construed as meaning that the contract was conditional upon the respondents being able to procure, as they were here, the shipment in December, 1950, of cloves of the stipulated quantity and description. If the words were to be construed as covering a situation when shipment did not take place merely as the result of the arbitrary choice of the vendors, then there would be no contractual force in the document, which would merely give an option to the vendors. The respondents could not be allowed to excuse their non-performance by reference to their other commitments and to seek to give to them priority over the appellants' claims—the contract made no reference to such commitments and they were no concern of the appellants. Accordingly, when the respondents failed to deliver to the appellants the cloves contracted for, and when they purported to cancel the contract, they committed a breach of it and were liable in damages (post, p. 763), the measure of them being the difference between the contract price and the market price at or about the date when the cloves arrived in Singapore.

Hollis Bros. & Co. Ltd. v. *White Sea Timber Trust Ltd.* [1936] 3 All E.R. 895, *Star Public Saw Mill Co.* v. *Robert Bruce & Co. Ltd.* (1923) 17 Ll.L.Rep. 7, C.A., and *Kokusai Kisen Kabushiki Kaisha* v. *Johnson* (1921) 8 Ll.L.Rep. 434 considered.

Judgment of the Court of Appeal of the Colony of Singapore reversed.

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* *Present*: LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST.

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HONG GUAN & CO. LTD. v. R. JUMABHOY & SONS LTD.

APPEAL (No. 18 of 1958) by leave of the High Court of the Colony of Singapore, against a judgment of the Court of Appeal of that High Court (Rigby and Wee Chong Jin JJ., Knight Ag.C.J. dissenting) (November 15, 1957) dismissing with costs the appeal of the present appellants from a judgment of Tan Ah Tah J. (October 9, 1956) whereby the claim of the appellants was dismissed with costs.

The following facts are taken from the judgment of the Judicial Committee: The claim made by the appellants (plaintiffs) in the action was for damages for breach of contract of sale. The appellants wished to purchase 50 tons of Zanzibar cloves. It was their practice to buy goods in bulk and to make contracts of sub-sale also in bulk. The respondents, according to the testimony of Mr. Jumabhoy, their chairman of directors, were, down to December, 1950, the biggest importers and stockists of cloves in Singapore. Mr. Jumabhoy stated in his evidence that there were two crops of cloves in Zanzibar in a year: one began to come in July and the other, which was larger, began to come in September. He stated that the total crop for the year 1949 was about 7,000 tons and that the 1950 crop was three-and-a-half times larger. He further stated that cloves were usually re-exported from Singapore to Java, there being almost no use for cloves in Singapore. The only type of cloves exported to Singapore for use in Indonesia was the particular type known as second grade Zanzibar cloves. The incidence of rain in Zanzibar, particularly if it came earlier than expected, might affect the picking and accordingly the selling by suppliers and the exporting.

The contract which was sued upon was dated November 7, 1950, and, bearing the respondents' number—number 106—was in one of a variety of forms used by the respondents. Its terms were as follows:

"Bought of R. JUMABHOY & SONS LTD.
"24, MALACCA STREET.
"Sold to MESSRS. HONG GUAN & CO. LTD.
"24, TELOK AYER STREET.
"Term: Cash in silver or bank notes:

"Subject to conditions of sale of the Indian Chamber of "Commerce, Singapore.

"50 Fifty tons Zanzibar cloves second grade, December ship-"ment @ $94½ per picul ex buyer's godown.

"Delivery to be taken within . . . days from date. In default "of delivery being taken within the stipulated time, the under-"signed have the option, without any notice to the purchaser, of "either cancelling the above sale, or of selling the goods by public "or private sale at the risk and expense of the purchaser, or of "retaining them, and if the goods are retained the usual charges "for storage and fire insurance (on the value of the said goods) "will be charged and also interest at the rate of 12 per cent. per "annum from the date on which delivery should have been taken.

"Subject to force majeure and shipment.

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" It is at the option of the seller to demand cash before or any " time after delivery of goods.

" N.B.—Buyers must examine the goods before delivery, and " no complaint may be made after delivery of same.

" Bearing interest at 24% per annum after due date of this " order.

" Tare four catties per bag.

" Broker for vendor and purchaser. Sd. R. Jumabhoy

" Sd. Illegible R. JUMABHOY & SONS LTD."

In fact the appellants did not receive any cloves from the respondents. A letter, dated December 29, was sent to them in these terms:

" RODYK & DAVIDSON

" Our Ref: FGV/F

" 29th December, 1950.

" Dear Sirs,

" Contract No. 106—50 tons

" Zanzibar 2nd grade cloves

" We are directed by your sellers, Messrs. R. Jumabhoy & " Sons Ltd., to inform you that your shipment was not effected " by the Zanzibar suppliers.

" Your contract was made subject to force majeure and ship- " ment in consequence of which please consider your contract as " cancelled.

" Yours faithfully,

" Sd. Rodyk & Davidson.

" Messrs. Hong Guan & Co. Ltd.,

" 14, Telok Ayer Street,

" Singapore."

On November 24, 1950, the appellants had entered into two contracts of sale, each for 25 tons of Zanzibar second grade cloves. One contract was with Messrs. Makhanlall & Co. and the other was with Messrs. Panachand & Co. Amongst other terms each contract included the following:

" Quality: Zanzibar second grade—as received from the " steamer.

" Price: S.S.$99/- per picul (ninety nine only).

" Shipment: December 1950.

" Delivery: At buyer's godown.

" Remarks: Subject to the safe arrival of the steamer and all " force majeure. . . ."

Evidence was given at the hearing of the action that the respondents had been informed by telephone that those two contracts of resale had been entered into. That evidence, contradicted by the evidence of Mr. Jumabhoy, was not accepted by the trial judge, who held that the respondents were not aware of the two contracts of resale until more than a month after they had been entered into and until the time when the appellants were contemplating bringing legal proceedings.

The respondents effected shipments from Zanzibar as follows: They shipped 300 tons on a ship called the *Tjibadak*. Though the actual date of sailing of that ship from Zanzibar was December 1, 1950, it was held, and it was not now disputed, that such shipment was properly to be regarded as a November shipment. The ship arrived at Singapore on January 25, 1951. The only December shipment on behalf of the respondents was of a quantity of 50 tons. It had in fact been hoped that that quantity would have been shipped on the *Tjibadak*. That quantity was actually shipped on the *Ettrick Bank*, which, sailing from Zanzibar on about December 21, 1950, reached Singapore on January 20, 1951, having overtaken the *Tjibadak*.

Inasmuch as the appellants did not receive any cloves from the respondents the appellants were in turn unable to deliver any cloves to Messrs. Makhanlall & Co. or to Messrs. Panachand & Co. In response to the inquiries which those sub-purchasers addressed to the appellants, the solicitors for the appellants stated (in letters dated January 18, 1951): "Our clients have pressed Messrs. "Jumabhoy & Sons Ltd. for delivery of the cloves but they replied "on the 29th December, 1950, to say that the Zanzibar suppliers "have not effected our clients' shipment of cloves and our clients' "contract with them must be considered as cancelled." Thereafter the appellants paid compensation to the two firms. Through what was called the respondents' arbitration it was agreed that the sum to be paid by the appellants to Messrs. Makhanlall in full settlement of their claim should be $28,000. That sum was paid as was likewise a sum of $15,000 to Messrs. Panachand & Co. with whom it was agreed that such sum would be accepted in full settlement.

The appellants brought proceedings against the respondents and by their statement of claim dated April 7, 1951, claimed the sum of $113,820 as damages by reason of the failure of the respondents to give delivery of the cloves referred to in the contract of November 7, 1950. The sum claimed was the difference between the market price (in December, 1950, and January, 1951) which was said to be $230 per picul, and the purchase price. The effective paragraph in the defence of the respondents, delivered on June 28, 1951, was in these terms: "Defendant "states that the contract was made subject to force majeure and "shipment and that no shipment of the goods contracted to be "sold took place." When the action came on for trial in October, 1955, the appellants were given liberty to amend their statement of claim and the trial was adjourned. The appellants added to their statement of claim by pleading their contracts of sub-sale with Messrs. Makhanlall and Messrs. Panachand and the settlements they had effected, and claimed the amounts paid under those settlements together with the amounts of costs they had paid and also their loss of profit, all by way of special damages. The appellants limited their claim to the sum of $48,280, being

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the amount of the special damage shown in the amended statement of claim. The claim for damages on the basis of the difference between the contract price and the market price remained—but the amount of such claim was limited to $48,280.

The trial judge dismissed the appellants' claim, and his decision was affirmed by the Court of Appeal by a majority.

1960. Feb. 8, 9, 10, 12. *B. J. M. MacKenna Q.C.* and *Michael Mann* for the appellants.

C. P. Harvey Q.C. and *John Donaldson* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Barnett* v. *Javeri & Co.*[1]; *Lebeaupin* v. *Richard Crispin & Co.*[2]; *Charles H. Windschuegl Ltd.* v. *Alexander Pickering & Co. Ltd.*[3]; *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush Materials) Ltd.*[4]; *Dampskibsselskabet Danmark* v. *Poulsen & Co.*[5]; *Millett* v. *Van Heek & Co.*[6]; *North Staffordshire Railway Co.* v. *Edge*[7]; *Wilson* v. *United Counties Bank Ltd.*[8]; *Perkowski* v. *Wellington Corporation*[9]; *Connecticut Fire Insurance Co.* v. *Kavanagh*[10]; *Gath* v. *Lees*[11]; *Borrowman, Phillips & Co.* v. *Free & Hollis*[12]; *Johnson* v. *Macdonald*[13]; *Lovatt* v. *Hamilton*[14]; *The Arpad*[15]; *Fox* v. *Star Newspaper Co.*[16]; *Graham and Scott (Southgate) Ltd.* v. *Oxlade*[17]; *Marks* v. *Board*[18]; *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food*[19]; *Hale* v. *Rawson.*[20]

April 4. The judgment of their Lordships was delivered by LORD MORRIS OF BORTH-Y-GEST, who stated the facts set out above and continued: Apart from questions relating to damages the issue in the action was that which was raised in the paragraph in the defence set out above. The respondents relied upon the words "subject to force majeure and shipment": they claimed that no shipment of the goods contracted to be sold took place.

In order that the reasoning of the judgments under review may be understood it is necessary to make brief reference to certain other arrangements made and other commitments entered into by

[1] [1916] 2 K.B. 390.
[2] [1920] 2 K.B. 714; 36 T.L.R. 739.
[3] (1950) 84 Ll.L.Rep. 89.
[4] [1952] W.N. 422; [1952] 2 T.L.R. 349; [1952] 2 All E.R. 497.
[5] [1913] S.C. 1043.
[6] [1921] 2 K.B. 369; 37 T.L.R. 411, C.A.
[7] [1920] A.C. 254; 36 T.L.R. 115, H.L.
[8] [1920] A.C. 102, H.L.
[9] [1959] A.C. 53; [1958] 3 W.L.R. 564; [1958] 3 All E.R. 368.
[10] [1892] A.C. 473, 480; 8 T.L.R. 752, P.C.
[11] (1865) 3 H. & C. 558.
[12] (1878) L.R. 4 Q.B.D. 500.
[13] (1842) 9 M. & W. 600.
[14] (1839) 5 M. & W. 639.
[15] [1934] P. 189; 50 T.L.R. 505, C.A.
[16] [1898] 1 Q.B. 636; 14 T.L.R. 280.
[17] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 808; [1950] 1 All E.R. 856, C.A.
[18] (1930) 46 T.L.R. 424.
[19] [1959] 3 W.L.R. 665; [1959] 3 All E.R. 434.
[20] (1858) 4 C.B.N.S. 85.

the respondents. As will be seen, however, these were of no concern to the appellants.

In November, 1950, the respondents entered into contracts (some 16 in number) to sell to various buyers various quantities of cloves, which in total amounted to approximately 760 tons. Such cloves were all to be of November shipments. On various dates (mostly in November, 1950) the respondents entered into contracts (some 13 in number) to sell various quantities of cloves, amounting in total to 375 tons, which were to be of December shipments. In November, 1950, the respondents entered into three contracts (being two in addition to the contract with the appellants now being considered) to sell Zanzibar cloves December shipment. In total these three contracts amounted to 125 tons. There were various differences in regard to the conditions which appeared in the various contracts.

After the respondents became aware that 300 tons were to arrive on the *Tjibadak* and 50 tons on the *Ettrick Bank* they consulted their solicitors as to what they should do. In the result, as was stated in his judgment by Tan Ah Tah J., the whole of the 300 tons carried on the *Tjibadak* were delivered to the buyers who were expecting the November shipments. As the total quantity to be delivered to these buyers was approximately 760 tons the respondents had to pay compensation for short delivery. As to this, Mr. Jumabhoy, in his evidence, said that in regard to the "November contracted goods" there were deliveries to the respective buyers proportionately. He said: "I did not take any "profit by selling cloves at the market price which was then very "high. I delivered the goods to buyers at contract price." Of the 50 tons carried on the *Ettrick Bank* four tons were delivered to buyers of November shipments while the remaining 46 tons were delivered to buyers of the December shipments which totalled 375 tons, in part performance of the contracts of sale. There was, therefore, a balance of 329 tons due to be delivered to such buyers. The trial judge held that in order to satisfy the claims of these buyers the respondents either had to buy cloves in Singapore for delivery to them or had to pay them compensation.

The trial judge held that the respondents were protected from liability by reason of the operation of the words of the contract. He based himself largely upon the judgment of Porter J. in *Hollis Bros. & Co. Ltd.* v. *White Sea Timber Trust Ltd.*[1] In that case the parties had entered into a contract for the sale of parquet blocks c.i.f. for shipment from a port in the Arctic Circle which was only open to shipping for about one month in the year. In respect of one parcel of the blocks there was an undershipment of blocks of a particular size. There was a clause in the contract which provided: "In the event of undershipment of any item "buyers are to accept or pay for the quantity shipped, but have "the right to claim compensation for such short shipment."

[1] [1936] 3 All E.R. 895.

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There was also a clause which read: "This contract is subject to "sellers making necessary chartering arrangements for the "expedition and sold subject to shipment any goods not shipped "to be cancelled." An arbitrators' award in favour of buyers was subject to the opinion of the court on the question whether the buyer's right to claim compensation for short shipment was negatived by the words "sold subject to shipment any goods not "shipped to be cancelled." In the context of that case, Porter J. rejected the view that those words could be given the meaning that the sale was subject to the ability of the sellers to ship, and that there was cancellation of any goods in respect of which there was inability to ship. He held [2] that the words "subject to ship-"ment" meant "provided the sellers in fact ship," and that there was an option in the sellers to ship or not to ship. He held, however, that if the goods were shipped they had to be attributed to the contract, and that the sellers could not treat them as free goods unattributed to any contract. He said [3]: "My view is that "if they have shipped the goods the sellers are obliged, at any "rate if they have not been shipped in fulfilment of other "contracts, to supply them under this contract."

Basing himself upon this case the trial judge considered that the 300 tons of cloves carried on the *Tjibadak* and the 50 tons carried on the *Ettrick Bank* were shipped in fulfilment of definite contracts which had been entered into by the respondents and which were subject to no condition as to shipment. He held that the respondents were under no obligation to supply the cloves to the appellants.

One question raised in this appeal is whether, apart from questions of construction, it is correct on the facts to say that the 50 tons were shipped in fulfilment of definite contracts.

In the Court of Appeal Wee Chong Jin J. agreed with the judgment of the trial judge. Rigby J. was also in agreement. He considered that the trial judge was justified in holding that the total quantity of 350 tons carried on the two vessels was clearly shipped in fulfilment of definite contracts which contained no condition as to shipment. Rigby J. was further of the opinion that the presence of the words "subject to shipment" had the result that there was no more than an executory and unenforceable agreement which would only be converted into a valid contract of sale between the parties by the seller exercising his option to ship coupled with some evidence, direct or circumstantial, that the goods shipped were intended to be appropriated to that contract. Knight Ag.C.J. was of the contrary opinion. He said: "As I see it, the appellants are right and the words "'subject to shipment' must be strictly construed and can only "mean 'subject to shipment of 50 tons in December'—which "shipment was in fact made to the respondents." He also said: "If the respondents wished to cover themselves against a failure

[2] [1936] 3 All E.R. 895, 899. [3] Ibid. 900.

" to obtain the cloves in Zanzibar why did they not say in the " contract ' subject to shipment of 350 tons '—or whatever " numbers of tons it was that they required to fulfil *all* their " undertakings? Again, if the respondents meant to contract " with the appellants only if they obtained the cloves and gave no " undertaking that they would obtain them—surely this too could " have been very simply embodied in the contract? "

Mr. MacKenna, for the appellants, submitted that the phrase " subject to shipment " contemplated a failure to ship which was beyond the control of the respondents and which might occur despite the exercise of reasonable diligence to effect shipment. He submitted that it was for the respondents, if they sought the protection of the contractual clause, to establish that they had used reasonable diligence, which, he submitted, they had failed to establish. In reliance upon his submission that the contractual clause did more than to give the respondents an option whether to ship any goods or not, he referred to *Star Public Saw Mill Co.* v. *Robert Bruce & Co. Ltd.*[4] and *Gray* v. *Slater, Birds & Co.*,[5] and to cases where contracts were made subject to import or export licences being obtained. Counsel for the respondents referred to authorities such as *Kokusai Kisen Kabushiki Kaisha* v. *Johnson.*[6] In that case there was a charter which had the words " This " charter is concluded subject to stem, same to be confirmed in " London not later than Monday, the 7th instant." In the circumstances of that case Rowlatt J. held that it would be improper for him to read in a qualification that the words should only take effect if it could be shown that the charterers had taken all due measures to try to arrange a stem.

Their Lordships were also referred to various authorities relating to the construction of phrases bearing some measure of resemblance to that now under consideration: but cases which relate to the construction of other words in other contexts do not yield effective guidance. It must furthermore be borne in mind that the clause now under consideration is not " subject to shipment " but " subject to force majeure and shipment." There is, therefore, a double-barrelled condition in which there is a juxtaposition of " force majeure " and of " shipment." Having regard to this consideration their Lordships think that the clause in the contract should be construed as meaning that the contract was (a) conditional upon the sellers not being prevented by circumstances amounting to force majeure from carrying it out, and (b) conditional upon the sellers being able to procure the shipment in December, 1950, of cloves to the quantity and of the description referred to in the contract. So far as the clause deals with force majeure it appears to be designed to protect the respondents from liability in the event of their being prevented from performing the contract by circumstances beyond their control. It seems to their Lordships to

[4] (1923) 17 Ll.L.Rep. 7.
[5] (1924) 19 Ll.L.Rep. 59.
[6] (1921) 8 Ll.L.Rep. 434.

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be in consonance with this to construe the second branch of the condition as being designed to protect them from liability in the event of their being prevented from carrying out the contract through inability to procure the shipment. If the words were to be construed as covering a situation when shipment did not take place merely as the result of the arbitrary choice of the vendor, then there would be no contractual force in the document, which would merely give an option to the vendor. There may be cases where words in a contract will in certain events provide an excuse for a vendor who fails to deliver. Thus, in *Tennants (Lancashire) Ltd.* v. *C. S. Wilson & Co. Ltd.*[7] there was a condition in the contract which provided that "deliveries may be suspended "pending any contingencies beyond the control of the sellers or "buyers (such as . . . war . . .) causing a short supply of "labour, fuel, raw material, or manufactured produce, or other- "wise preventing or hindering the manufacture or delivery of the "article." So in *Pool Shipping Co. Ltd.* v. *London Coal Co. of Gibraltar Ltd.*[8] there was an exceptions clause in wide terms under which the court felt entitled to look beyond the buyer and seller, and to consider the sellers' commitments under contracts with other buyers. There are no words in the present contract which enable the respondents to excuse their failure to deliver by reference to their other commitments.

The construction of the clause set out above seems to their Lordships to produce a more reasonable result than other suggested constructions. It would be strange if the clause had to be construed as making the contract conditional upon (a) the sellers not being prevented by force majeure from carrying it out, and (b) the sellers choosing to ship the cloves which they were to be free to do or not to do at their own will and pleasure. It would be additionally strange if, following upon the provision against the consequences of force majeure in its first branch, the second branch of the condition went on to make the contract conditional on the sellers choosing to ship the cloves, and thinking fit to allocate them to the contract which they were to be under no obligation to do. It seems unlikely that a clause would be framed to provide that force majeure was to excuse a contracting party from doing that which he was under no obligation to do. In the courts below the appellants appear to have relied mainly upon a submission that even if the respondents were free to ship or not to ship as they chose they became contractually bound if they did in fact ship. The respondents, on the other hand, argued that the contract was only binding in the double event of the sellers in fact shipping cloves and allocating a sufficiency of the cloves shipped to this particular contract. The undisputed facts show that the respondents were able to ship and did in fact in December, 1950, ship cloves to the quantity and of the description set out in the contract of November 7, 1950. The shipment by the

[7] [1917] A.C. 495; 33 T.L.R. 454, H.L.

[8] [1939] 2 All E.R. 432.

respondents of 50 tons shows that shipment of the goods contracted to be supplied was not prevented by circumstances beyond their control. The condition, as their Lordships think it should be construed, was therefore satisfied. Stated otherwise the respondents did not bring themselves within the excusing provision of the clause. It follows that when the respondents failed to deliver to the appellants the cloves contracted for and when they purported to cancel the contract they committed a breach of contract for which they became liable in damages to the appellants.

It was strongly submitted by Mr. Harvey that the submissions made by the appellants in the courts below did not include any submission covering the construction referred to above. While this appears to be the case, their Lordships cannot regard themselves as being restricted or circumscribed in regard to a question as to the proper construction of the clause in question. There would have been more force in the objection if a new point not taken below was one which could have been met by further evidence, e.g., if there had been no shipment and if it were alleged that the sellers had not taken all the steps which were reasonably open to them to procure the shipment. Inasmuch, however, as the respondents by shipping 50 tons had themselves shown that they were able to ship 50 tons, no new issue of fact was involved. Their Lordships are clearly of the opinion that the respondents cannot be allowed to excuse their non-performance by reference to their other commitments, or to seek to give those other commitments priority over the appellants' claim. The contract of November 7 contains no reference to other contracts or to other commitments. Such other commitments were of no concern to the appellants. The contract was simply a contract for the sale by the respondents of cloves of the quantity and description set out in the contract, and the respondents failed to fulfil their obligations to the appellants.

Apart from these considerations their Lordships find it difficult to see how it can be said that the 50 tons were "shipped in fulfil-"ment of other contracts." If it is asked: "Which contract or "contracts?" no satisfactory answer can be given and none was given. The respondents urged that the words "subject to ship-"ment" meant "subject to our in fact shipping enough to satisfy "our commitments" or "subject to our shipping enough to "satisfy all contracts that we will have made up to the date of "arrival of the last ship of December shipments." In their Lordships' view it would be quite unreasonable and would be an unwarranted straining of interpretation to place any such meaning upon the words now being examined. To arrive at any such interpretation a drastic series of additions to the words used would be necessary.

It is further to be observed that there are no additional words of limitation such as "subject to shipment of 50 tons which we, "at the time of shipping, appropriate to you." Doubtless no such words were used for the reason that in view of the nature of the

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respondents' business and operations there would be no question of their appropriating or earmarking any particular cloves to any particular contract at the time of shipment. The respondents were importers and stockists and their necessity was to secure that they arranged for sufficient goods to be shipped to themselves in Singapore, so that they could then meet all their obligations in Singapore. It is manifest that the respondents did not ship the quantities that they needed. But when they shipped they were merely shipping goods to themselves as merchants and importers, and so far as they are concerned they had not arranged the particular ways in which they would deal with the cloves after the cloves had arrived in Singapore. The evidence shows that there was no allocation or attribution to any particular client of theirs. According to the evidence, what the respondents did was to go to their solicitors to take advice as to what they should do by way of allocating the tonnage available for them having regard to the arrangements that they had made. But those arrangements were no concern of the appellants, and there was no stipulation in the contract in regard to any other contracts.

For the reasons stated their Lordships consider that on the undisputed facts the respondents were without excuse when they failed to deliver to the appellants. On this basis there was agreement between the parties during the hearing before their Lordships' Board that the correct measure of the appellants' damages was the difference between the contract price and the market price at or about the date when the *Ettrick Bank* arrived in Singapore. The difference between the parties was as to whether the amount of such damages could be ascertained and had been satisfactorily proved by the available evidence. It had been stated in the Court of Appeal that if an order were made directing the trial judge to reopen the proceedings and to assess the damages payable, no evidence could, after the intervening lapse of time, be called to establish what was the market price of cloves in January, 1951.

The problem was therefore one of proof. In the Court of Appeal, Knight Ag.C.J. held that the evidence was sufficient to establish that the appellants were entitled to recover the sum of $46,783.80 damages. Wee Chong Jin J. concurred in this view. The reasoning of Knight Ag.C.J. was that evidence as to the market price at the relevant time could sufficiently and satisfactorily be found in the facts and circumstances relating to the settlements effected by the appellants with Messrs. Makhanlall & Co. and with Messrs. Panachand & Co. The contract price between the appellants and these firms was $99 per picul. The sum paid after a negotiated settlement with Messrs. Makhanlall was $28,000. The respondents took a part in negotiating and bringing about that settlement. It seems a reasonable inference as a matter of business common sense that the sum of $28,000 would certainly not be more than but would probably be less than the sum resulting from taking the contract price of $99 and the

market price at the date when Messrs. Makhanlall should have received their cloves. In their Lordship's view this is very reasonable. But by way of answer to or criticism of this it was pointed out that the settlement made with Messrs. Panachand & Co. only involved a payment of $15,000. Both settlements, which incidentally were effected within a few days of each other in August, 1951, related to contracts for the same quantities and having the same figures of purchase price and the same times of delivery. It could not, therefore, be that both figures, since they differed, were direct calculations based upon the market price. This criticism does not, however, diminish the force of the inference that no settlement would have been negotiated, particularly by the respondents, on the basis of paying more than the difference between the contract price and the current or market price at the time of non-delivery. It was common ground that there was at all material times an available market for cloves in Singapore.

It was said that though Mr. Jumabhoy had himself been under the necessity to make local purchases in Singapore in an endeavour to meet his obligations, yet he was not asked questions as to the prices he had had to pay. Though it was agreed that the evidence showed that at the relevant time the price of cloves was rising, it was submitted that the evidence was not adequate to enable the court to arrive at a conclusion as to what was the market price. Though there is some force in the contentions advanced, their Lordships consider, in agreement with the majority of the Court of Appeal, that it was a reasonable inference that the difference between the contract price of $94½ per picul for the appellants' 50 tons and the market price at the time when there should have been delivery was not less than $46,783.80.

For the reasons stated, their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgments of the courts below be set aside and judgment entered for the appellants for the sum of $46,783.80.

The respondents must pay the costs of the appeal and the costs in the courts below.

Solicitors: *Amery-Parkes & Co.; E. F. Turner & Sons.*

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[COURT OF APPEAL.]

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March 2, 3, 4, 7, 8, 24.

Lord Evershed M.R., Pearce and Harman L.JJ.

MITCHELL AND EDON (INSPECTORS OF TAXES) *v.* ROSS.

MITCHELL AND HADDOCK (INSPECTORS OF TAXES) *v.* HIRTENSTEIN.

MITCHELL AND MELLERSH (INSPECTORS OF TAXES) *v.* MARSHALL.

TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY.

TAYLOR-GOOBY AND JOB (INSPECTORS OF TAXES) *v.* DREW.

Revenue —Income tax — Employment — Medical specialist — National Health Service—Part-time appointment with regional hospital board —Assessment—Whether appointment an "office"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schs. D, E* (*as amended by Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 122, 137 (*a*), 156.

Revenue — Income tax — Expenses — Medical specialist — Part-time appointment under Schedule E—One profession—Whether all professional expenses deductible under Schedule D.

The National Health Service Act, 1946, "An Act to provide "for the establishment of a comprehensive health service for "England and Wales and for purposes connected therewith," by section 3 (1), laid upon the Minister of Health the duty to provide, inter alia, the services of specialists, whether at a hospital, a health centre, a clinic, or at the home of the patient. The Minister carried out his duties by delegating certain of them to Regional Hospital Boards which, subject to regulations and directions made by the Minister, administered the hospital and specialist services in their area and appointed the officers required to be employed for those purposes. The Act provided that such officers should be officers of the board and that their remuneration, subject to regulations, was to be determined by the board; two categories, consultants and senior hospital medical (or dental) officers, constituted the "specialists" of the service. Specialists might hold whole or part-time appointments; they might have private patients, undertake "locum tenens" work in respect of a National Health Service appointment and lecture to students. In addition to their ordinary duties they might make domiciliary visits to patients within the area laid down in their contract; for such visits a specialist took his own apparatus to the patient's home, examined him and reported to the general practitioner.

Five specialists, holding part-time appointments under the National Health Service, appealed to the special commissioners against, inter alia, certain assessments to income tax under Schedule E on the ground that, in computing their profits or gains for the relevant years, their remuneration in respect of such appointments, and payments made in respect of domiciliary visits to patients under the service, had been wrongly included and should have been assessed under Case II of Schedule D. The commissioners found that the part-time appointments were offices within the

meaning of Schedule E to the Income Tax Act, 1918,[1] and section 156 of the Income Tax Act, 1952, and that the remuneration therefrom accordingly came under the dominance of that schedule, but that since the appointments were a necessary part of the exercise of their profession by the specialists, who each carried on one profession and not two, and were merely incidental thereto, the remuneration fell to be assessed as part of their professional earnings under Schedule D.[2] The commissioners' decision was reversed by Upjohn J. On appeal:—

Held, (1) that a specialist's hospital appointment under the National Health Service Act, 1946, constituted an "office" under section 156, paragraph 2 of the Income Tax Act, 1952, within Schedule E.

Great Western Railway Co. v. *Bater* [1922] A.C. 1; 38 T.L.R. 448; 8 T.C. 231; [1920] 3 K.B. 266, H.L. and *McMillan* v. *Guest* [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190, H.L. considered.

Davies v. *Braithwaite* [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198 distinguished.

Quaere, whether a specialist's hospital appointment was also a "public office" within Schedule E.

(2) That the domiciliary consultations which a specialist undertook were part of the duties of his "office."

(3) That the duties undertaken by a specialist as locum tenens

[1] Income Tax Act, 1918, Sch. E: "Tax under Schedule E shall be "charged in respect of every public "office or employment of profit. . . . "6. The tax shall be paid in respect "of all the public offices and "employments of profit . . . herein- "after respectively described, namely ". . . (*k*) all other public offices, or "employments of profit which are of "a public nature."

Finance Act, 1922, s. 18: "Such "profits or gains arising or accruing "to any person from an office, "employment or pension as are, "under the Income Tax Act, 1918, "chargeable to income tax under "Schedule D . . . shall cease to be "chargeable under that schedule and "shall be chargeable to tax under "Schedule E, and the rules applic- "able to that schedule shall apply "accordingly subject to the provisions "of this Act."

Income Tax Act, 1952, s. 156: "The Schedule referred to in this "Act as Schedule E is as follows— "Schedule E: 1. Tax under this "Schedule shall be charged in respect "of every public office or employment "of profit. . . . 2. Tax under this "Schedule shall also be charged in "respect of any office, employment or "pension the profits or gains arising "or accruing from which would be "chargeable to tax under Schedule D "but for the proviso to paragraph 1 of "that Schedule."

[2] Income Tax Act, 1918, Sch. D, para. 1: "Tax under this Schedule "shall be charged in respect of— "(*a*) the annual profits or gains aris- "ing or accruing— . . . (ii) to any "person . . . from any trade, profes- "sion, employment, or vocation. . . ."

Income Tax Act, 1952, s. 122: "The Schedule referred to in this Act "as Schedule D is as follows— "Schedule D: 1. Tax under this "Schedule shall be charged in respect "of—(*a*) the annual profits or gains "arising or accruing— . . . (ii) to any "person . . . from any trade, profes- "sion, employment or vocation . . . "Provided that profits or gains "arising or accruing to any person "from an office, employment or pen- "sion shall not, by virtue of this "paragraph, be chargeable to tax "under this Schedule unless they are "chargeable to tax under Case V of "this Schedule or under Chapter IV "of Part VII of this Act."

S. 137: ". . . in computing the "amount of the profits or gains to be "charged under Case I or Case II of "Schedule D, no sum shall be "deducted in respect of—(*a*) any dis- "bursements or expenses, not being "money wholly and exclusively laid "out or expended for the purposes of "the trade, profession or voca- "tion. . . ."

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during the temporary absence of a part-time consultant were essentially in pari materia with the appointment of a consultant at a hospital and were the duties of an office.

(4) That on the true construction of section 137 (*a*) of the Act of 1952 the word "profession" must not be confined to that profession, or part of it, the profits or gains arising from which were taxable under Schedule D and, since a specialist had been held, on the facts, to carry on one single profession, sums wholly and exclusively expended for the purposes of that profession were deductible in the Schedule D assessment, and nonetheless so because they might have been attributable to his hospital appointment and would not, wholly or partly, be allowed in the assessments of the emoluments of that appointment under Schedule E (post, pp. 783, 787, 791).

Fry v. *Salisbury House Estate Ltd.* [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266, H.L. and *Hughes* v. *Bank of New Zealand* [1938] A.C. 366; 54 T.L.R. 542; 21 T.C. 472; [1938] 1 All E.R. 778, H.L. considered.

Decision of Upjohn J. [1959] 3 W.L.R. 550; [1959] 3 All E.R. 341 reversed.

APPEALS from Upjohn J.[3]

The first and main appeal was in respect of Dr. Harold Leslie Ross, who for the relevant years of assessment held a part-time appointment as a consultant radiologist to the Birmingham Regional Hospital Board. The second appeal was in respect of Dr. Arnost Hirtenstein, who held a part-time appointment as a consultant ophthalmologist to the Birmingham Regional Hospital Board, and also undertook certain lecture work to nurses. The third appeal was in respect of Dr. Alfred Gordon Marshall, who held a part-time appointment as consultant pathologist to the Birmingham Regional Hospital Board. The fourth appeal was in respect of Dr. Herman Peter Tarnesby, who held two part-time appointments as a psychiatrist, one with the North West Metropolitan Regional Hospital Board and one as clinical assistant in the Department of Psychological Medicine of the West London Hospital, a teaching hospital. He also undertook work as a locum tenens in respect of National Health appointments. The fifth appeal was in respect of Charles Edwin Drew, who held three appointments as a consultant thoracic surgeon, one with the Westminster Hospital, a teaching hospital, another with the South West Metropolitan Regional Hospital Board, and the third as chief assistant at the Brompton Hospital for Diseases of the Chest. He also undertook certain locum tenens work in respect of National Health appointments and in addition lectured to medical students.

The consultants all had private patients.

The following are extracts from the case stated, as amended, in respect of Dr. Ross; the other cases, which raised similar questions of principle, are not set out.

At meetings of the Commissioners for the Special Purposes of

[3] [1959] 3 W.L.R. 550; [1959] 3 All E.R. 341.

the Income Tax Acts held on March 23, 26, 27, 28, and April 23, 24, 25, 1956, and April 23, 1957, Dr. Harold Leslie Ross (hereinafter called "the taxpayer") appealed against assessments to income tax under Schedule E for the years 1951–52, 1952–53, and 1953–54, and under Schedule D for the years 1952–53, 1953–54, and 1954–55.

The grounds of the appeal were, first, as regards the assessments made under Schedule E, that in computing the taxpayer's profits or gains for the accounting periods relative to the assessments under appeal his remuneration as a consultant radiologist under the Birmingham Regional Hospital Board and payments made to him in respect of domiciliary visits had been included contrary to law, and that the assessments should be reduced accordingly, and, secondly, as regards the assessments made under Schedule D, that the assessments being estimated should be adjusted in accordance with the accounts of the profits or gains of the respondent for the accounting periods relative to the assessments. . . .

The following conclusions of mixed fact and law were agreed between the parties: (1) The National Health Service Act, 1946 ("the Act") laid upon the Minister of Health ("the Minister") the duty to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness; and for that purpose the Minister was under a duty to provide or secure the effective provision of services in accordance with the Act [s. 1 (1) (2)]. The services provided included hospital and specialist services.

Subject to the exercise of functions by hospital management committees, it was the duty of a regional hospital board, "subject "to and in accordance with regulations and such directions as "may be given by the Minister, generally to administer on behalf "of the Minister the hospital and specialist services provided in "their area," and, in particular, to appoint officers required to be employed at or for the purposes of any hospital providing such services, other than a teaching hospital [s. 12 (1)]. . . .

The qualified medical staff of the hospital service was divided into a number of different categories, two of which were: (a) consultants; (b) senior hospital medical (or dental) officers. These two categories constituted the "specialists" of the service.

Some of the consultants in the service held whole-time appointments. The great majority of the consultants, however, only held part-time appointments.

In 1951 formal regulations under section 66 of the Act were made by the Minister, being the National Health Service (Remuneration and Conditions of Service) Regulations, 1951 [S.I. 1951, No. 1373], and were in very general form.

The terms of service for specialists made under section 66

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provided for the method of calculation of the remuneration of specialists and provided for the fees payable for exceptional consultations, and for fees payable for locum tenens work. The terms of service also controlled the remuneration in respect of domiciliary consultations. Domiciliary work was independent of and different from the part-time consultant's work under his ordinary appointment with the regional hospital board. The domiciliary consultation was a visit by the consultant to a patient in his home at the request of the patient's general practitioner.

The terms of service dealt with private practice and retention of fees, and also gave the right to reimbursement of travelling, subsisting and other expenses to a specified extent.

A part-time consultant (whether honorary or paid) on the staff of a hospital providing hospital and specialist services might make arrangements for the treatment of his private patients at that or any other such hospital, and . . . the hospital made the special accommodation available for that purpose [s. 5 (2)]. . . .

All general practitioners were assessed under Case II, Schedule D, in respect of their general practice in the service.

Apart from and in addition to the foregoing, the special commissioners found the following facts admitted or proved on the evidence adduced at the hearing of the appeal: (1) In the medical profession the normal way in which an individual became recognised as a "consultant" was by being appointed to the staff of a hospital as physician or surgeon (or a corresponding post). This was a recognition of his professional ability. The work of a consultant was the practice of his own special branch of medicine on cases sent to him by other doctors. Before the introduction of the National Health Service it was usual for consultants to have a private practice as such apart from their hospital appointments. Except in the case of hospitals run under the Public Health Act, 1936, and ex gratia payments from voluntary hospitals, it was not usual for consultants to receive payment for their hospital work. After the introduction of the National Health Service, consultants taking part in this service were paid in the manner hereinbefore referred to, but it remained the usual practice for part-time consultants to have a private practice, apart from their hospital appointments, though the volume of private work throughout the country declined. Apart from geographical limitations, consultants were free to take up part-time appointments with different regional hospital boards, payment being received from each in accordance with the amount decided by the Central Bureau, London, but subject to the maximum remuneration for part-time appointments laid down in the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales).

(2) Both before and after the introduction of the National Health Service, the holder of an appointment on the staff of a hospital obtained definite advantages, in that it gave him

professional prestige, and provided him with plenty of opportunity for developing and perfecting his skill. After the introduction of the National Health Service only those consultants who took part in that scheme were permitted to take a patient into a private bed in any of the hospitals under the Ministry of National Health and thus obtain for him the services of the nursing staff and the use of the apparatus in the hospital. The same facilities were available at only a few nursing homes.

(3) At all material times the taxpayer was a registered medical practitioner in the United Kingdom, specialising in radiology. He was a Bachelor of Medicine, a Bachelor of Surgery, a Master of Radiology, and held a diploma in Medical Radio Diagnosis.

(4) On March 1, 1950, he commenced a private practice as a consultant radiologist.

(5) On March 1, 1950, the taxpayer obtained a part-time appointment as a consultant radiologist under the Birmingham Regional Hospital Board to the hospital of St. Cross, Rugby, the Keresley Hospital and the Gulson Hospital. The terms of the appointment were set out in a letter which was dated November 9, 1950, and contained a schedule detailing the hospitals and hours of work required at each. At the end of the letter a form of acceptance was attached which the taxpayer signed. Also attached to the letter was a form of undertaking in connection with domiciliary consultations which he signed.

(6) The taxpayer interviewed his private patients either at his consulting rooms, or at any of the hospitals to which he was attached, or in nursing homes, or in their own private homes. At his consulting rooms at his house the taxpayer kept for professional purposes a desk, filing cabinets, portable X-ray apparatus, screens, a typewriter, telephone and a library of books of reference. He also had a dark room for developing films. The taxpayer also had a car which he used in his professional duties. When he required the use of hospital apparatus and film for a private patient in hospital he paid a fee of two guineas.

(7) The taxpayer also had need of and employed secretarial assistance in his private practice and also in connection with his undertaking to carry out domiciliary visits. The services of a secretary were also useful in connection with his hospital work and for receiving telephone calls from the hospitals. . . .

(8) Upon taking up his appointment under the Birmingham Regional Hospital Board, the taxpayer contacted the consultant radiologist in Coventry. No permission was sought from or given him the best way of covering the radiological work at Rugby. It was agreed between them that the taxpayer should do two sessions at Gulson Hospital and seven sessions at St. Cross Hospital, but that the work at Keresley Hospital should be done by the other consultant radiologist in Rugby and by the consultant radiologist at the hospital of St. Cross, Rugby, and arranged with

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by any of the administrative officials of the hospital for this arrangement.

(9) The taxpayer was solely responsible for the radiological work at St. Cross Hospital, Rugby, which he attended on four mornings a week. During this time he attended to National Health Service patients . . . and also to private patients, either in the paying bed section of the hospital, the private wing, or private out-patients. . . .

(10) At Gulson Hospital three consultant radiologists, including the respondent, were responsible for the radiological work which they arranged between them to their mutual convenience so as to dovetail in their work at the hospital. The taxpayer was entirely responsible for deciding what radiological work he should do and how he should do it.

(11) A domiciliary visit was usually inaugurated by a telephone message from a general practitioner to the taxpayer's house which was received by his secretary. Upon receipt of such message he loaded his portable X-ray apparatus into his car and proceeded to the place of consultation. After taking the necessary pictures he returned either to hospital or to his consulting rooms and proceeded at once to develop the film himself (usually in hospital). He usually informed the general practitioner concerned of the result the same day. The film used for domiciliary visits was provided by the Ministry of Health, and that used for private patients by the taxpayer himself. Domiciliary visits were usually undertaken between 5.30 and 8.30 p.m., i.e., after the afternoon session at a hospital, and at a time when general practitioners could very often be present. For each domiciliary visit carried out, up to a maximum of 200 in any year, the taxpayer received a fee of four guineas plus two guineas for the use of his apparatus; the latter fee being payable only once per patient. . . .

5. It was contended on behalf of the taxpayer: (i) that his activities as a consultant radiologist constituted the carrying on of a profession and the entirety of the profits and gains arising from those activities was therefore assessable to income tax under Case II of Schedule D and not otherwise; (ii) that the part-time appointments he held were not offices or employments within the meaning of Schedule E; (iii) that, if any such part-time appointment was an office or employment within the meaning of Schedule E, the tenure thereof was an incident in the course of the carrying on by him of his profession as a consultant radiologist, and any remuneration arising therefrom constituted a receipt of that profession to be included in computing the profits or gains thereof for the purposes of assessment to income tax under Schedule D; and, accordingly, (iv) that the assessments under Schedule E should be reduced accordingly, and the assessments under Schedule D should be adjusted to correspond with the figures shown in the taxpayer's accounts; and in the alternative (v) that if the assessments under Schedule E were in principle well founded, the

outgoings shown in his accounts were allowable deductions in computing his profits or gains assessable under Schedule D, in so far as they were not allowable as expenses under Schedule E; and, in any event, (vi) that any profits or gains arising to the taxpayer in respect of domiciliary visits were proper to be regarded as profits or gains of his profession assessable under Schedule D and not as emoluments of offices or employments assessable under Schedule E.

6. It was contended on behalf of the Crown: (i) that the taxpayer's remuneration as consultant radiologist under the Birmingham Regional Hospital Board was properly to be included in the assessments in question made upon him under Schedule E; (ii) that the payments made to him by the said board in respect of his part-time appointment as a consultant radiologist under the National Health Service Act, 1946, constituted remuneration received by him in respect of an office or employment of profit within the meaning of Schedule E; (iii) that he exercised a profession or vocation in respect of which he was assessable under Case II, Schedule D, only in so far as he carried on a private practice as consultant radiologist outside the National Health Service; (iv) that in computing the profits of the taxpayer under Schedule E in respect of his said part-time appointment only such expenses as were allowable under the said Schedule and the rules applicable thereto were deductible, and in computing his profits or gains under Case II, Schedule D, in respect of his said private practice only such expenses as were allowable under the Schedule and case and the rules applicable thereto were deductible, and the outgoings shown in his accounts fell to be dealt with accordingly; (v) that the payments made to the taxpayer under the National Health Service Scheme in respect of domiciliary consultations in the course of his part-time appointment were properly to be regarded as emoluments of an office or employment assessable under Schedule E and not as profits or gains assessable under Schedule D; and (vi) that the appeal should be dismissed and the assessments confirmed or adjusted in accordance with the appropriate figures.

7. The commissioners gave their decision in principle on July 31, 1956, in the following terms: . . .

(4) Upon consideration of the evidence adduced and arguments addressed to us on behalf of the parties, we find that each of Dr. Ross's part-time appointments as consultant radiologist to certain hospitals under the Birmingham Regional Hospital Board was an office, and the remuneration derived therefrom, together with the fees received in respect of domiciliary consultations carried out in connection therewith was the profit of an office within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952. It is immaterial for the purpose of determining this appeal to find whether or not such office is a

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public office within the meaning of the charging rule of Schedule E of the Income Tax Act, 1918, and section 156 of the Income Tax Act, 1952, and we express no opinion. Furthermore, finding as we do that the part-time appointments which Dr. Ross held as aforesaid constituted the holding of offices, it is unnecessary for the purpose of determining this appeal to find whether or not the hospital appointments also constituted an employment within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952, and again we express no opinion. We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general.

(5) We next have to decide the correct method of assessing the profits or gains which Dr. Ross derived from his hospital appointments. Having regard to the decision in *Fry* v. *Salisbury House Estate Ltd.*[4] and, in particular, to the judgment of Lord Atkin,[5] it would seem, prima facie, that remuneration received by Dr. Ross from his various hospital appointments, being, as we have found, derived from the holding of offices, must come under the dominance of Schedule E, to the exclusion of other Schedules, neither Dr. Ross nor the Crown having any option in the matter. We have, however, to consider what effect, if any, the decisions in the cases of *Davies* v. *Braithwaite*[6] and *Household* v. *Grimshaw*[7] have upon this view. In the first place, the *Salisbury House Etstate* case[8] can, we think, be distinguished because it dealt only with the mutual exclusiveness of Schedules A and D, whereas the cases of *Braithwaite*[9] and *Household*[10] were concerned with professional earnings falling within Schedule D and Schedule E. In the second place, the *Braithwaite*[11] and *Household*[12] cases were decided after the decision in the *Salisbury House Estates* case[13] had been given and we are, therefore, entitled to assume that they are reconcilable with the latter. We think that the decisions in the cases of *Braithwaite*[14] and *Household*[15] are authority for the principle that an individual may have an engagement or hold a post in the same line as his profession at large, but that the contract governing such engagement or post may nevertheless be nothing but an incident in the conduct of his professional career. In such a case we think we would be bound by the authorities to hold that the profits or

[4] [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266.
[5] Ibid.
[6] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.
[7] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.
[8] [1930] A.C. 432.
[9] [1931] 2 K.B. 628.
[10] [1953] 1 W.L.R. 710.
[11] [1931] 2 K.B. 628.
[12] [1953] 1 W.L.R. 710.
[13] [1930] A.C. 432.
[14] [1931] 2 K.B. 628.
[15] [1953] 1 W.L.R. 710.

gains arising therefrom fell to be assessed as part of his professional earnings under Schedule D. Applying this principle to our findings in the present case, we hold that the remuneration received by Dr. Ross from his various part-time hospital appointments falls to be assessed under Case II of Schedule D as part of the profits or gains of his profession, and so also do the fees received by him in respect of domiciliary consultations.

(6) The appeal therefore succeeds against the Schedule E assessments in so far as they relate to Dr. Ross's personal remuneration, and it is unnecessary for us to consider further what, if any, expenses incurred by Dr. Ross would fall to be set against such assessments. We adjourn the appeal against the remaining assessments for consideration and agreement of the figures by the parties on the basis of this our decision in principle.

The Crown appealed; the point of law stated for the opinion of the High Court being whether, on the facts found by the commissioners, there was any evidence upon which they could properly arrive at their decision, and whether, on the facts so found, their determination of the appeal was correct in law.

Upjohn J. allowed the Crown's appeal. He held that a specialist carrying on duties under a part-time National Health Service appointment was the holder of a public office, the profits and gains of which fell to be assessed under Schedule E, and the expenses attendant thereon must be deducted under the rules applicable to that schedule. When attending private patients a specialist was exercising his profession, the profits or gains from which were to be assessed under Schedule D.

The taxpayers appealed.

Heyworth Talbot Q.C. and *J. L. Creese* for the taxpayers.
R. O. Wilberforce Q.C. and *Alan Orr* for the Crown.

The following cases were cited in argument, which are not referred to in the judgments: *Tennant* v. *Smith* [16]; *In re National Insurance Act, 1911* [17]; *Reg.* v. *Shacter* [18]; *Foulsham* v. *Pickles.* [19]

Cur. adv. vult.

March 24. The following judgments were read:

LORD EVERSHED M.R. The five appeals in which we are now giving judgment have raised the same questions, in substance two in number. For the purposes of the hearing in this court, as for the purposes of the hearing before Upjohn J., as he then was, the facts in the case of Dr. Ross have been taken as typical of all five cases, and I shall therefore, as did the judge, treat the facts

[16] [1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158, H.L.
[17] [1912] 2 Ch. 563.
[18] [1960] 2 W.L.R. 258; [1960] 1 All E.R. 61.
[19] [1925] A.C. 458; 41 T.L.R. 323, H.L.

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relating to Dr. Ross, appearing from the case stated by the special commissioners upon Dr. Ross's appeal against the assessments made against him, as typical of the facts relevant to all the appeals, and therefore as constituting the necessary basis for this judgment upon all the appeals.

The material circumstances are set out most fully in the case stated, which contains also an analysis of the relevant provisions of the National Health Service Act, 1946, and of various statutory instruments made thereunder. Like him, therefore, I shall confine myself to such brief statement of facts as will suffice to make clear the nature of the questions for our decision and the reasons for my conclusions upon them.

Dr. Ross is, and has at all material times been, a qualified and registered medical practitioner. He is, and has at all material times been, in common with the other appellants, of the category of medical practitioners known as "specialists." The word is so commonly understood that it requires no further exposition. It is used in its commonly understood sense (and so as to be applicable to Dr. Ross and the other appellants) in the Act of 1946 itself, particularly in sections 3 and 14. Dr. Ross's specialist activity is that of a consultant radiologist. In that capacity he attends private patients, and he also holds a part-time appointment by contract with the Birmingham Regional Hospital Board at certain hospitals in the area of the board. The professional activities of the other appellants are in all material respects wholly similar. The only difference between them is that whereas in the case of Dr. Ross and three of the other appellants the fees received in the relevant years of assessment from private patients were appreciably less than the emoluments from the hospital appointments, in the case of the remaining appellant, Dr. Hirtenstein, the fees from private patients exceeded the hospital emoluments. But no point was made before us arising out of the distinction.

I can now state the first of the questions debated before us. It is this: Should Dr. Ross be assessed for income tax in respect of the profits or gains or emoluments arising to him from his practice as a consultant radiologist, alike from his private patients as from the hospital appointment, entirely under the relevant rules of Schedule D? Dr. Ross's contention is that he should. Or, as the Crown contends, should he be assessed under Schedule D in respect of the profits or gains arising from his private patients and under Schedule E in respect of his emoluments under his hospital appointment? I have so far deliberately, and for reasons which will later sufficiently appear, avoided the use of the word "profession"; but it has not been in dispute that Dr. Ross's profits or gains from his services to private patients and his emoluments from his hospital appointment alike arose from his practice, his one "job in life," as a consultant radiologist.

I should assume that nine people out of every ten—indeed, that everyone not versed or experienced in the intricacies and

anomalies that the heritage of a century and a half of income tax legislation has bequeathed—would, upon hearing the questions that I have posed, inquire: "What can it matter? Why should "it matter?" And emphasis is given to the inquiry by the commissioners' finding that Dr. Ross's part-time hospital appointment, no less than his private practice, was a part, and indeed a "necessary" part, of his profession as a consultant radiologist. The actual language of the finding, supplemented after the case had been sent back to them by Roxburgh J. for the purpose, was as follows: "We also find that at all material times Dr. Ross "exercised the profession of consulting radiologist, his part-"time hospital appointments being a necessary part of the exer-"cise of that profession by him and merely incidental thereto, "notwithstanding that a great deal of his time was thereby taken "up. We do not seek," they added, "to describe the profession "of consulting radiologist in general." There was some discussion before us of the exact significance of the language I have quoted, which Upjohn J. described as not entirely happy. But this much was quite clear and not in dispute: that for one in Dr. Ross's position, who was earning his living as a consultant radiologist, the undertaking of part-time hospital appointments was part of his "job" (and again I deliberately do not use the word "profession")—and a part of it which, as a matter of practical necessity for professional success, he had to do. And the same is true of the other four appellants, save for the substitution for "consultant radiologist" of their respective specialist activities.

Why, then, should it matter whether Dr. Ross is assessed wholly under Schedule D or partly under that Schedule and partly under Schedule E? The answer is that, notwithstanding the unity of Dr. Ross's calling as a consultant radiologist, the allowances and deductions which he may make under the two Schedules differ. The rules for chargeability under Schedule D are now to be found in Part V of the Income Tax Act, 1952, beginning with section 122. By section 137 (*a*), the permissible deductions are, in effect, defined, so far as relevant, as sums wholly and exclusively expended for the purposes of the taxpayer's profession or vocation. Liability under Schedule E is expounded in Part VI of the Act, beginning at section 156. I shall not here recite the language of the two charging sections, which in material respects show a certain lack of conformity. But the disconformity is further exhibited by the circumstance that, for the appropriate allowances under Schedule E, it is necessary to turn to the Ninth Schedule to the Act, paragraph 7 of which reads as follows: "If "the holder of an office or employment of profit is necessarily "obliged to incur and defray out of the emoluments thereof the "expenses of travelling in the performance of the duties of "the office or employment, or of keeping and maintaining a horse "to enable him to perform the same, or otherwise to expend "money wholly, exclusively and necessarily in the performance "of the said duties, there may be deducted from the emoluments

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"to be assessed the expenses so necessarily incurred and "defrayed."

To the reader in the present age (which is sometimes described as that of the internal combustion engine), the reference to the horse will be somewhat startling. Its presence is evidence of the long ancestry of the paragraph, re-enacted in succeeding consolidating statutes; for it reflects the fact, interesting, if hardly relevant today, that the means and speed of conveyance of an inhabitant of this island from one place to another depended in Napoleon's days, as it had depended in the days of Julius Caesar, upon the performance of the horse. More important, however, for present purposes is that the standard of permissible deductions under Schedule E is that of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the taxpayer's office or employment. Thus, the standard is in two respects stricter than that appropriate to the taxpayer assessed under Schedule D; for (1) not only must the expenses be wholly and exclusively but they must also be necessarily incurred, and (2) they must be incurred not merely for the purposes of the taxpayer's office or employment but, according to the language, actually in the performance of the duties of it.

When Schedule E was first devised it was limited in its application to the holders of certain public offices tabulated in paragraph 5 of the Schedule. It may well be that the stricter standard of allowances was appropriate and sensible in the case of the holders of such offices, whether equestrian or otherwise, starting with the holders of offices belonging to either House of Parliament; and it may also be that 150 years ago the class of Schedule D taxpayers was far smaller than it is today. But in 1922 there was transferred from the embrace of Schedule D to that of Schedule E a large class of taxpayers covered by the language of what is now the proviso to section 122 (1) of the Act of 1952 and reflected in section 156, paragraph 2. It is, of course, altogether beyond the scope of this judgment to attempt to define the limits of the transferred class. For my present purposes it is sufficient to observe that it covers the large class of taxpayers who receive their remuneration after deduction of tax under what is called the P.A.Y.E. system. I hope, therefore, I am not exceeding my judicial duty if I venture to suggest (probably not for the first time) that Parliament might well consider the justification and sense, at the present day, of the considerable distinction between the two Schedules in the matter of deductions and allowances. And added force is lent (as I hope) to my inquiry by the circumstances of the present cases. If the Crown is right (as, for reasons later appearing, I think it is) upon the first question already posed, then it follows that persons in the position of Dr. Ross must for the purposes of taxation have one essential part or function of their single calling severed from the rest, and must likewise, if the Crown is right upon the second question which the answer to the first involves, have each item of their expenses similarly

dissected and then apply (as I think somewhat artificially) a different standard of justification to each dissected part.

An example or two from Dr. Ross's revenue account, exhibited to the case stated, will illustrate the point. In this account, the first item on the debit side is the salary (£2 per week) paid to Dr. Ross's secretary. Another item is that of expenses in respect of his motor-car. It was not suggested that either of these two items would have been disallowed as not having been wholly and exclusively expended for the purposes of Dr. Ross's profession if he were taxable in respect of all his earnings under Schedule D. But, on the basis of his taxability in respect of his hospital appointment under Schedule E, it was said that some proportion of these items must be regarded as attributable to this appointment, and as such would then be likely to be disallowed as either not necessarily incurred or as not incurred in the (actual) performance of his hospital duties.

The difficulty of such analysis is enhanced when it is borne in mind that Dr. Ross might well proceed on occasion from his consulting room to the hospital to attend both upon private patients and upon patients under his charge in pursuance of his duties under his hospital appointment—in both cases according to arrangements made by his secretary. Whether or not it was ever contemplated, when the conditions of the two Schedules were devised, that a taxpayer practising a single calling would be taxable for part of his single activity under one Schedule and for part under another, it is obvious that, if the Crown be right upon both questions, the process of severing expenses wholly and exclusively incurred for the purposes of that activity and applying different tests of justification to the severed parts are not only, as I have thought, artificial, but also highly formidable. There is, I venture to think, an unreality and absence of common sense in the processes which has encouraged me to suggest that consideration should now be given to the incidence and characteristics of the two Schedules; and, not the less so, since it must be in the public interest that the incidence of taxation should generally be regarded as sensible and just. We were informed that the result of the present cases would similarly affect some 4,700 other medical practitioners, and it has seemed to me likely enough that men of other professions will be similarly affected.

For reasons later appearing, however, I think with my brethren that the appellants succeed upon the second main question raised; that is, that although they must be taxed in respect of their hospital appointments under Schedule E, nevertheless they may still bring into account by way of deduction in their Schedule D assessments sums shown to have been wholly and exclusively expended for the purposes of their single professions as consultants, even though referable to their hospital work, and even though not allowable in their Schedule E assessments. The result may be logically unsatisfactory, but, as later appears, is one from which the language of section 137 (*a*) of the Act (which

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remained unaltered in spite of the transfer from Schedule D to Schedule E brought about in 1922, and now enshrined in the proviso to section 122 (1)) leaves no escape in the circumstances of the present cases. Though, therefore, if our conclusion on this matter is right, the complex processes above referred to will in the present cases at any rate be futile, the processes will still, so far as I can see, have to be undertaken; nor will they necessarily be futile in other but similar cases to which the commissioners' findings would not be applicable. The futility and illogicality in the present cases provide, therefore, I venture to think, no argument against a review of the Schedules by Parliament.

I return, however, to the first question for our determination, and the answer to it must depend upon whether Dr. Ross's hospital appointment constitutes an office or employment within the terms of section 156, paragraph 2, of the Act of 1952. It was the view of the special commissioners that the question should be answered affirmatively but that, nevertheless, the doctor was not assessable in respect of the emoluments thereof under Schedule E. This conclusion they based on the premise of their finding (already quoted) that the appointments were mere incidents, and necessary incidents, of his profession as a consultant radiologist; founding themselves upon the authority of the cases of *Davies* v. *Braithwaite* [1] and *Household* v. *Grimshaw*.[2] Mr. Heyworth Talbot, for the appellants, did not attempt to support the reasoning of the special commissioners: nor could he, with all respect to them, do so. It is now well established—for example, by Fry J. in *Salisbury House Estate Ltd.*[3] in the House of Lords, that the various Schedules must be treated as distinct codes, of which Schedule D is, as it were, residuary in nature, applicable, if at all, to cases not falling within any of the other Schedules. It follows, therefore, that if, as regards his hospital appointment, Dr. Ross held an office or had an employment within section 156, then, as regards the emoluments of that office or employment, he must be taxable under Schedule E.

But it was Mr. Heyworth Talbot's submission that, because Dr. Ross's engagement by the hospital board was a mere incident of his professional activity, therefore he should not be regarded as holding an office or employment at all; and Mr. Heyworth Talbot cited the case of *Davies* v. *Braithwaite* [4] to support that argument. The cited case related to the professional activities as an actress of Miss Lilian Braithwaite, and it was proved that, in the ordinary course of those activities, Miss Braithwaite entered into contracts of "employment" with theatre managers and other persons. In that case the Crown (be it observed) was contending for the applicability not of Schedule E but of Schedule D; and the Crown's contention succeeded on the ground, putting

[1] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.
[2] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.
[3] [1930] A.C. 432; 46 T.L.R. 336; 15 T.C. 266.
[4] [1931] 2 K.B. 628.

it briefly but sufficiently, that such contracts which did not involve in any true sense the relation of master and servant were not in truth contracts of employment at all, or at least not "employ-" ments" within the purview of Schedule E.

In my judgment, the case of *Davies* v. *Braithwaite* [4] is upon its facts far removed from the present case. I agree with Upjohn J. that the conclusion that Dr. Ross's engagement with the Birmingham Regional Hospital Board constituted an "office" within the section is inescapable; though I prefer to express no view (and we were not invited to do so by Mr. Wilberforce) whether it was or was not a "public" office.

The contract of engagement is headed "National Health Ser-" vice Act, 1946," followed by the name and address of the Regional Board. It is in the form of a letter under the heading "Appointment of Consultant (Part-time)" addressed to Dr. Ross and signed by the secretary to the board, having attached to it a form of acceptance signed by Dr. Ross. "The duties attaching to "the appointment" were expressed to be such as might be assigned by the Regional Board for the purpose of providing hospital and specialist services under section 3 of the National Health Service Act, 1946, at the hospitals indicated—though, as the judge pointed out, it naturally followed from the nature of Dr. Ross's professional status as a specialist that he was not placed under any direction as to how he would carry out his treatment of patients. The letter stated the number of hours Dr. Ross was expected to work. It contained certain provisions in regard to his place of residence if more than a certain distance from the hospitals where he was required to serve; it required Dr. Ross to notify the board in regard to his taking of "leave"; it provided that the appointment carried the right to a pension. There was no statement of the period of service, but it is not in doubt that there was a fixed retiring age, and that the appointment was only terminable by Dr. Ross on reasonable notice to the board. The form of acceptance signed by Dr. Ross was in the following terms: "I hereby accept the appointment and the terms "and conditions of service described above." It is convenient here to add that Dr. Ross also signed on the same document an agreement "in addition to the above named duties" to undertake domiciliary consultation in accordance with the terms and conditions stated in a document issued in 1949 by the Ministry of Health.

In my judgment, the document which I have recited and which constituted the contract between the Birmingham Regional Board and Dr. Ross makes clear, upon the face of it, that Dr. Ross's appointment thereunder as a part-time consultant was, according to the ordinary understanding of its language and effect, an appointment to an "office," to what the commissioners referred to as a "post." Nor does the matter end there. The

[4] [1931] 2 K.B. 628.

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appointment was made by the Regional Board under the powers delegated to them under the Act by the Minister whose duty it was, by section 3 (1) (*c*), to provide the services of specialists at hospitals. By section 14 (1) of the Act it is provided (inter alia) that part-time specialists, appointed, as Dr. Ross was appointed, should be "officers" of the relevant Regional Boards; and the regulations made under that section likewise (and, as I think, naturally) refer to such specialists as "officers" (see Statutory Instrument 1948, No. 1416, paragraph 3).

The words "office" and "employment" as used in sections 122 and 156 of the Income Tax Act, 1952, have been the subject of judicial consideration. Thus, in the case of the *Great Western Railway Co.* v. *Bater*[5] (the decision in which by the House of Lords was the occasion for the transfer from Schedule D to Schedule E in 1922) Rowlatt J.[6] used the language "an office or "employment which was a subsisting permanent substantive "position which had an existence independent of the person who "filled it, which went on and was filled in succession by succes-"sive holders"; language which was accepted as generally sufficient by Lord Atkin and Lord Wright, in *McMillan* v. *Guest*.[7] Lord Wright, in the latter case, also referred[8] to the New English Dictionary meaning of "office" as: "a position or place "to which certain duties are attached, especially one of a more or "less public character." In my judgment, Dr. Ross's appointment clearly satisfied the tests indicated by these citations, and I have, therefore, for myself, no doubt upon authority and common sense that it was an "office" within the meaning of the relevant section of the Income Tax Act.

It will be convenient to deal here with two subsidiary points. First, I have equally no doubt that the domiciliary consultations which Dr. Ross undertook to do formed part of the duties of his "office." Domiciliary consultations (as the words imply) involve calls by the specialist at the homes of National Health patients; and the specialist making them is entitled from public funds to receive a fee of so much per visit, subject to a maximum. Dr. Ross was not bound to undertake this duty as an essential part of the hospital appointment, but in fact he agreed to do so. The obligation to make the visits was therefore a part of the duties of his "office."

The question of undertaking the duties of a locum tenens during the temporary absence of a part-time consultant is perhaps more difficult. (The question arises, in fact, in relation to another of the appellants than Dr. Ross.) I agree, however, with Upjohn J. that the duties involved are also those of an "office." The arrangements made were no doubt somewhat informal; but, as appears from the document of 1949 issued by the Ministry of Health, the engagement of a locum is made by the Regional

[5] [1922] A.C. 1; 38 T.L.R. 448; 8 T.C. 231; [1920] 3 K.B. 246.
[6] [1920] 3 K.B. 266, 274.
[7] [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190.
[8] [1942] A.C. 561, 566.

Board. In my judgment, therefore, the duties owed to the board are essentially in pari materia with those of an appointment of a consultant: they are the duties of an "office."

I turn now to the second main question involved, which I formulate thus: Are the sums which Dr. Ross may deduct for the purposes of his Schedule D assessment limited to sums wholly and exclusively expended by him for the purpose of his private practice, or may he deduct all expenses so incurred for the purposes of his single calling of a consultant radiologist, even though such expenditure related to his hospital appointment and could not be allowed for the purposes of his Schedule E assessment in respect thereof? I have earlier anticipated my answer to this question, and I have upon it had the advantage of reading in advance the judgments to be delivered by my brethren. With those judgments and with their reasoning I am in entire accord. I confine myself therefore to a brief statement of my conclusion, which I only add out of respect for the view of the judge, from which, upon this matter, we are differing.

The relevant terms of sections 122 and 156 are set out in the judgment of Pearce L.J., and I do not repeat them, noting only that they do not entirely correspond. The question turns upon the meaning in its present context of the language of section 137 (*a*), which is: "Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation." It was, and was necessarily, of the essence of the argument of the Crown that, having regard to the present context of the paragraph, the word "profession" must be limited so as to be confined to that "profession" or part of the profession the profits or gains arising from which are taxable under Schedule D. In my judgment, the language of the paragraph is too clear and unambiguous to admit of such a limitation in a case such as the present, where, according to the findings of the commissioners, the taxpayer's calling or "job in life"—that is, his "profession"—is the single profession of a consultant radiologist. If that is in truth his profession, as has been found and as we must, in my view, clearly hold, then sums in fact wholly and exclusively expended for the purposes of that profession are deductible in his Schedule D assessment, and nonetheless so because they may have been attributable to his hospital appointment and cannot, wholly or partly, be allowed in the assessment of the emoluments of that appointment under Schedule E. If it had been intended to make clear that the terms of paragraph (*a*) of section 137 were limited as the Crown suggests, it would have been easy so to express the paragraph. Its terms, however, appear to have remained and been re-enacted without alteration after the passing of section 18 of the Finance Act, 1922, and notwithstanding the insertion of the proviso to

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section 122 (1) in the consolidating Act of 1952. In my judgment, the words mean what they appear to me clearly to say. The Crown's argument requires that some gloss should be added to the statutory language, and I do not see any justification for making the gloss.

The result is that the appeal must be allowed. We will discuss the form of order appropriate to be made when my brethren have delivered their judgments.

PEARCE L.J. I agree. It is clear that the hospital appointment is an office. But the taxpayer contends that, even though it be an office, he is entitled to include its expenses among the other expenses of his profession deductible under Schedule D. The commissioners have found that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointment being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. These are findings of fact, and have not been challenged.

One would think, therefore, at first sight, that expenses wholly and exclusively expended for the purposes of his hospital appointment should be regarded as wholly and exclusively expended for the purpose of his profession. The Crown argue that they cannot be so regarded for the following reason: section 122 of the Income Tax Act, 1952 (which is Schedule D), provides that tax under that Schedule shall be charged in respect of the annual gains arising or accruing to any person residing in the United Kingdom from any trade, profession or vocation. Dr. Ross's professional profits therefore fall to be taxed under Schedule D. But the proviso to Schedule D says that profits or gains arising or accruing to any person from an office shall not by virtue of that paragraph be chargeable to tax under Schedule D except in certain circumstances which are inapplicable. Section 156 of the Act (which is Schedule E) provides in paragraph 2: "Tax under this Schedule "shall also be charged in respect of any office . . . the profits or "gains arising or accruing from which would be chargeable to tax "under Schedule D but for the proviso to paragraph 1 of that "Schedule."

The hospital appointment therefore must be taxed as an office under Schedule E, and any expenses of it can, it is said, only be deducted under Schedule E. In respect of an office there can only be deducted under Schedule E (Ninth Schedule, paragraph 7) money wholly and exclusively and necessarily expended in the performance of the duties, whereas in respect of a profession there can be deducted under Schedule D (section 137) disbursements or expenses wholly and exclusively laid out or expended for the purposes of the profession. The Crown therefore seek to disallow certain expenses of the hospital appointment which are not within the narrower limit imposed by Schedule E although they are within the broader limit imposed by Schedule D.

The Income Tax Act, it is argued, is divided into self-contained Schedules, and one cannot set against the Schedule D profits of a profession any expenses attributable to a part of that profession that has been caught by Schedule E. It would, it is said, be absurd and disruptive of the present methods of taxation to allow the taxpayer to recover, as part of the Schedule D expenses attributable to his profession, expenses which are attributable to the hospital appointment taxed under Schedule E, but which are not allowable under Schedule E. I do not see any absurdity in such a situation. In the infrequent cases where an office is found to be a necessary part of the exercise of a profession and to be merely incidental to it, I see nothing absurd in treating the expenses of the office as part of the expenses of the profession. Nor do I think it will cause a general disruption of the present method. It is more reasonable than notionally dividing in half a profession, which has been found to be one entity, producing an artificial allocation of expenses between the two halves, and then allowing the expenses of one-half and disallowing those of the other.

The argument of the Crown, therefore, can derive no aid from any argument based on merits. It must stand or fall on the wording of the Act. Lord Simonds observed in *St. Aubyn* v. *Attorney-General*[9]: "The question is not at what transaction the "section is, according to some alleged general purpose, aimed but "what transaction its language, according to its natural meaning, "fairly and squarely hits."

Only two cases are relevant. The *Salisbury House* case[10] decided that rents were profits arising to a company from the ownership of land, and that the Schedule A assessment was exhaustive in respect of them, so that they could not be included in an assessment under Schedule D as trade receipts of the company. Lord Atkin there said[11]: "Believing as I do that "the specific Schedules A, B, C and E and the rules thereunder "contain definite codes applying exclusively to their respective "defined subject-matters, I find no ground for assessing the tax-"payer under Schedule D for any property or gains which are "the subject-matter of the other specific Schedules. In the "present case the income from the offices should be and has been "assessed under Schedule A on the annual value as prescribed by "statute. It therefore is not the subject-matter of assessment "under D." That case is relied on by the Crown as showing that once the hospital appointments have been excised from the profession and put into Schedule E, that part of the profession which is left in Schedule D cannot have any regard to hospital appointment or claim any of its expenses.

But in so far as any inference favourable to the Crown can be

[9] [1952] A.C. 15, 32; [1951] 2 All E.R. 473.
[10] [1930] A.C. 432.
[11] Ibid. 457.

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drawn from dicta in the *Salisbury House* case,[12] they are negatived by what was said in *Hughes* v. *Bank of New Zealand*,[13] decided seven years later by the House of Lords. In that case the bank made substantial profits in dealing with Government securities which came within Schedule C, and which by their terms of issue were exempted from taxation. It was held that those profits, since they were exempt from taxation and came within Schedule C, were not to be included in the trading profits under Schedule D, but that the expenses attributable to them could be included in the general trading expenses under Schedule D and deducted from the profits under Schedule D. It was there said by Lord Wright M.R.[14]: "The result seems to be that the "legislature in the Income Tax Acts has expressly provided for "certain exemptions and exclusions which will operate when the "profits of the trade are being dealt with under Case I of "Schedule D, and has, either inadvertently or by design, omitted "to make any corresponding provision in respect of any allocation "or apportionment of the expenses of the trade."

In the House of Lords, Lord Thankerton said[15]: "It is "perhaps enough to say that the Crown are unable to point to any "statutory provision in support of their contention, whereas the "respondents find full justification for their resistance in the pro-"visions of rule 3 of the Rules applicable to Cases I and II of "Schedule D, which is as follows: '3. In computing the amount "'of the profits or gains to be charged, no sum shall be deducted "'in respect of—(*a*) any disbursements or expenses, not being "'money wholly and exclusively laid out or expended for the "'purposes of the trade, profession, employment, or vocation.' "In order to ascertain the authorised deductions it is right to "turn this into positive form. In this view, it seems to me to be "incontrovertible that, in the present case, the investments in "question were part of the business of the respondents' trade, "and that the expense connected with them was wholly or "exclusively laid out for the purposes of the trade. Expenditure "in course of the trade which is unremunerative is nonetheless a "proper deduction, if wholly and exclusively made for the pur-"pose of the trade. It does not require the presence of a receipt "on the credit side to justify the deduction of an expense."

It is clear from that case that there is no absolute rule that when part of the profits under Schedule D are transferred to another Schedule (in that case Schedule C) the expenses attributable to the part transferred cannot remain to be dealt with under Schedule D. It is true that Schedule C had no provision for deduction of expenses: but that does not, to my mind, affect the principle. I find no authority for reading into the Act a rule that where part of the profits under Schedule D are transferred to another Schedule, then if (and only if) each other Schedule has a

[12] [1930] A.C. 432.
[13] [1938] A.C. 366; 54 T.L.R. 542; 21 T.C. 472; [1938] 1 All E.R. 778.
[14] [1937] 1 K.B. 419, 450.
[15] [1938] A.C. 366, 378.

provision for deductions, the expenses attributable to the part transferred cannot be dealt with under Schedule D. In this case, therefore, there is no constraint by authority or reason or manifest general intention to do other than follow the literal wording of the Act.

It is clear that this particular problem was not in the mind of the draftsman of the relevant sections. No doubt it never occurred to him that a taxpayer carrying on the profession of a consultant radiologist, whose hospital appointment was a necessary part of his profession and was, in fact, inextricably mixed up with it, would be divided by theoretical binary fission into two halves having unequal rights to expenses laid out in the exercise of that profession. If it did occur to him, he was not very fortunate in his choice of words.

Section 137 (*a*) reads as follows: "Subject to the provisions "of this Act, in computing the amount of the profits or gains to "be charged under Case I or Case II of Schedule D, no sum "shall be deducted in respect of—(*a*) any disbursements or "expenses, not being money wholly and exclusively laid out or "expended for the purposes of the trade, profession or vocation." In neither that nor the following subsections (in six of which the words "trade, profession or vocation" occur) is there any suggestion that the trade, profession or vocation referred to might not be the actual physical trade, profession or vocation, but might be the metaphysical residue of that trade, profession or vocation after it has been notionally denuded of some part that has been taken over by some other Schedule.

It is argued by the Crown that the words "in computing the "amount of the profits or gains to be charged under Case I or "Case II of Schedule D no sum shall be deducted," and so forth, show that the deductions must be only those which are referable to the profits and gains to be charged under Schedule D. But although, in general, you only expect expenses referable to the gains and profits that they produce, it is not always so. Many things that produce no gross profit are proper expenses of a business, things that have been intended to help the business, and may have done so. As Lord Thankerton said, above: "It does "not require the presence of a receipt on the credit side to justify "the deduction of an expense."

The test laid down in section 137 is whether the expenses have been wholly or exclusively laid out or expended for the purposes of such trade, profession or vocation. Here, the sums in question have been laid out or expended for the purposes of Dr. Ross's profession, as found by the commissioners. If it had been desired to exclude the expenses of a part of the profession transferred to Schedule E, it would have been easy to say so. I decline to read that gloss into the plain words of section 137 (*a*), or to import into this consolidation Act implications which could have been easily and clearly expressed.

The Crown argument seems to me to be covered by the words

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of Lawrence J. in *Hughes* v. *Bank of New Zealand* [16]: "I am of "opinion that there is no ground for excluding those expenses "merely because some part of the profits which those expenses "had been incurred to earn is exempt from income tax. The "contention of the Crown is based upon reading rule 3 applicable "to Cases I and II as though it read, 'any disbursements or "'expenses, not being money wholly and exclusively laid out or "'expended for the purpose of earning profits brought into "'charge,' but that is not what the rule says, and again the "words of the rule must be strictly adhered to. The expenses "may be laid out for the purposes of trade, and undoubtedly were "apparently in this case laid out for the purposes of the trade, "although they earned profits which, by reason of exemption, are "not brought into charge."

There is no hardship or unfairness in such a refusal to read into the Act dubious implications that could easily have been expressed: for the Crown are always in a favourable position to clarify any matter by amendment, and to put their rights against the taxpayer beyond any doubt.

For these reasons I would allow the appeal.

HARMAN L.J. Two questions arise here. First, whether the activities of the doctor under the National Health Act, 1946, constituted the holding of an office of profit within the meaning of Schedule E of section 156, paragraphs 1 or 2 of the Income Tax Act, 1952, or whether these activities were merely one of the engagements entered into by the doctor in the course of the practice of his profession. This is not a matter patient of much discussion. The commissioners and the judge below agreed that this is an office, and I too agree. It cannot, in my judgment, properly be described as merely an engagement, as were the various activities of Miss Lilian Braithwaite in the course of the exercise of her profession as an actress, illustrated in the *Braithwaite* case.[17] The appointment of a consulting radiologist by the agent of the Minister of Health in pursuance of his duty of maintaining a national health service (see National Health Service Act, 1946, s. 12 (1)) is plainly, in my judgment, the constitution of an office and the appointment of an officer to hold it. An office is a position or post which goes on without regard to the identity of the holder of it from time to time, as was said, in effect, by Rowlatt J. in the *Great Western Railway Co.* v. *Bater*,[18] and approved by Lord Atkin in *McMillan* v. *Guest*.[19] Coming to this conclusion, I need not consider whether this is not also an employment within Schedule E, nor whether the office is a public one. I should incline to answer both these questions in the affirmative if necessary.

[16] 21 T.C. 472, 486.
[17] [1931] 2 K.B. 628.
[18] [1920] 3 K.B. 266, 274.
[19] [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190.

It seems to me to follow inevitably—and, though the commissioners thought otherwise, it was accepted by the judge, and not contested here—that the emoluments of the office come into charge to tax under Schedule E. So also, in my judgment, do the doctor's activities in the sphere of domiciliary visits to patients by arrangement with general practitioners in the area covered by the office. These seem to me on the facts stated to be perquisites of the office. It is true that they arise out of a separate agreement, and that the doctor need not assume the obligation to make such visits, even though he holds the office, but the opportunity to make the contract is offered to him as being the consultant radiologist in the area, and profits from it are, it seems to me, perquisites of the office.

The second point was not, as I understand it, discussed at great length before the judge, who dealt with it in one sentence,[20] concluding in accordance with the decision in the *Salisbury House* case [21] that the Schedules were exclusive and that, therefore, the expenses incurred by the doctor must be divided and attributed in part to one set of activities—namely, the treatment of private patients—and in part to the other—the performance of the duties of his office. This, in my judgment, brushes aside with too little attention the special feature of this case—namely, the finding by the commissioners first in these words in paragraph 7 (2) of the case stated: "His private practice which he commenced on "1st March, 1950, was carried on at an address in Rugby which "was also his home, and as a necessary part of the exercise of "that profession he had accepted and still held part-time appoint-"ments as consultant radiologist to each of several hospitals"; and this conclusion at the end of paragraph 7 (4): "We also find "that at all material times Dr. Ross exercised the profession of "consultant radiologist, his part-time hospital appointments being "a necessary part of the exercise of that profession and merely "incidental thereto, notwithstanding that a great deal of his time "was thereby taken up."

I do not think these are conclusions of fact so as to be binding on the court, but they are, in my judgment, conclusions of mixed fact and law dependent on the testimony of witnesses whom the commissioners heard and we have not, nor have we any note of it, and I do not think that these conclusions can possibly be disregarded. It follows that the doctor did not carry on two professions, nor engage in two sets of activities, but one. Whether he was attending his National Health patients or his paying patients, he was following the same vocation, the practice of a radiologist. It is true that in order to succeed in this profession he found himself, professionally speaking, obliged to serve part-time as an officer of the National Health Service. We have concluded that he thus brought himself within Schedule E.

[20] [1959] 3 W.L.R. 550, 567. [21] [1930] A.C. 457.

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Now this is an historical accident. Until 1922 tax was levied under Schedule D on the annual profits accruing to any person residing in the United Kingdom from any trade, profession, employment or vocation (see Income Tax Act, 1918, Sch. D (1) (A) (ii)). Under Schedule E were taxed "every public office or "employment of profit" (see Income Tax Act, 1918, Sch. E). Under this latter Schedule, the tax was paid by deduction and it was used, because it was convenient, for many cases which did not fall within the Schedule at all. The House of Lords, in the case of the *Great Western Railway Co.* v. *Bater*,[22] pointed this out. Bater was a ticket clerk on the Great Western Railway, certainly not holding a public office, nor indeed an office at all. One of their Lordships remarked that he did not hold an office but merely sat in one. This decision was an administrative inconvenience, and the law was altered by the Finance Act, 1922, s. 18, whereby profits accruing from an office or employment under the Act of 1918 chargeable under Schedule D ceased to be chargeable under that Schedule and were made chargeable under Schedule E; and the section adds these words: "the rules applicable to that "Schedule shall apply accordingly."

Now it is notorious—and is, indeed, a long-standing injustice—that the scale of the taxpayer's allowances under Schedule E are on an altogether more niggardly and restricted scale than under Schedule D. Indeed, it has been said that the pleasures of life depends nowadays upon the Schedule under which a man lives. When you turn to the Act of 1952, you will accordingly find in section 122 included under Schedule D profits arising from any profession, employment or vocation, with the proviso that profits accruing from an office or employment shall not be chargeable under the Schedule (with exceptions here immaterial). Section 137, as inverted in accordance with the true interpretation of it, allows the deduction of disbursements or expenses wholly and exclusively laid out for the purposes of the trade, profession or vocation. Under section 156, Schedule E is to include (ii) tax in respect of any office or employment the profit accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule. For the expenses which may be deducted under this Schedule one must turn to Schedule 9 of the Act of 1952, paragraph 7, which limits the deductions to expenses incurred: (a) in travelling, (b) in keeping a horse, or (c) any expenses wholly, exclusively and necessarily laid out in the performance of the duties of the office.

It is the object of the Crown, therefore, to split the doctor in two and to treat him as if he was in the enjoyment of two sorts of profit, one arising under Schedule D and one under Schedule E, to oblige him to make two returns, and to attribute to each activity the expenses exclusively incurred in the course of it. The result will be that such of the expenses as fall under a

[22] [1922] A.C. 1.

Schedule E activity will be disallowed unless they are necessary, whereas of the expenses attributed to the Schedule D activity expenses in fact incurred "for the purposes of the profession" may be deducted. This, as it seems to me, is a conclusion contrary to common sense and to the facts. As I have earlier said, the doctor must be taken to have been carrying on one profession of which the services to the National Health Scheme are part. I do not think he has two sources of profit. All his income is the result of the practice of his profession. There must be many occasions when it cannot be said which activity is being pursued, and when the proposed division of activities cannot be made except on a purely arbitrary basis. Many absurd results follow. For instance, a general practitioner is taxed under Schedule D, notwithstanding the fact that he has entered into a contract with the agent of the Minister, here the Executive Council. When he calls in a consultant, both will attend the patient, but the expenses attendant on each will rank under different Schedules though both are doing the same work.

In my judgment, Dr. Ross's accounts in this case can properly be made up only by setting all the professional remuneration on one side and all the expenses incurred "for the purpose of the "profession" on the other. Having done this, the proviso to section 122 obliges you to take out of the account the profits or gains accruing from the office. In my judgment you must, when transferring these to Schedule E, make such deductions as that Schedule allows. You will then have the taxable sum under Schedule E. To ascertain the taxable sum under Schedule D, you will deduct from the professional receipts which remain the expenses incurred for the purpose of the whole profession after deducting such (if any there be) as have already been allowed against the Schedule E total as having been necessarily expended on a horse or what-not. This seems to me to be the best that can be done. It is said that this does violence to the policy of the Act, because expenses appropriate to the Schedule D activity should be deducted from the Schedule D profits. I agree that this would be what one might expect to find, but I cannot find it stated in the Act.

The judge considered that the *Salisbury House* case [23] obliged him to treat the two schedules as mutually exclusive, but it has been pointed out to us that this is not by any means always so, notably in the *Bank of New Zealand* case,[24] where profits which would have been chargeable under Schedule C were excluded because they were exempt from tax and so taken out of the credit side of the account, but expenses incurred in the making of those profits were nevertheless held properly to remain on the debit side. Lord Thankerton forcibly pointed out that an expense was nevertheless a proper charge although profits did not accrue from

[23] [1930] A.C. 432.

[24] [1938] A.C. 366.

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it. This seems to me a good analogy for the method of assessing the tax here which I have above proposed.

I add that this result will only follow in the special and peculiar situation resulting from what I have called the special findings of the commissioners—namely, that only one profession is being followed, and that the office is held merely as an incident of it, and because without it the whole profession cannot in practice be carried on. I would therefore allow the appeal.

Appeal allowed.
The Crown to have two-thirds of its costs.
Leave to appeal to the House of Lords.

Solicitors: *Hempsons; Solicitor of Inland Revenue.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

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Lord Parker C.J., Ashworth and Salmon JJ.

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Extradition—"Accused" or "convicted" fugitive—Final judgment in default—Conviction and sentence in absence of alleged fugitive criminal—Whether "conviction for contumacy"—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *ss.* 10, 26—*Treaty of* 1876 *between England and France* [*Order in Council dated May* 16, 1878], *art. VII* (c).

Extradition—Foreign proceedings offending English justice—Whether relevant—Judgment in absence of fugitive.

Section 10 of the Extradition Act, 1870, provides: "In the case "of a fugitive criminal accused of an extradition crime, if . . . such "evidence is produced as . . . would, according to the law of "England, justify the committal for trial of the prisoner if the "crime . . . had been committed in England, the . . . magistrate "shall commit him . . .

"In the case of a fugitive criminal alleged to have been convicted "of an extradition crime, if such evidence is produced as . . . "would, according to the law of England, prove that the prisoner "was convicted of such crime, the . . . magistrate shall commit "him . . ."

By section 26: ". . . The terms 'conviction' and 'convicted' "do not include or refer to a conviction which under foreign law "is a conviction for contumacy, but the term 'accused person' "includes a person so convicted for contumacy."

By article VII (c) of the Treaty between England and France of 1876: "Persons convicted by judgment in default or arrêt de "contumace, shall be in the matter of extradition considered as "persons accused, and, as such, be surrendered."

The applicant, who had been summoned to appear before a French criminal court on January 5, 1954, to answer a charge of theft in France, did not appear, either then or at an adjourned

hearing, and in his absence was convicted and sentenced to four years' imprisonment. In French law that conviction was known as a "jugement par défaut" and anyone subject to it had the right at any time, on notice, to have it set aside and the case retried in his presence. On June 2, 1956, the applicant gave the requisite notice but at the rehearing he again failed to appear, and the court, in accordance with French law, confirmed the conviction and sentence by a "jugement itératif défaut," which judgment, unless notice of appeal were given within ten days, became final and conclusive. No such notice of appeal was given. On January 12, 1960, the applicant was arrested in this country on a warrant issued under the Extradition Act, 1870, stating that requisition had been made by the French Government for his surrender as "suspected "and accused of the commission of the crime of larceny," and the magistrate committed him for extradition on that basis. Had the applicant been subject to a "jugement par défaut" or "arrêt "de contumace" he would, in effect, have been retried upon his surrender, but being subject to a "jugement itératif défaut" he would, if surrendered, have gone straight to prison to serve his sentence without further trial.

On an application for a writ of habeas corpus on the ground, inter alia, that the basis of the application and committal of the applicant for extradition as an "accused" person was false in law and in fact, in which the respondents relied, inter alia, on section 26 of the Act of 1870 and article VII (c) of the Treaty of 1876 between England and France:—

Held, that, on the true construction of section 10 of the Extradition Act, 1870, a person subject to a final "jugement itératif "défaut" was a person "convicted of an extradition crime" within the meaning of the second paragraph, and not a person "accused" within the meaning of the first paragraph of the section. The words "conviction for contumacy" in section 26 were a translation of the French words "conviction par contumace" and did not include a final "jugement itératif défaut" which was radically different in character, although they did include a "jugement par défaut" which was of the same character, for persons subject to a "jugement "par défaut" and a "conviction par contumace" were retried on their surrender and so fell into the category of accused persons. Accordingly, even though it was not expressly referred to in section 26, a person subject to a "jugement par défaut" might properly be proceeded against and committed as an accused person under the first paragraph of section 10, whereas a person such as the applicant, subject to a final "jugement itératif défaut," who, upon his surrender, would begin serving his sentence without further trial, was not an accused but a convicted person. Nor did article VII (c) of the treaty—which might be prayed in aid to limit but not to extend the scope of the Act—apply to persons subject to a "jugement "itératif défaut"; it related only to persons subject to a "jugement par défaut" and an "arrêt de contumace," whom it was agreed should be treated as accused persons, which was in reality what they were, and not to persons who were in reality convicted persons. The committal of the applicant as an accused person, therefore, was wrong in law, and his application for habeas corpus must be allowed.

In re Coppin (1866) 2 Ch.App.Cas. 47 considered.

Quaere, whether, in proceedings under the Extradition Act, 1870, the courts of this country are bound to commit on proof of a conviction or may inquire into the foreign proceedings and may refuse to commit if the foreign judgment offends against English notions of substantial justice.

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Regina v. Governor of Brixton Prison. *Ex parte* Caborn-Waterfield.

Application for a writ of habeas corpus.

The following statement of facts is taken from the judgment of the court: On October 25, 1955, the applicant, Michael David George Patrick Caborn-Waterfield, together with certain other persons, was duly summoned by the Public Prosecutor in France to appear before the Criminal Court at Grasse to answer a charge of having stolen approximately 23 million French francs and 7,000 United States of America dollars from a certain Jack Warner at Antibes towards the end of the month of August, 1953. The case came on for hearing at Grasse on January 5, 1956. The applicant was represented by counsel but did not appear in person. The case for the prosecution appeared to be formidable and the court intimated that the applicant should be given a further opportunity of attending, should he wish to do so, in order to contradict or explain the evidence against him. Thereupon, the applicant's counsel applied for an adjournment of the trial so that the applicant might attend and give evidence at the adjourned hearing. The court granted the application and adjourned the trial until April 10, 1956. The applicant, however, failed to attend the adjourned hearing and his counsel appeared only out of courtesy to the court to say that he had no further instructions. The applicant was then convicted of the charge against him and sentenced to four years' imprisonment. That conviction in his absence is known to the French criminal law as a "jugement par "défaut." Anyone against whom such a judgment is pronounced has the right at any time thereafter, upon notice, to have the judgment set aside and the case retried in his presence. On June 2, 1956, the applicant, through his advocate, gave the appropriate notice and was duly summoned to appear before the Criminal Court at Grasse on October 4, 1956. On that date the applicant again failed to appear before the court and has never advanced any excuse for his absence. The court then, in accordance with the French law, pronounced judgment against the applicant for the second time and confirmed the former conviction and sentence. That judgment of October 4, 1956, is known to the French criminal law as "jugement itératif défaut." Unless a notice of appeal against such a judgment is given within ten days it becomes final. No notice of appeal was given and, accordingly, under French law the conviction stands and the applicant is liable to serve the four-year prison sentence imposed upon him.

On January 12, 1960, the applicant was arrested in London on a warrant issued by leave of the chief magistrate. The warrant was in the form prescribed in the Second Schedule to the Extradition Act, 1870.[1] It stated on its face that requisition had been

[1] Extradition Act, 1870 [applied in the case of the Treaty of 1876 between England and France, by Order in Council dated May 16, 1878], s. 2: "Where an arrangement has been "made with any foreign state with "respect to the surrender to such "state of any fugitive criminals, Her "Majesty may, by order in council, "direct that this Act shall apply in "the case of such foreign state. Her "Majesty may, by the same or any "subsequent order, limit the operation of the order, . . . and render

made to Her Majesty's Secretary of State for Home Affairs for the surrender of the applicant "suspected and accused of the "commission of the crime of larceny within the jurisdiction of "the Government of France." The form of warrant made provision for the arrest of a suspected or accused person or a convicted person with an intimation that the inappropriate words should be struck out, and the words "or convicted" were struck out of the warrant. On March 23, 1960, the applicant was brought before the magistrate at Bow Street Police Court to show cause why he should not be surrendered in pursuance of the Extradition Act, 1870, on the ground of his being accused of the commission of the crime of larceny in France. The facts, including the French law referred to above, were all put in evidence by the respondents before the magistrate. Two points were taken before the magistrate on behalf of the applicant. It was argued that no order should be made against the applicant, first, because the applicant was not a person "accused of an extradi- "tion crime" within the meaning of section 10 of the Extradition Act, 1870, inasmuch as he had already been convicted of the crime in respect of which his extradition was sought, and secondly, that the proceedings in France were contrary to English notions of substantial or natural justice in that the applicant had been tried in his absence.

The magistrate rejected both those points and committed the applicant to Brixton Prison for extradition on the ground that he was suspected and accused of stealing 23 million French francs and 7,000 United States of America dollars at Antibes in France on or about August 25 or 26, 1953.

The applicant applied to the court for a writ of habeas corpus, submitting that the magistrate's order was unlawful on the grounds (1) that he was proceeded against as a person accused and not as a person convicted; (2) that the English notions of a

"the operation thereof subject to such "conditions, exceptions and qualifica- "tions as may be deemed expedient."

S. 8: "A warrant for the appre- "hension of a fugitive criminal, "whether accused or convicted of "crime, . . . may be issued—(1) By a "police magistrate on the receipt of the ". . . order of the secretary of state, "and on such evidence as would in "his opinion justify the issue of the "warrant if the crime had been com- "mitted or the criminal convicted in "England."

S. 10: "In the case of a fugitive "criminal accused of an extradition "crime, if the foreign warrant autho- "rising the arrest of such criminal "is duly authenticated, and such "evidence is produced as (subject to "the provisions of this Act) would, "according to the law of England, "justify the committal for trial of the "prisoner if the crime of which he is "accused had been committed in "England, the police magistrate shall "commit him to prison, but otherwise "shall order him to be discharged.

"In the case of a fugitive "criminal alleged to have been con- "victed of an extradition crime, if "such evidence is produced as (subject "to the provisions of this Act) would "according to the law of England, "prove that the prisoner was con- "victed of such crime, the police "magistrate shall commit him to "prison, but otherwise shall order him "to be discharged. . . ."

S. 26: "In this Act . . . The terms "'conviction' and 'convicted' do not "include or refer to a conviction "which under foreign law is a con- "viction for contumacy, but the term "'accused person' includes a person "so convicted for contumacy."

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substantial justice were offended thereby; and (3) that in law and in fact the order should not have been made. Pursuant to the directions of the court given on March 25, 1960, notice of the application was served upon the Home Secretary, the Governor of Brixton Prison and the French Government.

F. H. Lawton Q.C. and *Michael Sherrard* for the applicant.

Sir Reginald Manningham-Buller Q.C., A.-G., J. R. Cumming-Bruce and *R. A. Barr* for the Home Secretary.

J. H. Buzzard for the Governor of Brixton Prison.

Michael Koenig for the French Government.

The following cases were cited in argument: *Pemberton* v. *Hughes* [2]; *Nouvion* v. *Freeman* [3]; *Robinson* v. *Fenner* [4]; *Jacobson* v. *Franchon* [5]; *Rex* v. *Wilson* [6]; *In re Henderson* [7]; *In re Coppin* [8]; *Reg.* v. *Governor of Brixton Prison, Ex parte Perry* [9]; *Macalpine* v. *Macalpine* [10]; and *Rex* v. *Governor of Brixton Prison, Ex parte Bidwell.* [11]

Cur. adv. vult.

April 12. SALMON J. read the judgment of the court, which, after stating the facts as set out above, continued as follows: In this court Mr. Lawton has argued the same points on behalf of the applicant as he argued before the magistrate. Counsel for the respondents dealt with these points in the reverse order to that in which Mr. Lawton took them. It would perhaps be convenient to deal with these points in the same order as that in which they were dealt with by the respondents' counsel.

The Attorney-General contends that the courts of this country are bound to commit under section 10 of the Extradition Act, 1870, on proof of a conviction, and cannot inquire into the question of whether or not the conviction was secured by means which offend our notions of natural or substantial justice. According to the argument, even if the conviction in this case were contrary to natural justice the magistrate was still bound to commit. The Attorney-General argues that the well-known common law principle that the courts of this country will not enforce a foreign judgment if it offends against English views of substantial justice has no application to proceedings under the Extradition Act, 1870. He argues that that Act excludes this principle and gives the courts no discretion but compels them to commit on proof of a conviction. He says that where the legislature intends to give the courts a discretion in the case of fugitive

[2] [1899] 1 Ch. 781; 15 T.L.R. 211, C.A.
[3] (1890) 15 App.Cas. 1.
[4] [1913] 3 K.B. 835.
[5] (1927) 44 T.L.R. 103; 138 L.T. 386, C.A.
[6] (1877) 3 Q.B.D. 42.
[7] [1950] 1 All E.R. 283, C.A.
[8] (1866) 2 Ch.App.Cas. 47.
[9] [1924] 1 K.B. 455; 40 T.L.R. 181, D.C.
[10] [1958] P. 35; [1957] 3 W.L.R. 698; [1957] 3 All E.R. 134.
[11] [1937] 1 K.B. 305; 53 T.L.R. 1; [1936] 3 All E.R. 1, D.C.

offenders it does so in plain terms as in section 10 of the Fugitive Offenders Act, 1881. He contends that the legislature in passing the Extradition Act, 1870, intended that our courts should be bound by the foreign conviction even if it grossly contravened all English notions of substantial justice. In such a case he contends that the legislature has enacted that the liberty of the subject should depend not upon the decision of the courts but on the discretion of the executive—the executive having power under the Act to refuse to surrender the alleged fugitive criminal.

This point is one of great importance, but on the view we take of the facts it does not fall to be decided in this case, and we prefer to express no opinion upon it. We are completely satisfied that the proceedings in France in no way offended against English views of substantial justice. The applicant was treated with complete fairness and, indeed, was shown every consideration by the French court; he was fully apprised of the very strong case he had to meet, and repeatedly given the fullest opportunity of meeting it. He elected not to do so and on three separate occasions, without any excuse, he failed to appear in person before the French court. Accordingly, it certainly does not lie in his mouth to complain that the case was dealt with in his absence. It is, moreover, to be observed that in this country there are cases, admittedly most exceptional, in which a man accused of misdemeanour may be tried and sentenced in his absence: see *Rex* v. *Browne*,[1] and section 15 of the Magistrates' Courts Act, 1952. We, accordingly, reject the second point taken on behalf of the applicant.

Mr. Lawton's first point turns upon the true construction of section 10 of the Extradition Act, 1870. If one looks at the section alone it is plain beyond argument that the applicant was a person "convicted of an extradition crime" within the meaning of the second paragraph, and not a person "accused of an "extradition crime" within the meaning of the first paragraph of that section. When an accused person is committed under the first paragraph of section 10 and surrendered to a foreign government he is surrendered for trial. Before that course is taken the magistrate has to be satisfied that a prima facie case is made out. When a convicted person is committed under the second paragraph of section 10 and surrendered to a foreign government he is surrendered to serve his sentence, in which case all that is necessary in the magistrates' court is to prove his conviction.

In the present case the applicant was committed under the first paragraph of section 10 as an accused person but there is no question of his being tried if he is surrendered. He has already been tried, convicted and sentenced in France. If surrendered, he will go to prison to serve his sentence without any further proceedings. Accordingly, if section 10 means what it plainly says, the magistrate has wrongly committed the applicant under

[1] (1906) 70 J.P. 472.

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the first paragraph of section 10. The respondents argue, however, that the prima facie meaning of the words "accused" and "convicted" in section 10 are altered by section 26 of the Extradition Act, 1870. This is an interpretation section and states: "The terms 'conviction' and 'convicted' do not include "or refer to a conviction which under foreign law is a conviction "for contumacy, but the term 'accused person' includes a person "so convicted for contumacy." We agree with Mr. Buzzard that these words must contemplate a conviction in respect of an extradition crime for contumacy. The respondents contend that the applicant has been so convicted for contumacy and that, accordingly, he was properly committed as an accused person under the first paragraph of section 10. The meaning of the words "for contumacy" in this statute is somewhat obscure and hitherto has never been considered by the courts. In our view these words were introduced into section 26 in order to bring the statute of 1870 into line with the decision in *In re Coppin*.[2] This view is supported by Piggott on the Law Relating to Fugitive Offenders (1910), p. 129. Before the passing of the Extradition Act, 1870, this country had entered into extradition treaties with France and the United States of America. Each of these treaties was the subject of a separate Act of Parliament passed in 1843. Those statutes were the first Extradition Acts to be passed in England. The statute governing the treaty with France was the Extradition Act, 1843 (6 & 7 Vict. c. 75). Under that Act only a person accused of committing an extradition crime could be extradited. No one who had been convicted in France and escaped to England could be extradited in respect of such conviction. The question arose in that case as to whether Coppin was an accused or a convicted person. He was the subject of a conviction "par "contumace" in France for forgery and fraud. In the course of his judgment in *Coppin's* case[3] Lord Chelmsford L.C. made an elaborate investigation into the effect in French law of a conviction "par contumace"; he found[4] that if a person so convicted "is arrested and surrenders himself, that judgment is "annulled, so that it is exactly the same as if no proceedings had "been taken against him and then he undergoes his trial for the "offence with which he was charged." Lord Chelmsford L.C. came to the conclusion[5] that a person convicted "par contu-"mace" could not properly be described otherwise than as an accused person, since on his apprehension the judgment against him is annulled and he is put upon his trial. In our view, the words "for contumacy" in section 26 of the Act of 1870 were intended as a translation of the French words "par contumace." This view accords with that expressed in Clarke upon the Law of Extradition, 4th ed. (1903), p. 233. In our judgment, a conviction for contumacy does not include a final judgment "itératif

[2] (1866) 2 Ch.App.Cas. 47.
[3] Ibid.
[4] Ibid. 53.
[5] Ibid. 54.

" défaut " which is radically different in character from a conviction " par contumace." A fugitive criminal convicted " par " contumace " would upon his surrender be tried, whereas a fugitive criminal subject to a final conviction " itératif défaut " would, on his surrender, be sent straight to prison without any further trial.

It is to be observed that section 26 makes no reference to a conviction " par défaut." This may be because the researches into French law by those responsible for drafting it, did not go beyond a consideration of the judgment in *Coppin's* case.[6] According to the evidence before us a conviction " par défaut " is exactly the same in character as a conviction " par contumace." The former is a decision of a Tribunal Correctionale which has jurisdiction over " delits," and the latter is the decision of a Cour a Assize which has jurisdiction over other types of crime. Applying the reasoning of Lord Chelmsford in *Coppin's* case [6] it is clear that anyone subject to a " jugement par défaut " comes into the category of an accused person, rather than into the category of a convicted person. Accordingly, even although a judgment " par " défaut " is not expressly referred to in section 26, in our view any alleged fugitive criminal subject to such a judgment would properly be proceeded against and committed as an accused person under the first paragraph of section 10 of the Extradition Act. But the applicant is not such a person, for he is subject to a final " jugement itératif défaut."

The respondents have sought to rely upon article VII (c) of the Extradition Treaty made between England and France in 1876. The English version of that article reads as follows: " Persons " convicted by judgment in default or arrêt de contumace shall be " in the matter of extradition considered as persons accused, and, " as such, be surrendered." The respondents argue that, on a true construction of the treaty " persons convicted by judgment in " default " include persons subject to a final judgment " itératif " défaut," and that the words of the treaty must be read into the Extradition Act so as to qualify section 10. Even if the suggested construction of the treaty were correct, which, in our judgment, it is not, it would not avail the respondents. The treaty may be prayed in aid to limit the scope of the Extradition Act (*Reg.* v. *Wilson* [7]), but not to extend it. Were there any ambiguity in the Act it might be possible to look at the treaty in order to resolve the ambiguity. There is, however, no ambiguity in the relevant sections of the Act, and the treaty certainly cannot be used to alter the plain meaning of the words " accused " or " convicted " in section 10. The applicant, being subject to a final judgment " itératif défaut " will, if surrendered, go straight to prison to suffer the sentence imposed upon him. Looking at the realities of the situation he is, in the fullest sense of the words, a convicted person and in no sense an accused person. In any event, article VII

[6] 2 Ch.App.Cas. 47.

[7] (1877) 3 Q.B.D. 42.

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(c) of the treaty does not in our view apply to judgments "itératif "défaut." Such judgments are certainly not expressly mentioned in the article, and we think that the omission is intentional. As we have already indicated "jugement par défaut" and "arrêt "de contumace" are essentially of the same character. Anyone subject to such judgments is much more akin to an accused person than he is to a convicted person. On the other hand, judgments "itératif défaut" are of an entirely different character. Anyone subject to such a judgment, certainly to such a final judgment, is clearly in the class of convicted persons and not in the class of accused persons.

In our view, the parties to the treaty agreed that the persons referred to in article VII (c) should be treated as accused persons because, in reality, that is what they are. There is no reason to suppose that the parties intended that those who are in reality convicted persons such as the applicant should be dealt with otherwise than as convicted persons.

We have, accordingly, come to the clear conclusion that Mr. Lawton's first point is a good one. We have reached this conclusion with considerable reluctance for the applicant appears to be entirely devoid of merit. Had he been proceeded against and committed as a convicted person it is difficult to see in the circumstances of this case how he could have succeeded in this court. The point raised before us on the construction of the statute is, however, of some importance, and, as the Attorney-General has said, goes far beyond the scope of this particular case. There can be no doubt that upon the true construction of the statute the applicant's committal as an accused person was wrong in law. Accordingly, the application succeeds and the applicant, who has surrendered to his bail and is before this court, will be discharged.

Application allowed, with costs against the Home Secretary and the French Government.

Solicitors: *Blacket, Gill & Prior; Treasury Solicitor; Director of Public Prosecutions; Rowe & Maw.*

J. F. L.

[COURT OF APPEAL.]

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Mar. 16, 17; *April* 5.

Hodson, Willmer and Devlin L.JJ.

Husband and Wife—Desertion—Three years from presentation of petition — Amendment to pleading — Amendments of cross-petition and reply to cross-petition to allege desertion—Three years' desertion not completed at date of original petition and answer—Three years' desertion completed at date of hearing—Validity of amendments—Effect of disposing of original prayer before allowing amendments—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*)—

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Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 3 (2)—*R.S.C., Ord.* 70, *r.* 1.

Practice—Non-compliance with rule of court—Dispensation by court—Whether court empowered to authorise disregard of rule in advance—New petition for divorce before prior petition disposed of—R.S.C., Ord. 70, *r.* 1.

A wife petitioned for dissolution of marriage on the ground of cruelty, and her husband, by his answer, cross-petitioned for dissolution of marriage also on the ground of cruelty. Neither charge of cruelty succeeded. At the time of the hearing the parties had been separated for the three years immediately preceding thereto, although they had not been separated for three years immediately preceding the presentation of the petition and the cross-petition.

The husband was given leave to amend his cross-petition to allege desertion by the wife and to ask for a decree nisi on that ground; the wife was similarly given leave to amend her reply by adding a cross-petition alleging desertion by the husband. Both charges of desertion were dismissed, and on appeal therefrom, the court took the point that the judge had no jurisdiction to allow those amendments:—

Held, (1) that the allegations of desertion could not be raised merely by amendment, since that would be to defeat the plain language of section 1 (1) (*b*) of the Matrimonial Causes Act, 1950,[1] which required the period of three years to elapse not before the amendment of, but before the presentation of the petition (post, pp. 803, 806).

Spawforth v. *Spawforth* [1946] P. 131; 62 T.L.R. 262; [1946] 1 All E.R. 379 applied.

Thatcher v. *Thatcher* [1959] 1 W.L.R. 730; [1959] 2 All E.R. 649 and *Swiszczowski* v. *Swiszczowski* [1959] 1 W.L.R. 187; [1959] 1 All E.R. 495 overruled.

(2) That if the amended cross-petition and the reply thereto be regarded as separate petitions, rule 3 (2) of the Matrimonial Causes Rules, 1957,[2] had not been complied with, since the original petition and answer had not been disposed of when the amendments were made; that non-compliance with that rule was a substantive objection and not a mere technicality, and the order purporting to dispose of the cross-charges of desertion was a nullity (post, pp. 804, 807).

Per Willmer L.J. Although he expressed no concluded opinion on the matter, the same objection [under rule 3 (2)] might possibly not have been taken if, in the present case, the judge had been invited first to dispose of the prayer and cross-prayer for relief in the original petition and answer before leave was asked to make the amendments (post, p. 807).

Per Hodson L.J. Although the court had power under R.S.C., Ord. 70, r. 1,[3] to dispense with the requirements of rules where

[1] Matrimonial Causes Act, 1950, s. 1 (1): "... a petition for divorce "may be presented to the court either "by the husband or the wife on the "ground that the respondent ... "(*b*) has deserted the petitioner with- "out cause for a period of at least "three years immediately preceding "the presentation of the petition...."

[2] Matrimonial Causes Rules, 1957, r. 3 (2): "A petition shall not be "filed if there is before the court "another petition by the same petitioner which has not been dismissed "or otherwise disposed of by a final "order."

[3] R.S.C., Ord. 70, r. 1: "Non- "compliance with any of these rules "... shall not render any proceedings "void unless the court or a judge "shall so direct, but such proceedings "may be set aside either wholly or in "part as irregular, or amended, or "otherwise dealt with in such manner "and upon such terms as the court or "judge shall think fit."

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justice requires, it did not follow that the court, notwithstanding the consent of the parties, could authorise disregard of the rules in advance (post, p. 804).

Per Devlin L.J. (1) He was not satisfied that the court had power, even with the consent of the parties, to dispense in advance with compliance with any of the Rules of the Supreme Court; the procedure under Order 70, r. 1, could be used to cure irregularities, but it did not authorise in advance disregard of the rules, and it ought not to be supposed that it was automatically available for curing deliberate infraction of any rule. (2) Even if there was any such power it ought to be used only in the most exceptional circumstances. (3) He doubted whether the court should use any powers it might have to assist parties who, having failed in one claim for relief, sought priority in bringing another. (4) The rule was not to be dispensed with merely by ignoring it (post, pp. 808 et seq.).

APPEAL and CROSS-APPEAL from Judge Rewcastle.

The following statement of facts is taken substantially from the judgment of Willmer L.J.: The parties were married on February 29, 1936, and cohabited until December 31, 1955, when the husband left the wife. There had been no cohabitation since that date. The wife's petition was filed on April 3, 1957, and by it she prayed for a decree of dissolution on the ground of cruelty. By his answer, dated May 13, 1957, the husband denied the charges of cruelty, and himself cross-prayed for a decree of dissolution on the ground of cruelty on the part of the wife. The wife filed a reply, dated July 26, 1957, denying the husband's charges of cruelty and repeating the prayer of the petition. At this stage a period considerably less than three years had elapsed since the date of the separation. The case came on for trial on June 2, 1959, and the hearing which extended over several days lasted until June 8, 1959. During the course of the trial the husband withdrew his charges of cruelty against the wife, but the wife persisted in her charges throughout. The commissioner found that no cruelty had been proved on either side, and there had been no appeal on this point.

By the time of the trial more than three years had elapsed since the date of the separation; and in those circumstances, at some time during the trial leave was obtained by the husband to amend his answer by adding a cross-petition alleging desertion against the wife during the period of three years preceding the presentation thereof; and at the same time leave was granted to the wife to amend her reply by adding an answer to the cross-petition, whereby she in turn alleged desertion against the husband. The amendments allowed were in the following terms: "And it is ordered that the respondent [the husband] do amend "the answer by way of cross-petition to allege desertion . . . and "that service be effected in court. And it is ordered that the "petitioner [the wife] do amend her reply by way of answer to "the cross-petition to allege desertion . . . and that service be "effected in court." Those amendment were duly made and supported by affidavits pursuant to rule 15 of the Matrimonial Causes

Rules, 1957. On June 8, 1959, the commissioner gave judgment and dismissed both charges of desertion; it was against the dismissal of those charges that the present appeal and cross-appeal were brought.

At the hearing of the appeal the court took the point whether the judge had jurisdiction to make the amendment.

David Karmel Q.C. and *A. B. Hollis* for the wife, the petitioner.

F. Donald McIntyre Q.C. and *Derek Wheatley* for the husband, the respondent.

All the cases cited in argument are referred to in the judgment.

Cur. adv. vult.

April 5. The court delivered the following written judgments:

HODSON L.J., having stated the facts, continued: The order of the judge shows that he dismissed the husband's cross-petition based on desertion, and also the wife's charge of desertion contained in her amended reply, which, although not described as a new petition, was in effect such.

There appears to have been some confusion as a result of these amendments adding additional charges because, although the judge dismissed both charges of desertion in his order, he made no reference at all to the wife's charge of desertion in his spoken judgment. He cannot be criticised for this since he was addressed by her counsel in his final speech on the issue of cruelty alone. Both parties have appealed against the dismissal of the charges of desertion and have asked this court to pronounce a divorce on the ground of desertion; and in the case of the petitioner there is the anomalous position that she is relying, as her main ground of appeal, on the judge's failure to deal with the charge of desertion which she did not press before him.

The question is whether there is in this suit any jurisdiction to deal with the desertion issue which each party now seeks to raise. This cannot be done simply by amendment, for that would be to defeat the plain language of the statute, which requires the period of three years to elapse not before the amendment of but before the presentation of the petition. Compare *Spawforth* v. *Spawforth*,[1] where an attempt was made to circumvent the statute by a supplemental petition, three years' desertion not having run before the date of the petition but having expired before the date of the supplemental petition. The supplemental petition was held to be the equivalent for this purpose of an amendment: see *Sandler* v. *Sandler*.[2] The attempt accordingly failed.

[1] [1946] P. 131; 62 T.L.R. 262; [1946] 1 All E.R. 379.

[2] [1934] P. 149; 50 T.L.R. 397, C.A.

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The question is, can the same result be achieved by cross-petition? The answer to this is in the affirmative if the three years have expired before the presentation of a cross-petition. For this purpose an original answer may be regarded as a cross-petition: see *Faulkner* v. *Faulkner*,[3] for by section 6 of the Matrimonial Causes Act, 1950, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking for such relief.

If there is a separate cross-petition there is no obstacle to this being consolidated with the original petition; and in *Robertson* v. *Robertson*[4] Barnard J. allowed a cross-petition to be included in an answer when no cross-relief had been previously sought, thus avoiding the necessity of a separate suit and consolidation, etc. This does not mean that where the respondent has already prayed for relief in his answer and thus placed himself in the position of a petitioner, a further petition can be presented by him before the first has been disposed of.

The same applies to the original petitioner. If, as in this case, she has presented a petition based on cruelty, she cannot present a fresh petition based on desertion until the first has been disposed of. To do so is to contravene rule 3 (2) of the Matrimonial Causes Rules, 1957, which provides: "A petition shall not be filed if "there is before the court another petition *by the same petitioner* "which has not been dismissed or otherwise disposed of by a "final order." The cross-petition in the answer based on desertion and the equivalent contained in the reply were plainly filed in breach of this rule.

The rules have statutory effect, and although no doubt the court has a power after the event, under R.S.C., Ord. 70, r. 1, to dispense with the requirements of rules where justice requires and needless inconvenience would otherwise result, it does not follow that, notwithstanding the consent of the parties, the court can authorise disregard of the rules in advance. It has not been and cannot be contended that in this case the first petition of the petitioner or its equivalent by the respondent were dismissed or wholly disposed of by final order before the new petitions were presented, and, indeed, the situation was so confused that the wife's allegation of desertion was apparently forgotten.

No application either to dispense with the rule or to dispose of the cruelty first was ever made. The more substantial objection is, however, that to allow this course to be taken would be to ignore the plain language of the statute by enabling a petitioner or respondent to pray for relief on some ground other than desertion, and later at the hearing treat the statute as having provided that the relevant period of desertion expired at the hearing and not at the presentation of the petition.

Rule 3 (2) deals with substance and not with mere technicality. It is just that a petitioner should not be allowed to present a

[3] (1941) 57 T.L.R. 628; [1941] 2 All E.R. 748.

[4] [1954] 1 W.L.R. 1537; [1954] 3 All E.R. 413.

fresh petition until the first has been disposed of, and reasonable that in a situation like the present the petitioner and respondent should, before launching against one another charges of cruelty, which are notoriously easy to make, at least reflect what the consequences may be if their charges turn out to be groundless.

In my opinion, leave to amend by alleging desertion was wrongly given, although again no criticism can be levelled against the judge, who, in giving leave, had followed the decisions of Karminski J. in *Thatcher* v. *Thatcher*[5] and *Swiszczowski* v. *Swiszczowski*,[6] both of which cases were, I think, wrongly decided.

Apart altogether from the provisions of rule 3 (2), which must certainly, where desertion as a ground for divorce is concerned, be strictly adhered to, it is right that where the requirements, even what may be regarded as the technical requirements, of the rules concerned are being dispensed with, this should be stated in the order made by the court. Affidavits in support, service, time for appearance and answer and registrar's certificate are all matters subject to rules of court. If these provisions or some of them are simply ignored it is not to be wondered at that a muddle will occur.

These appeals must be dismissed, on the ground that neither the petitioner's nor the respondent's allegations of desertion have been effectively before the court as grounds for dissolution of the marriage.

WILLMER L.J. The appeal and cross-appeal in this case are both confined to the issue of desertion which was raised by the respondent husband's cross-petition, and the petitioner wife's answer thereto contained in her amended reply. I also have come to the conclusion that both appeal and cross-appeal must be dismissed, for the reason that the commissioner, having regard to the course that was taken at the hearing, would have had no jurisdiction to grant relief to either party on the ground of desertion. Consequently, his dismissal of the cross-charges of desertion is not a matter in respect of which complaint can properly be made to this court.

It is a regrettable fact that the difficulties in which the parties now find themselves arise out of a laudable desire to save costs. If I thought that these difficulties were of a purely technical nature, I should, for my part, have been disposed to struggle hard to find a way of overcoming them. But I am satisfied that the objection to the course which was adopted in this case is one of substance, and that if that course were regularly followed it might lead to an abuse of the process of the court and to the possible prejudice of parties in other suits. For it would be open to parties, whose only real case was one of desertion, to file a petition or answer before the expiration of the necessary three years praying for relief on sham grounds—with the possibility

[5] [1959] 1 W.L.R. 730; [1959] 2 All E.R. 649.

[6] [1959] 1 W.L.R. 187; [1959] 1 All E.R. 495.

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perhaps of obtaining thereby various forms of interim relief—and then, as soon as the three years have elapsed, to obtain leave to file a cross-petition and an answer thereto alleging desertion, with the possible effect of obtaining undue expedition of their case in priority to other litigants. [His Lordship stated the facts as set out above and continued:]

When the appeal on behalf of the wife was opened a question was immediately raised as to the propriety of the course taken by the commissioner in allowing the charges of desertion to be raised in the present proceedings. The question is whether it is permissible for a respondent, when an answer is already on the file containing a prayer for substantive relief, to be given leave to amend that answer, once the necessary period of three years has elapsed, by adding a cross-petition for relief on the ground of desertion. This was a course taken in *Swiszczowski* v. *Swiszczowski*[7] and in *Thatcher* v. *Thatcher*,[8] both of which were relied on to justify what was done in the present case. If that course is permissible, I think that the further step taken in *Thatcher* v. *Thatcher*,[8] and followed in this case, of granting leave to amend the reply by adding an answer to cross-petition containing a cross-prayer for relief on the ground of desertion would be an almost necessary corollary.

Having considered the propriety of this procedure I have been unable to see any escape from the dilemma that was put during the argument. Either the cross-petition and the answer thereto are to be regarded as one with the original petition and answer, or else they must be regarded as separate proceedings. If they are to be regarded as one with the original petition and answer, then they are no different from a supplemental petition or answer, and must be held to speak from the dates of the original petition and answer. That seems to me to be the effect of *Spawforth* v. *Spawforth*[9] and *Chapman* v. *Chapman*,[10] following the decision of this court in *Sandler* v. *Sandler*.[11] If that is the correct view, it will not help the parties in the present case, since three years had not elapsed at the date of either the original petition or the original answer.

If, on the other hand, as I think, the cross-petition and the answer thereto are to be regarded as separate proceedings from the original petition and answer, it seems to me that the effect of rule 3 (2) of the Matrimonial Causes Rules, 1957, is to forbid their being filed unless and until the original proceedings have been finally disposed of. It was suggested in argument that R.S.C., Ord. 70, r. 1, could be invoked, so as to enable the court to dispense with the application of rule 3 (2) of the Matrimonial Causes Rules, 1957. In that connection our attention was called to a note (at p. 1600) of the Annual Practice for 1957. But this note has not been repeated in the current edition of the Annual

[7] [1959] 1 W.L.R. 187.
[8] [1959] 1 W.L.R. 730.
[9] [1946] P. 131.
[10] [1938] P. 93; 54 T.L.R. 462; [1938] 1 All E.R. 635.
[11] [1934] P. 149.

Practice, and no case has been called to our attention in which strict compliance with rule 3 (2) of the Matrimonial Causes Rules, 1957, has been dispensed with. It seems to me that, if we are to regard the cross-petition and the answer thereto as proceedings entirely separate from the original petition and answer—as we must, if either party is to be able to allege desertion for three years—rule 3 (2) is a fatal objection to the course that has been taken. If that rule is to be complied with, it must follow that leave cannot properly be granted to file a cross-petition or an answer thereto, unless and until the prayers for relief in the original petition and answer have been disposed of, which was not done in this case.

This conclusion necessarily involves that we must hold the course taken in *Swiszczowski* v. *Swiszczowski* [12] and *Thatcher* v. *Thatcher* [13] to have been misconceived and unjustified. The procedure followed in those cases was in purported pursuance of the decision in *Robertson* v. *Robertson*.[14] In that case also leave was granted to amend the answer, after the expiration of the necessary three years, so as to add a cross-petition alleging desertion. But I think it is possible to distinguish what was done in that case, on the ground that there the original answer contained no prayer for substantive relief. It can, therefore, be said that the course taken in that case did not offend against rule 3 (2), since there was nothing equivalent to a "petition" by the respondent already on the file. The vice of what was done in the present case was that leave to institute fresh proceedings by adding the cross-petition and the answer thereto was granted at a time when the prayer and cross-prayer for substantive relief on the ground of cruelty in the original petition and answer were still on the file and undisposed of.

Though I do not find it necessary to express any concluded opinion on the matter, it occurs to me that possibly the same objection could not have been taken if in the present case the commissioner had been invited first to dispose of the prayer and cross-prayer for relief in the original petition and answer, before leave was asked to amend the answer by adding a cross-petition and the reply by adding an answer to cross-petition. Had that been done, and had the parties then asked leave to institute their fresh proceedings by adding a cross-petition and an answer thereto, it may be that the commissioner could properly have acceded to the request, and with the consent of the parties could then have given the necessary directions for abridgement of time, dispensing with the registrar's certificate, and so forth, so as to enable him to dispose of the issue of desertion while he was yet seised of the case, and thus avoid the necessity for the parties to incur the additional costs of a fresh trial before another judge. It would appear from the report of *Chapman* v. *Chapman* [15] that this was the course in fact adopted in that case. If this is so, I

[12] [1959] 1 W.L.R. 187.
[13] [1959] 1 W.L.R. 730.
[14] [1954] 1 W.L.R. 1537.
[15] [1938] P. 93.

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should not wish, as at present advised, to be regarded as dissenting from it.

Be that as it may, in the present case I can see no ground on which we can say that the course adopted by the commissioner was other than irregular. The irregularity was such that, in my judgment, this court can do no other than direct, in pursuance of Order 70, r. 1, that the proceedings instituted by way of cross-petition and answer thereto were void. It follows, therefore, that in so far as the commissioner's order purported to dispose of the cross-charges of desertion it was a nullity. So far as these charges are concerned, accordingly, there is no valid order from which to appeal. Appeal and cross-appeal must be dismissed, leaving the parties free to institute such fresh proceedings as they may be advised.

DEVLIN L.J. I agree that the cross-petition and answer thereto should be declared void for the reasons given by my Lords and that, accordingly, the appeal and cross-appeal should be dismissed.

We have listened to some discussion about the propriety of the decision in *Robertson* v. *Robertson*,[16] and about whether the present difficulties could have been surmounted if the original proceedings had first been dismissed so that no breach of rule 3 (2) of the Matrimonial Causes Rules, 1957, was involved. On this point I wish to make some observations.

First, I am not satisfied that the court has power, even with the consent of the parties, to dispense in advance with compliance with any of the rules of the Supreme Court, these being made under the authority of an Act of Parliament. I should wish to hear that point fully argued before reaching any conclusion upon it. The procedure under Order 70, r. 1, can be used after the event to cure irregularities, especially those brought about by inadvertence. But the order does not authorise in advance disregard of the rules, and it ought not to be supposed that it is automatically available for curing the deliberate infraction of any rule, even the least important.

Secondly, I consider that if there is any such power it ought to be used only in the most exceptional circumstances. The rules themselves provide various methods of saving costs and expediting proceedings in appropriate cases—as, for example, provision for an early trial (R.S.C., Ord. 50, r. 1A and Ord. 64, r. 9), and the formulation by consent of an issue for trial without pleadings (Ord. 34, r. 9). I think that the court should be slow to attempt the invention of other methods.

Thirdly, I doubt whether the court should use any powers it may have to assist parties who, having failed in one claim for relief, seek priority in bringing on another. I appreciate that the chief object in these cases is to save costs and that is always tempting. But two things ought to be borne in mind. The first

[16] [1954] 1 W.L.R. 1537.

is that, if relief is to be granted in one case, it ought to be granted in all cases of the same type; and there must be many cases of the type in which a petitioner has unsuccessfully brought cruelty charges before the period of desertion has been completed. If relief is to be given in a class of case, it ought surely to be done by means of an alteration to the rules and not by the action of an individual judge, which should, I think, be reserved for exercise in circumstances peculiar to the case before him. The second thing to be borne in mind is that it is not in the public interest that charges of cruelty should be made when the real case, if there is one, is one of desertion. Willmer L.J. has pointed out the danger that a spouse, whose real case is one of desertion, may be tempted to file a petition before the expiration of the necessary three years, praying for relief on sham grounds in order that a charge of desertion, made as soon as the three years have expired, may obtain a hearing earlier than if it had been made in the ordinary way. Apart from the danger of abuse, it cannot be desirable that a party who makes charges of cruelty which he cannot prove should obtain a divorce more quickly than one who, taking a more balanced view of such conjugal unkindnesses as may have occurred, decides to wait for the period of desertion to be completed.

My final observation is that a rule is not dispensed with merely by ignoring it. If that were so, then rule 3 (2) could be taken as having been dispensed with in this case, and none of the difficulties we have been considering would have arisen. If rules are to be dispensed with, presumably under some inherent power of the court, I think that there should be an order specifying precisely what is being done. The order made in this case—" that the " respondent do amend the answer by way of cross-petition "—is confusing, if not meaningless. The cross-petition was not an amendment to the answer; as such, it would have no virtue. It was a separate proceeding and no order was required to institute it. What was required, and what was not made, was some order dispensing with all the other rules that would normally have to be complied with before the matter could be brought to trial. If the issue had been disposed and judgment delivered, Order 70, r. 1 could, no doubt, have been invoked—I do not say with what success—to cure the irregularities involved. But the complaint that is made here—namely, that the issue was not adjudicated—cannot be made successfully unless it is shown that the procedure prerequisite to adjudication has either been complied with or dispensed with. On that ground, alone, and apart from rule 3 (2), I should be prepared to dismiss these appeals.

Appeals dismissed; no order as to costs.
Leave to appeal to the House of Lords.

Solicitors: *J. E. Baring & Co.; C. E. Maplestone.*

I. G. R. M.

[COURT OF APPEAL.]

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Mar. 21, 22, 23;
April 12.

Sellers, Ormerod and Upjohn L.JJ.

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[1957 A. No. 1297.]

Agency—Estate agent—Commission—Whether "prepared to" means "does"—Payable upon introduction of a person "prepared to enter "into a contract to purchase on certain terms or on such other terms "to which you may assent"—Agreement to sell property "subject "to contract"—Contract to purchase signed by purchaser—Refusal by vendor to sign contract—Meaning of "prepared to enter into a "contract"—Meaning of "assent"—Whether assent given by vendor—Whether agent's commission payable.

The plaintiffs, a firm of estate agents, were consulted by the defendant, who wished to sell her leasehold interest in certain premises. The terms of the contract between the parties were contained in a letter written by the plaintiffs, which set out the terms upon which the defendant was prepared to sell the lease, and continued: "We would take this opportunity of confirming that in "the event of our introduction of a party prepared to enter into a "contract to purchase on the above terms or on such other terms "to which you may assent you will allow us commission upon the "scale of the Estate Agents' Institute."

The plaintiffs introduced two applicants who were interested jointly in purchasing the lease, and negotiations proceeded between the applicants and the defendant "subject to contract." At the conclusion of these negotiations the solicitors acting respectively for the applicants and for the defendant prepared counterparts of the proposed contract of sale. The applicants signed their part of the contract, and it was forwarded to the defendant's solicitor, who sent the defendant's part of the contract to her for signature. The defendant then decided not to sign her part of the contract and, in consequence, no enforceable contract came into existence.

In an action by the plaintiffs claiming that they had earned their commission under the contract with the defendant:—

Held, that the defendant could not give her assent to the terms of the proposed sale until she had received and approved the counterpart of the proposed contract; accordingly, there had been no assent by her to the terms of the proposed sale, and, in consequence, the event stipulated in the contract as that upon which the plaintiffs' commission would be earned had never occurred, and the plaintiffs' claim failed (post, pp. 819, 823).

Per Ormerod and Upjohn L.JJ. That the ordinary rules of construction governed the interpretation of estate agents' contracts so that there was no justification for interpreting the words "introduction of a party prepared to enter into a contract" as "introduction of a party who does enter into a contract," nor did the word "assent" mean a final and legally binding assent (post, pp. 814, 816, 818, 821, 822).

Luxor (Eastbourne) Ltd. v. *Cooper* [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33, H.L. and *Midgley Estates Ltd.* v. *Tand* [1952] 2 Q.B. 432; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394, C.A. applied.

Per Sellers L.J. "I am not at present satisfied that . . . the "assent of the defendant, which the agreement requires, could be "an assent which fell short of concluding a bargain with the "applicants" (post, p. 824).

Decision of Winn J. [1959] 1 W.L.R. 706; [1959] 2 All E.R. 370 affirmed on different grounds.

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APPEAL from Winn J.

The following statement of facts is taken substantially from the judgment of Upjohn L.J.

In July, 1956, Mr. Smalley, a partner in the plaintiff firm of estate agents, approached the defendant, Mrs. Hasan, and her husband, with a view to introducing a purchaser of leasehold premises known as 11, Wardour Street, W.1, belonging to the defendant. The premises consisted of a ground floor and basement on which the defendant carried on the business of a restaurant, her husband being the manager. On the second floor the defendant's husband carried on the business of a club with the help of the defendant.

The first floor was partly let off, and, as to the rest, was used as a store and office mainly for the restaurant but partly also for the club under informal arrangements made between the defendant and her husband.

The defendant and her husband gave some oral instructions to Mr. Smalley on July 23, 1956, and he confirmed them by letter next day in these terms:

"Dear Sir,

"re 11 Wardour Street, W.1.

"Following our meeting of yesterday, we are pleased to confirm with thanks, receipt of your instructions to offer for sale your leasehold interest in the above property together with the business of the Stage Door Grill on the ground floor and basement, in the sum of £12,000 S.A.V., it being agreed that you shall take a tenancy of the second floor at a rent of £500 per annum.

"We are immediately placing particulars of this proposition before all likely applicants and assure you of our best and continued endeavours on your behalf.

"We would take this opportunity of confirming that in the event of our introduction of a party prepared to enter into a contract to purchase on the above terms or on such other terms to which you may assent you will allow us commission upon the scale of the Estate Agents' Institute.

"Yours faithfully,

"ACKROYD & SONS."

In giving instructions to the plaintiffs, the defendant never explained that it would be necessary to keep some storage space on the first floor for use by her husband in connection with the club that he was to continue carrying on on the second floor under the terms of the sub-lease, which was to be granted to him as part of the bargain.

Although the applicants interested in the purchase of the premises at 11, Wardour Street, began discussions from a date

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early in August, 1956, negotiations took a long time to fructify and it was not until nearly the end of October, 1956, that the basic purchase price for the lease of the premises was agreed at the sum of £9,750, of which £6,000 was to remain on mortgage repayable over the term of the remaining six years of the lease, and that the rent of the sub-lease to the defendant's husband was agreed at £500 per annum.

Solicitors were then instructed on behalf of the defendant and the applicants and each solicitor received a letter from the plaintiff dated October 27, 1956, setting out the basic terms of the proposed contract as the terms were then understood by them. It was made quite clear in that letter that all negotiations were to be subject to contract.

In November the defendant took up the applicants' references, and the applicants on their part had a surveyor's report. Ultimately, the defendant's solicitor sent a draft contract to the solicitors instructed by the applicants on November 30, 1956. It was agreed between these solicitors in the interests of their clients that drafts of the mortgage and the sub-lease of the second floor should be annexed to the contract, and drafts of those documents were sent on by the defendant's solicitor shortly afterwards. During December the parties and their solicitors continued negotiating on minor details, e.g., obtaining draft consents by the head landlord to the assignment of the lease, to the transfer of liquor licences, and other details of that sort. On December 28, 1956, the defendant's solicitor wrote to the solicitors for the applicants a letter, which started by saying: "I have now had an "opportunity of considering the document in detail with my "client" (referring to the contract and the various documents annexed thereto), "and the following points arise." There was a paragraph in the letter which dealt with the underlease to the defendant's husband, and it stated that his client felt that the user of the premises comprised in the underlease should not be restricted to that of a non-residential club, but that he should also be entitled to use the premises for office purposes if required. This and many other matters of detail were satisfactorily settled, and on January 10, 1957, the applicants' solicitors sent the following letter: "We now enclose our client's part of the con-"tract signed together with draft underlease approved. As you "see, we have retyped your original draft as the many amend-"ments make it difficult to follow. Please let us have your "client's part of the contract in exchange as soon as possible." To that the solicitor for the defendant replied that there had not yet been returned the draft mortgage, which would require to be annexed to the contract, and he asked for it to be sent on, and there was also a point on the inventory. Both these matters were, however, cleared up satisfactorily. Further amendments were then made by the solicitor for the defendant on behalf of his clients to the underlease of the second floor. He stated in his letter of January 14, 1957, to the solicitors for the applicants:

"I have forwarded the contract to my client for signature on the "basis that you agree these amendments and will you please "telephone me on receipt of my letter." On January 15 the applicants' solicitors replied, agreeing the further amendments to the draft underlease.

On January 17, 1957, so far as the solicitors were concerned all matters were agreed and, on that date, the defendant's solicitor wrote to the applicants' solicitors: "I refer to your letters "of the 15th and 16th. I confirm that I have sent all the docu-"ments to my client and am waiting her instructions. I shall "be telephoning her during the day to ascertain the position." He also acknowledged the receipt of the cheque which represented the balance of the deposit, part of it having been paid some weeks earlier. The defendant's solicitor then went to see the defendant at her restaurant and he explained the documents to her, when it emerged for the first time that the defendant apparently had it in mind that her husband must have the use of a store on the first floor for his non-residential club in continuance of the existing arrangements between herself and her husband.

The defendant then put forward other proposals to meet the difficulty created by her failure to give proper instructions to the plaintiffs, but those proposals were not acceptable to the applicants and the contract never came into existence.

It was common ground between the parties that if the agents had earned their commission, it would amount to £404 7s. 6d. The plaintiffs claimed this amount as commission due to them from the defendant under the terms of the contract. Winn J. dismissed their claim. The plaintiffs appealed.

Harold Lightman Q.C. and *Edward Seeley* for the plaintiffs.

D. P. Croom-Johnson Q.C. and *Peter Ripman* for the defendant.

The following cases, in addition to those referred to in the judgments, were cited in argument: *Bennett, Walden & Co.* v. *Wood* [1]; *Giddy and Giddy* v. *Horsfall.* [2]

Cur. adv. vult.

April 12. The following judgments were read:

UPJOHN L.J. stated the facts and continued: When an agent claims commission from a principal, there are certain principles of law applicable which cannot be doubted. First, when an agent claims that he has earned the right to commission, the test is whether upon the proper interpretation of the contract between the principal and the agent the event has happened upon which commission is to be paid. Secondly, there are no special principles

[1] (1950) 66 T.L.R. (Pt. 2) 3; [1950] 2 All E.R. 134, C.A.

[2] (1947) 63 T.L.R. 160; sub nom. *Giddys* v. *Horsfall* [1947] 1 All E.R. 460.

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of construction applicable to commission contracts with estate agents. Thirdly, contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language.

Authority for these propositions is to be found in the well-known speech of Lord Russell in *Luxor (Eastbourne) Ltd.* v. *Cooper*,[1] and put in more summary form by Jenkins L.J. in *Midgley Estates Ltd.* v. *Hand*,[2] where he said: "As pointed out "over and over again in the reported cases, an agency contract "of this sort, just like any other contract, must be construed "according to its terms. One has to look at the particular "contract and see whether, according to its terms, construed in "accordance with the ordinary principles of construction, the "event has happened on the occurrence of which the commission "is expressed to be payable." Then, after pointing out that prima facie the intention of the parties is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting, he continued[3]: "That is the broad "general principle in the light of which the question of construc-"tion should be approached; but this does not mean that the "contract, if its terms are clear, should not have effect in accord-"ance with those terms, even if they do involve the result that "the agents's commission is earned and becomes payable although "the sale in respect of which it is claimed, for some reason or "another, turns out to be abortive."

Winn J., in the course of his judgment, expressed certain views which, in my opinion, run counter to the principles which I have just stated. He said[4] that he felt constrained by the philosophy of the decisions in 1951 and 1952, though not by any express direction from the Court of Appeal, to regard the introduction into the definition of the operative event upon which commission was to be earned of the phrase "prepared to enter into a contract" as a nullity. He construed those words as meaning a party who enters into a contract. With the utmost respect to the judge, that is altering the language which the parties have thought fit to employ in agreeing the contract for commission between themselves, and it seems to me to run entirely counter to the principles I have already stated. There was no ambiguity or inconsistency of language which on the usual principles of construction would entitle the court to alter the language of the contract or to reject the words used and substitute others. The judge was, I think, influenced by certain observations of Denning L.J. in *Dennis Reed Ltd.* v. *Goody*,[5] where he dealt with the construction of commission agreements dealing with those who introduce "purchasers." Denning L.J., however, was careful to confine his observations

[1] [1941] A.C. 108, 124; 57 T.L.R. 213; [1941] 1 All E.R. 33, H.L.
[2] [1952] 2 Q.B. 432, 435; [1952] 1 T.L.R. 1452; [1952] 1 All E.R. 1394, C.A.
[3] [1952] 2 Q.B. 432, 435.
[4] [1959] 1 W.L.R. 706, 711.
[5] [1950] 2 K.B. 277; 66 T.L.R. (Pt. 1) 918; [1950] 1 All E.R. 919, C.A.

to contracts employing the word "purchasers." The moment the word "purchaser" is used, there is conjured up the idea that to earn the commission there must be a purchaser, that is one who actually buys the property. But Denning L.J. himself pointed out that he was not considering words like "prepared to "enter into a contract." He said[6]: "He must introduce 'a "'person ready, able and willing to purchase the above property "'for the sum of £2,825 or such other price to which I shall "'assent.' These words do not mean a person ready, able and "willing 'to make an offer,' or even 'to enter into a contract': "they mean a person ready, able and willing 'to purchase,' that "is, to complete the purchase."

The judge also derived assistance from the observations of Lord Goddard C.J. in *Peter Long & Partners* v. *Burns.*[7] Valuable as the observations of the noble Lord always are, they do not seem to me to help in the present case because he had to consider a different point; that is, whether the estate agent introduced "a person ready, willing and able to enter into a binding "contract to purchase" by introducing a person who entered into a voidable contract.

Finally, the judge came to the conclusion that the assent required under the terms of the commission agreement must be a legally binding assent. There, again, as a matter of interpretation of this particular contract and, for reasons which later appear, I regret that I am unable to agree with him.

I turn then to the consideration of the true interpretation of the commission contract between the plaintiffs and the defendant. It is in these terms: "We would take this opportunity of con-"firming that in the event of an introduction of a party prepared "to enter into a contract to purchase on the above terms or on "such other terms to which you may assent, you will allow us "commission on the scale of the Estate Agents' Institute."

It is clear that commission would become payable on one of two events. The first is the introduction of a party prepared to enter into a contract to purchase on the terms set out earlier in the letter. That did not happen, and it is unnecessary to consider it further. The second alternative is that commission would be payable in the event of the introduction of a party prepared to enter into a contract to purchase on such terms as the defendant might assent. That is the event upon which the plaintiffs are entitled to their commission. While these terms are ultimately indivisible and require the consensus ad idem of two parties, it is convenient for the purpose of analysis to divide it into two parts. The first limb requires the agent to introduce a party prepared to enter into a contract, and the second limb requires

[6] [1950] 2 K.B. 277, 287.

[7] [1956] 1 W.L.R. 413; [1956] 2 All E.R. 25; on appeal [1956] 1 W.L.R. 1083; [1956] 2 All E.R. 207, C.A.

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him to prove the assent of the defendant to the contract into which the other party is prepared to enter.

I am unable to read the words "prepared to enter into a "contract" as being equivalent to entering into a contract, because that is altering the language which the parties have thought fit to employ. It seems to me essentially a question of fact to decide whether the agent has introduced a purchaser who satisfies that description. Certainly there are some observations to be found in the reported cases which support the view I have just expressed.

Perhaps the closest case is *John E. Trinder & Partners* v. *Haggis*.[8] We have had the advantage of being supplied with photostat copies of the judgment in the Bar Library. The terms of the commission agreement sufficiently appear from the following extract from the judgment of Lord Evershed M.R.: "I have "once again the misfortune to differ from Denning L.J., but in "my judgment, 'willing to sign a contract' must in its context "mean and does mean 'willing to sign a contract' (that is, a "document being on the face of it an exhaustive statement of "the terms of a bargain), 'in form put to him or approved by the "'vendor.' In the present case that is exactly what [the pur-"chaser] did. He was not only willing to sign but in fact signed "a contract in the form which had been approved by the defen-"dant's legal agents duly authorised by him in that behalf. The "defendant having, nevertheless, refused to proceed with the "matter cannot now, in my judgment, escape the penalty which "flows from the fact that the plaintiffs, according as I read the "letter, have earned their commission."

The third member of the court (Roxburgh J.) delivered a judgment[9] placing the same construction upon the commission agreement as Lord Evershed M.R.

Then, in two cases where the words "ready able and willing "to purchase" have been used, Bucknill L.J. has pointed out that the agent may (if the facts are established), be entitled to commission though no contract results: see *E. P. Nelson & Co.* v. *Rolfe*.[10]

In the second case, *Dennis Reed Ltd.* v. *Goody*, Bucknill L.J. said[11] (admittedly obiter): "It seems to me that the plaintiffs "place an interpretation on the words which would in effect make "them equivalent to words such as 'upon introduction of a pur-"'chaser.' I think that the words of this clause in question are "intended to give to the agents a claim to commission in circum-"stances which fall short of the execution of an enforceable con-"tract on both sides. I do not think it unreasonable that house "agents should try to arrange for their claim to commission to be "earned in some cases where a sale through their introduction of a "person willing to purchase is not in fact effected."

[8] [1951] W.N. 416, C.A.
[9] Ibid. 417.
[10] [1950] 1 K.B. 139; 65 T.L.R. 494; [1949] 2 All E.R. 584, C.A.
[11] [1950] 2 K.B. 277, 283.

The words in the present case seem to me to be perfectly clear and unambiguous, though whether the person introduced by the agent satisfies that description may be a difficult question of fact in each particular case. I regretfully find myself unable to agree with the judge upon this part of the case.

Mr. Croom-Johnson for the defendant further submitted that where the negotiations are expressed to be "subject to contract," there cannot be a purchaser who is aptly described as being one who is prepared to enter into a contract until the contract is signed and he relied on the case in this court of *Graham & Scott (Southgate) Ltd.* v. *Oxlade*.[12] No doubt that case did decide that prima facie a purchaser who is only prepared to negotiate subject to contract is not properly described as one who is prepared to enter into a contract. Cohen L.J., delivering the leading judgment, put it in this way[13]: "Applying that case "by analogy to the case before us, I think that the agent may "prove that a person whom he has introduced is willing to "purchase the property by showing that that person has made "an unqualified offer or expressed an unqualified intention to "make an offer notwithstanding that such an offer until accepted "could be withdrawn. On the other hand, if the evidence shows "that the offer is qualified by a condition inserted to prevent "the other party's turning the offer into a contract by acceptance, "I think it impossible to say that the agent has discharged the "onus which rests on him of proving that the person whom "he has introduced was willing to purchase the property."

On the other hand, he recognised that each case must depend on its own particular facts, for he also said[14]: "In reaching "my conclusion, I am not saying that the introduction into the "preliminary arrangements of the expression 'subject to "'contract' would necessarily in all cases prevent the agent "from establishing that the person he introduced was willing "to purchase. It clearly would not be fatal to the agent's claim "if it were introduced by the vendor in accepting an unqualified "offer; but, if it were introduced by the prospective purchaser, the "normal inference would be that he did so with a view to reserving "to himself a locus poenitentiae—conduct which seems to me "inconsistent with the view that he is a willing purchaser."

No doubt the principle established in the *Oxlade* case applied during the active negotiations between the parties and during that time the applicants could not be properly described as persons prepared to enter into a contract, for they were not making an unconditional offer. But on the facts of the present case, it seems to me that although the negotiations remained of course subject to contract, yet in fact the position had been reached by January 17, 1957, where the purchasers satisfied the test laid down by Cohen L.J. as it has in my judgment been

[12] [1950] 2 K.B. 257; 66 T.L.R. (Pt. 1) 747; [1950] 1 All E.R. 864, C.A.

[13] [1950] 2 K.B. 257, 266.

[14] [1950] 2 K.B. 257, 265.

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shown that the applicants had made an unqualified offer—that is one capable of acceptance at once by the defendant.

What was the situation on January 17, 1957? The solicitor acting for the defendant had in his possession an unconditional offer by the applicants contained in a completely detailed contractual document with annexures signed by them. It is clear he had full authority to accept the offer contained in those documents by sending by way of exchange his own client's part duly executed to the applicants' solicitors and that would constitute a contract. True it is it was still an offer subject to contract, but the parties had reached a stage where at all events so far as the solicitors were concerned they were or appeared to be ad idem because the solicitors were prepared to advise their clients to sign the lengthy and complicated documents in the form and having the contents which they had so painstakingly prepared. No-one was contractually bound at that stage and either party could of course have withdrawn from the negotiations until actual exchange. But it seems to me that the fact that the negotiations were all "subject to contract" had for the relevant purpose become unimportant. It merely meant that the unconditional offer made on behalf of the applicants could only be accepted in a particular way—that is by exchange of contracts. It seems to me that here was a perfectly plain and unconditional offer capable of acceptance in that way, and I think that on the facts of this case the plaintiffs have established the first limb of the event upon which the commission is payable: that is they have introduced a purchaser who was prepared to enter into a contract to purchase on the terms contained in the contract and its annexures which they had, in fact, signed.

But that is only one side of the medal. The commission agent has to prove that the terms so unconditionally offered were terms to which the defendant would assent. That again is purely a question of fact in each particular case.

I am unable to accept the judge's view that on the construction of the commission agreement "assent" meant assent by a legally binding contract, and, for this reason, that it must then follow that not only the defendant but also the applicants must be legally bound, so that to establish the event on which commission is payable the agents must prove a contract. But that is inconsistent with the other limb of the agreement because all that the commission agent has to do is to introduce a purchaser "prepared to enter into a contract" and not one who does enter into a contract. The judge is, in fact, reading the contract as though the commission became payable only upon the introduction of a party who did enter into a contract with the defendant. But those are not the words which the parties have used in their contract. Accordingly, I cannot agree to that construction of the word "assent."

Has there then been an assent in this case? That again is

purely a question of fact. I can envisage circumstances such, for example, as those in *John E. Trinder & Partners* v. *Haggis* [15] or in *Eccles* v. *Bryant and Pollock* [16] where although the parties were never legally bound together, it could be strongly argued that the purchaser in signing his part of the contract satisfied the description of a person prepared to enter into a contract and the vendor was one who assented to it by signing his part of the contract though he then withdrew before exchange. However, naturally, I express no concluded view upon such a hypothetical case.

But the facts here were entirely different. Mr. Lightman argued that there had in fact been assent by the defendant for the reason that as early as December 28, 1956, the defendant plainly knew of the terms of the underlease and he urged that she must be taken to have assented to those terms. That the defendant may have seen the draft lease can be assumed, but I am quite unable to accept the argument. The solicitors had no authority to bind their clients to the terms which they were negotiating and, in fairness to them, let it be said they never purported to bind their clients. It would be an impossible situation if, during the negotiation of a complicated contract such as this, the parties for the purposes of some collateral commission agreement were to be taken to assent piece by piece to the terms as they were agreed by their solicitors and one of the difficulties of Mr. Lightman in the present case was to fix a date upon which it could fairly be said there had been an assent by the defendant to the terms offered by the applicants. In my view, no question of assent could arise until the proposed agreement as finally approved between the respective solicitors as being proper to put before their respective clients for signature was in fact submitted to their clients. Just as it could not be suggested that the applicants satisfied the description of persons prepared to enter into the contract until they had signified such preparedness by signing their part of the contract, so, in my view, the first moment of time when any question of an assent could arise for the purposes of the commission agreement was when the defendant received the completed documents ready for signature from her solicitor. She considered them and never at any time did she give her assent to those documents because it emerged that there had been a fundamental difference of conception as to the subject-matter of the sub-lease. She never had been willing to give up all rights to occupation of every part of the first floor.

Accordingly, on this short ground, it seems to me clear in the present case that the plaintiffs have never established the event upon which they were entitled to claim commission because they never established that the defendant assented to the terms to which the purchaser was prepared to contract.

[15] [1951] W.N. 416.

[16] [1948] Ch. 93; [1947] 2 All E.R. 865, C.A.

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Later on, the defendant suggested certain terms to which she would give her assent, but unfortunately for the plaintiffs, the applicants were not prepared to enter into an agreement containing those terms. It follows therefore that the plaintiffs have not established that the event has happened upon which they are entitled to claim payment of the commission, and for those reasons I would dismiss this appeal.

ORMEROD L.J. I agree. The appeal turns in the first place on the construction of the contract between the parties, which is contained in the letter dated July 24, 1956, from the plaintiffs to the defendant. The material paragraph is: "We would take "this opportunity of confirming that in the event of our "introduction of a party prepared to enter into a contract to "purchase on the above terms or on such other terms to which "you may assent you will allow us commission upon the scale "of the Estate Agents' Institute." No party prepared to enter into a contract in the terms set out in the earlier part of the letter was introduced by the plaintiffs, and the question was whether on a true construction of the above paragraph, and in the light of the evidence, the plaintiffs introduced a party prepared to enter into a contract upon the terms to which the defendant had assented.

The judge, after a careful consideration of numerous authorities cited to him, dismissed the plaintiffs' claim. He held that on a true construction of the contract between the parties the event had not happened which would entitle the plaintiffs to commission. He took the view that commission could not be earned until the parties had entered into a binding contract. He said,[17] "I am now constrained, not by any express direction "from the Court of Appeal but by the philosophy implicit in the "judgments in the cases decided in 1951 and 1952, to regard "the phrase 'prepared to enter into' as a nullity, if that phrase "is sought to be construed against the owner of the property. "One must ignore any such phrase as 'prepared to enter into' "and construe the document as a matter of law as though it did "not contain those words but read 'a party who enters into a con-"'tract' in place of 'a party prepared to enter into a contract.'" Again he said[18]: "I hold that this phrase 'introduction of a party "'prepared to enter into a contract' means, as a matter of con-"struction, precisely the same as 'introduction of a party who "'does enter into a contract'"; and later, "it is necessary to "have the one clear and undoubted criterion: has there been a "contract?"

I find myself unable to agree with the view which the judge has taken. It is well established that a contract of agency of this type must be interpreted according to the ordinary rules of construction, and if, on a proper construction of the contract

[17] [1959] 1 W.L.R. 706, 711. [18] Ibid. 711, 712.

commission is payable before the purchase is completed or if the purchase never is completed, there is no reason in such circumstances why an agent should not succeed in establishing a claim for such commission. In considering the matter, however, it is well to have in mind the words of Lord Russell of Killowen in *Luxor (Eastbourne) Ltd.* v. *Cooper*[19]: "It is "possible that an owner may be willing to bind himself to pay a "commission for the mere introduction of one who offers to "purchase at the specified or minimum price; but such a "construction of the contract would in my opinion require clear "and unequivocal language."

Applying the ordinary rules of construction and bearing in mind this warning, the contract in the present case does not appear to me to be sufficiently clearly expressed to warrant the construction for which the plaintiffs contend. I can find no justification, with all respect to the judge, for holding that the words "prepared to enter into a contract" mean the same as "introduction of a party who does enter into a contract." The words would not, in my view, be so construed in any other class of contract, and so to construe them in this case appears to be applying some special rule of construction to estate agents' contracts.

In *John E. Trinder and Partners* v. *Haggis*,[20] a case which came before this court on July 21, 1951, the relevant words in the contract for commission were: "In the event of us being "successful in introducing a person willing to sign a contract "to purchase at an agreed price, you will pay us the usual scale "commission." It was held, Denning L.J. dissenting, that the agents were entitled to their commission, even though the sale eventually went off altogether. Lord Evershed M.R., after referring to the passage in the speech of Lord Russell of Killowen in the *Luxor* case,[21] to which I have already referred, said[22]: "I take that passage as a sufficient statement of the relevant "law which is now well established, and I take it to be true "that if commission is to be attracted at any stage prior to the "coming into existence of a binding contract, it must be so "provided in clear terms." Later in his judgment, Lord Evershed M.R. said: "It is no doubt upon a close analysis "possible to create doubts and ambiguities in the language used, "but it is, I conceive, the duty of the court to give a meaning "to the relevant words, if reasonably possible to do so, and "not lightly to conclude that the words are too uncertain and "vague to be capable of making an enforceable bargain." It is true that in *Dennis Reed Ltd.* v. *Goody* Denning L.J. said[23]: "I "can see no sensible distinction between instructions to 'find "'a purchaser,' 'find a party prepared to purchase,' 'find a "'purchaser able and willing to complete the transaction,' and

[19] [1941] A.C. 108, 129.
[20] [1951] W.N. 416.
[21] [1941] A.C. 108, 129.
[22] [1951] W.N. 416, 417.
[23] [1950] 2 K.B. 277, 288.

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" ' find a person ready, willing and able to purchase.' The rights " and liabilities of house owners in these cases should not depend " on fine verbal differences." It may be that the judge had in mind this and other similar passages from the judgment of Denning L.J. when he considered the present case, but it is to be observed that Denning L.J. went on to say [24]: " If estate agents desire " to get full commission not only on sales, but also on offers, they " must use clear and unequivocal language." In my judgment, the language here is clear and unequivocal. The words " pre- " pared to enter into a contract " appear without any straining of language, to bear the meaning that commission will be earned when a party fulfilling the necessary conditions is introduced, and not, as the defendants contend, and as the judge found, only when a binding contract is entered into.

If that is the proper construction of the contract, it remains to consider whether the plaintiffs did introduce a party prepared to enter into a contract on terms assented to by the defendant. Mr. Lightman contended that the necessary conditions had been fulfilled. He pointed out that the time came when all the details of the contract had been agreed between the respective solicitors and the applicants had actually signed their part of the contract and forwarded it through their solicitors to the defendant's solicitors together with the balance of the deposit. This, he contended, must be conclusive evidence of the applicants' preparedness to enter into a contract. Mr. Croom-Johnson, on the other hand, contended that the commission could not be earned, as the judge found, until the contract had been signed by both parties and the respective parts had been exchanged. The offer made by the applicants was " subject to contract " and, therefore, neither party could be bound until a binding contract was executed. See *Chillingworth* v. *Eshe*.[25] There is no doubt that an offer " subject to contract " is not evidence that the person making the offer is " willing " to purchase the property. The offer must be a firm one and not one subject to a condition. See *Graham and Scott (Southgate) Ltd.* v. *Oxlade*,[26] where the wording of the contract was: " We confirm " that in the event of our introducing a person or persons willing " and able to purchase we shall look to you for the payment of " the usual commission. . . ." An offer was made which was expressed to be " subject to contract, satisfactory survey." It appeared from the evidence that the words " subject to " contract " had been inserted by the agent, but that the words " satisfactory survey " were put in at the instance of the purchaser. It was held that the agent was not entitled to commission as an unconditional offer had not been made. Cohen L.J. said [27]: " In reaching my conclusion, I am not saying " that the introduction into the preliminary arrangements of the

[24] [1950] 2 K.B. 277, 288.
[25] [1924] 1 Ch. 97; 40 T.L.R. 23, C.A.
[26] [1950] 2 K.B. 257.
[27] Ibid. 257, 265.

" expression ' subject to contract ' would necessarily in all cases " prevent the agent from establishing that the person he intro- " duced was willing to purchase. It clearly would not be fatal " to the agent's claim if it were introduced by the vendor in " accepting an unqualified offer; but if it were introduced by " the prospective purchaser, the normal inference would be that " he did so with a view to reserving to himself a locus penitentiae " —conduct which seems to me inconsistent with the view that " he is a willing purchaser."

It is to be remembered in considering the present case that the contract, under which the claim is made, is not between vendor and purchaser. It is between the agent and the vendor. The two questions which have to be decided are (1) were the applicants prepared to enter into a contract to purchase on certain terms, and (2) were those terms assented to by the defendant. I have no doubt that the first question should be answered in the affirmative. It is true that in the first place the offer was subject to contract and therefore conditional, but by January 17, 1957, all the details had been agreed to the satisfaction of the applicants who had actually signed their part of the contract, and paid the balance of the deposit. At that time the conditional offer became, in my judgment, an unconditional one, and the only question which remains is whether the terms of the offer were assented to by the defendant. I have come to the conclusion that there was no assent by the defendant. It is not suggested that at any time her solicitor was acting otherwise than within his instructions. He discussed from time to time with the applicants' solicitors the various terms of the transaction, which was more complicated than usual since not only were the terms of a mortgage to be arranged, but there was also to be a lease of part of the premises to the defendant's husband. Eventually the transaction was embodied in the necessary documents, but there is no evidence that the defendant's solicitor had authority to assent on behalf of his client to the terms of the documents. The true position appears to be that the form of the documents was agreed between the solicitors, but that it was still necessary to obtain the final assent of the defendant to the terms. I have no doubt that the defendant's solicitor anticipated that this would be forthcoming when he sent the documents to the defendant on January 14 with a letter in which he said: " if necessary I shall be pleased " to discuss the documents with you." He attended on the defendant and her husband on January 18, when a further question was raised which had apparently been overlooked up to that time, with the result that the transaction after some further negotiations went off. The position therefore appears to be that when the defendant's solicitor sent the documents to the defendant, there had been no final assent, but that the documents were sent to her for her consideration with a view to her assent being given. Assent was not given, and therefore

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the event did not happen which would have entitled the plaintiffs to their commission.

I would dismiss the appeal.

ORMEROD L.J. I have been asked to read the judgment of Sellers L.J.

SELLERS L.J. (read by Ormerod L.J.). I agree with my Lords that this appeal fails and should be dismissed. I have nothing to add to what has been said on the facts of the present case which show no assent by the defendant.

In view of some of the observations of the judge, I would, however, quote a brief extract from the speech of Lord Russell of Killowen in *Luxor (Eastbourne) Ltd.* v. *Cooper*,[28] which puts some essential and established considerations concisely: "A few "preliminary observations occur to me. (1) Commission "contracts are subject to no peculiar rules or principles of their "own; the law which governs them is the law which governs all "contracts and all questions of agency. (2) No general rule can "be laid down by which the rights of the agents or the liability "of the principal under commission contracts are to be deter- "mined. In each case these must depend upon the exact terms "of the contract in question, and upon the true construction of "those terms. And (3) contracts by which owners of property, "desiring to dispose of it, put it in the hands of agents on "commission terms, are not (in default of specific provisions) "contracts of employment in the ordinary meaning of those "words. No obligation is imposed on the agent to do anything."

Although the judge expressed himself in language wider perhaps than I would use, I am not at present satisfied that he was wrong in his conclusions and that circumstances could arise, under such an agreement as this, where commission would be payable where the assent of the defendant, which the agreement requires, could be an assent which fell short of concluding a bargain with the applicants. The assent, which the commission agreement requires, is clearly an assent to the offer which the agent has obtained. An assent to an unqualified offer would conclude a bargain and commission would be payable. Can an assent not communicated or an acceptance of his offer to the proposed purchaser (whose offer must to meet the first requirement of the event be unqualified), be treated as an assent which entitled the agent to commission? I am not convinced that it could and would reserve consideration of it should it arise on another set of facts.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Pratt & Sydney Smith; R. C. de M. Blum.*

N. P.

[28] [1941] A.C. 108, 124.

[COURT OF APPEAL.]

TRUSTEES OF TOLLEMACHE SETTLED ESTATES *v.* COUGHTRIE (INSPECTOR OF TAXES).

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Feb. 26, 29;
Mar. 1, 24.

Lord Evershed M.R., Pearce and Harman L.JJ.

Revenue — Income tax — Excess rents — Land — Royalties of sand-pit — Whether actual or notional receipts taken in making assessment— Whether royalties part of rent—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 82, *Sch. A*, *paras*, 2, 175 (1) (*a*).

Revenue—Income tax—Appeal to High Court—Form of order—Remission of case to commissioners—Self-contained order.

Practice — Title of proceedings — Plaintiff — "Trustees of estate" — Whether appropriate—Revenue appeal (post, p. 836).

By a lease dated December 17, 1946, a sand-pit was let for a term of 21 years from March, 25, 1946, at an annual surface rent of £10 and a royalty of 6d. per ton for all sand worked. In 1946–47 the royalties payable under the lease were just under £100, but they mounted steadily and in 1955–56 were £850, an average of about £390 a year. At first the sand-pit was not separately assessed to Schedule A, but for the year 1953–54, following the decision in *Russell* v. *Scott* [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1; 30 T.C. 375, it was assessed to Schedule A tax in the sum of £3 5s. and assessments of £5 and £1,000 in respect of excess rents and royalties respectively were made under Schedule D. On appeal the General Commissioners held that the royalties were within section 175 of the Income Tax Act, 1952,[1] and should be treated as

[1] Income Tax Act, 1952, s. 82: "The Schedule referred to in this Act as Schedule A is as follows— Schedule A: 1. Tax under this Schedule shall be charged in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom . . . for every twenty shillings of the annual value thereof: Provided that tax in respect of certain lands, tenements, hereditaments or heritages in the United Kingdom, that is to say, in the case of the following concerns, namely—(*a*) quarries of stone, slate, limestone or chalk; and (*b*) mines of coal, tin, lead, copper, mundic, iron and other mines; and (*c*) ironworks, gasworks, salt springs or works, alum mines or works . . . and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages, shall not be charged under this Schedule, but the profits . . . shall be charged to tax under Case I of Schedule D . . . 2. The annual value for the purposes of this Schedule shall, in the case of all lands, tenements, hereditaments or heritages, of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value, be understood to be—(*a*) if they are let at a rack rent and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment, the amount of the rent by the year at which they are let; or (*b*) if they are not let at a rack rent so fixed, then the rack rent at which they are worth to be let by the year. . . ."

S. 175: "(1) If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of Schedule D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Schedule A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the provisions of Part III of this Act) by reference to that rent and the other terms of the lease or leases, over

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excess rents under Schedule D, and they altered the assessment to £35 in respect of the dead rent and £646 in respect of the actual royalties received in that year, less the Schedule A assessment, the net aggregate figure being £681. The taxpayers appealed.

Upjohn J. reversed the decision of the commissioners, holding that the assessment should be on Schedule A principles, and ordered that the case should be remitted to the commissioners to adjust the assessment in accordance with his judgment.

On appeal it was admitted that the royalties were covered by section 175 of the Income Tax Act, 1952, and fell to be taxed as excess rents under Case VI of Schedule D. The Crown contended, contrary to what Upjohn J. held, that the assessment should be made year by year on the basis of the actual receipts, subject to certain deductions, and not by way of assessment as on Schedule A principles with evidence as to values:—

Held, allowing the Crown's appeal, that the assessment under section 175 of the Income Tax Act, 1952, was a yearly one, and the excess rents should be assessed by reference to the actual rent plus royalties received without any valuation on Schedule A principles except for the purpose of deductions and allowances.

Strick v. *Longdon* (1953) 34 T.C. 528 and *Barron* v. *Littman* [1953] A.C. 96; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548; 33 T.C. 373, H.L. considered.

Per Lord Evershed M.R. I should like to register my disapproval of the form of order whereby this case is remitted to the commissioners to adjust the assessment in accordance with the judgment. The order must be self-contained (post, p. 835).

Decision of Upjohn J. [1959] 1 W.L.R. 900; [1959] 2 All E.R. 582 reversed.

APPEAL from Upjohn J.[2]

On October 8, 1957, the trustees of the Tollemache Settled Estates, the taxpayers, appealed to the General Commissioners against an assessment to income tax made upon them under Schedule D of the Income Tax Act, 1952, for the year 1953–54 in the sum of £5 in respect of excess rents and of £1,000 in respect of royalties.

The case stated that the following were among the facts admitted or proved before the commissioners: By a lease dated December 17, 1946, made between the then trustees of the Tollemache Settled Estates and three persons trading together in partnership as the Tarvin Supply Co., as the tenants, the trustees demised to the tenants for a term of 21 years from March 25,

" whichever is the greater of—(*a*) the " actual amount of the assessment of " the unit for the purposes of Schedule " A, as reduced for the purpose of " collection; or (*b*) the amount of " any rent payable by the immediate " lessor in respect of the unit under " any short lease or short leases. . . . " (4) A lease shall be deemed to be a " lease to which this section applies " if, and only if, the following conditions are fulfilled with respect to " it—(*a*) that it is a short lease; " and (*b*) that the land comprised in " it is or forms part of a single unit " of assessment; and (*c*) that the rent " under it is payable to the immediate lessor of that unit; and (*d*) that " the estate or interest of the immediate lessor of that unit is not, as " respects any part of that unit, subject to any short lease which comprises also land not wholly within " that unit, being a lease the rent " under which is payable to that " immediate lessor."

[2] [1959] 1 W.L.R. 900; [1959] 3 All E.R. 582.

1946, a sand-pit at Beeston, Cheshire, on the Peckforton estate forming part of the Tollemache Settled Estates.

So far as material, clause 2 of the lease provided as follows: "In consideration of the rents and royalties hereinafter "reserved and of the covenants, conditions and agreements "hereinafter contained and by the tenants to be paid observed "and performed the lessors hereby demise unto the tenants the "following liberties:—(*a*) liberty for the tenants to enter upon "and occupy the said land; (*b*) liberty for the tenants and their "servants and workmen . . . to dig raise and get by open "surface workings in and from the said land the demised sand."

Clause 6 of the lease provided that the tenants should pay a surface rent of £10 per annum and a royalty of 6d. per ton for all sand worked and gotten from the demised land and that the said rent and royalties should be due and payable quarterly.

The area originally demised to the tenants was an area of approximately 2 acres and 9 perches. Clause 10 of the lease provided that, when the tenants should have removed from the demised land all the demised sand, they should be entitled to occupy and work and to remove sand from certain additional land adjoining the land originally demised; and that, as from the date of such occupation, the tenants should pay in addition to the surface rent and royalty referred to in clause 6 a yearly surface rent at the rate of £5 per acre in respect of all additional land from time to time occupied. In accordance with the provisions of clause 10, the tenants occupied an additional 5 acres from September 29, 1953.

In previous years the Beeston sand-pit was not separately assessed to Schedule A, but for the year 1953–54 an assessment under Schedule A in respect of the sand-pit was made upon the tenants as follows:

Gross annual value	£3	15	0
Repairs allowance		10	0
Net annual value	£3	5	0

This assessment was made by reference to the original area of the sand-pit, the additional 5 acres taken over by the tenants in September, 1953, being covered by the separate assessment on a farm of which the land originally formed part.

From the commencement of the term to March 31, 1956, the royalties payable were just under £100, and thereafter mounted steadily until in 1955–56 they were £850, an average of about £390 per annum.

Evidence was given on behalf of the taxpayers, by a chartered surveyor and chartered land agent, to the effect that in his opinion a reasonable fixed rent for the original area of the sand-pit, together with the additional 5 acres taken over in September, 1953, for a 21 years' lease from March 25, 1946, would have been

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£292 per annum; this calculation was based on what a tenant taking a 21 year lease in 1946 might have been prepared to pay by way of rent on an estimated tonnage of sand available in the area of 446,444 tons. The Crown's valuer estimated such rent at £500 per annum. That calculation was based on an estimated tonnage of sand available in the area of 462,825 tons. Both witnesses were of the opinion that a sand-pit would rarely be let at a fixed rack rent for a term of 21 years. The only terms of letting satisfactory to both landlord and tenant were those adopted in the present case, whereby the tenant paid a small fixed rent and a royalty per ton of sand extracted.

The commissioners did not find it necessary to decide the question what rent a tenant might have been prepared to pay for the area covered by the assessment under appeal if offered a lease for 21 years in 1946.

As to the alternative approach put forward on behalf of the Crown the witnesses said that if asked to estimate at the beginning of a year, a fair annual value for occupation of the sand-pit over the coming year, they would have to consider all the circumstances, including the results of the previous year's working and the likely commercial demand for sand in the coming year. In the absence of any significant change of circumstances, their valuation would not differ greatly from that shown by the previous year's working.

On behalf of the taxpayers it was contended: (1) that in so far as the assessment under appeal purported to be an assessment in respect of royalties there was no provision of the Income Tax Act, 1952, under which such an assessment could be made; (2) that in so far as the assessment under appeal purported to be an assessment in respect of excess rent under section 175 of the Income Tax Act, 1952, the only rent to which the appellants, as immediate lessors, were entitled within the meaning of that section, was the surface rent payable under clause 6 (i) of the said lease and any additional surface rent payable under clause 10; (3) that section 175 did not justify an assessment being made after the end of the year of assessment by reference to the royalties actually paid by the tenants in the year of assessment; section 175 could only operate where the immediate lessor was entitled to rent payable under a lease the amount of which could be quantified at the beginning of the year of assessment; (4) that if section 175 was applicable the section required a notional Schedule A assessment to be made in accordance with the provisions of paragraph (2) of section 82; any such notional Schedule A assessment should be made on the footing that the rack rent at which the land in question was worth to be let by the year did not exceed £292; and (5) that the appeal should be allowed and the assessments reduced.

On behalf of the Crown it was contended: (1) that the royalties payable under the lease dated December 17, 1946, were

"rent" for the purposes of section 175; (2) that an assessment fell to be made under section 175 for the year 1953–54 by reference to the rent, including royalties, paid in that year and the other terms of the lease; (3) alternatively, that if, contrary to the Crown's contentions, the value of the lessors' rights had to be ascertained before the beginning of the year, it should be estimated afresh at the beginning of each year in the light of the facts then known; and (4) in the further alternative, that, if an annual value over the whole term of the lease had to be ascertained, that value in this case should be £500.

The commissioners gave their decision as follows: "1. We "have decided that in this case royalties are covered by section "175 of the Income Tax Act, 1952, and should be taxed as excess "rents under Case VI of Schedule D. 2. The assessment for "tax will be the excess received above the Schedule A assessment, "and this figure is the dead rent received, namely, £35, plus the "actual royalties received during the current tax year, £646, less "the Schedule A assessment." The total annual sum being £681.

The commissioners were subsequently informed that for the year 1953–54 a further assessment had been raised on the sand-pit under Schedule A, which took account of the increased area of occupation from September 29, 1953, and that the parties had agreed a figure of £577 to give effect to the decision and they accordingly reduced the assessment to £577.

The taxpayers required the commissioners to state a case pursuant to section 64 of the Income Tax Act, 1952, the point of law for the opinion of the High Court being whether, on the facts found, their decision was correct in law.

Upjohn J. held that under section 175 the assessment should be on Schedule A principles but that actual receipts of royalties should not be taken, and a notional computation should be made, either by treating the rent and royalties as a rack rent and averaging them out (applying *Inland Revenue Commissioners* v. *Dickson's Executors* [3]), or by determining the proper rack rent over the term of 21 years under section 82, Schedule A, paragraph 2 (*b*) from a consideration of the terms of the lease, and he made an order in the following terms: "It is ordered that the said case "be remitted to the said commissioners for them to adjust the "assessments in accordance with the judgment of this court."

The Crown appealed.

R. O. Wilberforce Q.C. and *Alan Orr* for the Crown.

H. H. Monroe for the taxpayers.

The following cases were cited in argument, which are not

[3] 1928 S.C. 69; (1928) 14 T.C. 69.

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referred to in the judgments: *Fry* v. *Salisbury House Estates Ltd.*[4]; *Davies* v. *Abbott*[5]; *Reg.* v. *Westbrook.*[6]

Cur. adv. vult.

March 24. The following judgments were read:

LORD EVERSHED M.R. I have asked Pearce L.J. to deliver the first judgment.

PEARCE L.J. This case concerns the assessment of certain royalties received by the taxpayers in respect of sand-pits let by them. These royalties are admittedly covered by section 175 of the Income Tax Act, 1952, and fall to be taxed as excess rent under Case VI of Schedule D. The Crown contend that the assessment should be made year by year on the basis of the actual receipts, subject to certain deductions. The General Commissioners adopted that view. On an appeal by the taxpayers, who contended that there must be an assessment on Schedule A principles with evidence as to value, the judge accepted their contention and remitted the case to the commissioners.

The material part of section 175 reads as follows: "(1) If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of Schedule D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Schedule A, as reduced for the purposes of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the provisions of Part III of this Act) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(*a*) the actual amount of the assessment of the unit for the purposes of Schedule A, as reduced for the purpose of collection; or (*b*) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases."

The problem here is to find what is the amount which would have been the amount of the assessment for the purposes of Schedule A if the annual value had been determined "by reference to that rent and the other terms of the lease." "That rent" is the rent to which the lessor is entitled in the year in question, the rent whose excess over the Schedule A assessment has provoked the incidence of section 175—namely, in this case, £681. The opening words, "if, as respects any year of assessment," indicate that the section envisages a yearly operation.

[4] [1930] A.C. 432; 46 T.L.R. 336; 15 T.C. 266, H.L.

[5] (1927) 11 T.C. 575, C.A.

[6] (1847) 10 Q.B. 178.

The fact that the charge is under Case VI of Schedule D makes it clear that the assessment is aimed at a year's profit or gain.

According to the taxpayers, the section really does no more than provide for a revaluation of Schedule A assessments, and the resulting excess liability is only put into Case VI, Schedule D, because that is a receptacle for oddments. It is said further that the resulting assessment would involve an inquiry on Schedule A principles; namely, what the unit is worth to be let by the year having regard not only to the rent of £681 received this year, but also " to the other terms of the lease," including the fact that there are several years of the lease to run. It is not disputed that this procedure will produce a different and practically always a lower figure than that produced by an assessment on the actual figure of the excess rent. In spite of Mr. Monroe's forceful argument, I cannot accept this view of the section.

The Schedule A assessment under section 82 is an attempt to find the annual value. If a rack rent has been fixed within the preceding seven years, then that is the annual value: if such a useful guide cannot be found, and the premises are not let at a rack rent so fixed, the inquiry is to ascertain the rack rent which the premises are worth to be let by the year. From a practical point of view, section 175 comes into play because during the year in question there is an extra profit to be taxed, and the rent to which the lessor has become entitled has shown the inadequacy of the Schedule A assessment; it has shown that either the actual rack rent or the estimate of the rack rent at which the premises are worth to be let by the year has produced an annual value that is incorrect for the year in question. The section directs that the lessor shall be chargeable on the amount which would have been the Schedule A assessment if the annual value of the unit had been determined by reference to " that " rent "—namely, a rent of £681; that is, if the actual rack rent or the rack rent at which it is worth to be let had been £681. There is no need for further valuations or for calculations under section 82 (2) (*a*) or (*b*). The words " by reference to that rent " provide an ad hoc formula for the ascertainment of the annual value; a formula which excludes further estimation. The figure of £681 is, as it were, written into section 82, or is a tertium quid to (2) (*a*) and (*b*). The case has to be considered as a Schedule A case only for the purpose of deductions and allowances. When section 175 refers to the annual value being determined by reference to " that rent and the other terms of the lease," the " other terms " mean those which are relevant to allowances, such as liability for rates and maintenance.

The Master of the Rolls in argument pointed out that if the excess rent is lower than the rent at which they are worth to be let (as it well might be) the computation could not be made under section 82 (2) (*b*), as Mr. Munroe contends should be done in each case. For the computation has to be done by reference to

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"that rent"—that is, the actual rent for the year—while section 82 (2) (*b*) demands the computation of the rack rent at which they are worth to be let. In such a case, a tertium quid is necessary in section 82 (2), and that tertium quid must surely be the actual rack rent for the year in question, which is the objective of section 175. It would be thus more analogous to subsection (2) (*a*), which uses a recent actual rack rent where it can be found.

It would be contrary to good sense that the section, whose object was to ensure that certain actual profits did not go untaxed, should throw the assessment away from the realm of actual and exact figures, and back into the realm of estimation, in which the profit had once already been allowed to escape. Seeing that the assessment under section 175 is a yearly one, intended to catch a particular year's profit, it is hard to believe that it intended to send each case back to section 82 for a valuation focused not on the particular year but on a period of years, and calculated to assess "what a tenant taking one year with another "may fairly and reasonably be expected and required to pay" (*per* Swinfen Eady L.J. in *A. P. Gundry* v. *D. Dunham* (*Surveyor of Taxes*) [1]). Had such an odd result been intended it would have been very easy to say so.

The normal case of excess rents is dealt with by direct calculation without a further assessment on Schedule A principles. For instance, in the case of *Strick* (*Inspector of Taxes*) v. *Longsdon* [2] the direct figures of the excess rents were used without embarking on further computation (except as to deductions). I see no reason why this case should differ from it. This view accords with that expressed by Lord Reid in a somewhat different context in *Barron* v. *Littman*,[3] where he said: "The calculation which section 15," now section 175, "directs is simply the method by which profits "from the transaction are to be measured for income tax purposes "and the assessment and charge to tax under the section are in "respect of the profits so measured."

The point is not an easy one, but for these reasons I would allow the appeal.

HARMAN L.J. I agree. Section 175 is designed to deal with the injustice caused by the delay in reassessing freeholds under Schedule A. These assessments were intended to represent rack rents, but first they were allowed as a matter of convenience to run for a quinquennium, and then, owing to the war, even these reassessments were pretermitted. Meanwhile, in a period of inflation, values were continually going up, and landowners were more and more escaping from making a fair contribution to taxation. Hence section 175, the object of which was to tax "excess "rents": excess over what?—over the out-of-date Schedule A values. It follows that one expects to find in the section

[1] (1915) 32 T.L.R. 142; 7 T.C. 12, 22, C.A.
[2] (1953) 34 T.C. 528.
[3] [1953] A.C. 96, 119; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548; 33 T.C. 373, H.L.

provisions designed to tax the difference between the existing Schedule A assessment and the rent actually being received. And this is what you do find, the words " that rent " meaning the actual rent receivable by the landlord in the year of assessment. The words are, slightly rearranging them: He shall be chargeable to tax under Case VI of Schedule D in respect of the excess over the actual Schedule A assessment of the amount which would have been the Schedule A assessment if the annual value of the unit had been determined by reference to that rent and the other terms of the lease. Note that this is a Schedule D assessment, and therefore not concerned with any but the one year in respect of which it is made. The reference to the " other " terms of the lease," in my judgment, points to such things as covenants to repair, to pay rates, and so forth, not to the " term " of the lease.

If this were all, there would be an injustice to the landlord, who would be unable to deduct from the actually receivable rent those allowances which Schedule A provides. Hence the reference to the hypothetical Schedule A assessment. This does not entail a new valuation: that is precluded by laying down " that " rent " as the gross figure. The net figure is to be arrived at on Schedule A principles—that is, with the deductions and allowances which that Schedule prescribes—and will thus be truly comparable with the actual Schedule A figure which has undergone the same process. To postulate a new valuation—which ought, I should have thought, if properly done, to make no difference—is, to my mind, to reject the words " that rent," and is unjustified. If Mr. Monroe were right, the section should simply have provided that wherever the receivable rent is in excess of the actual Schedule A assessment, there shall be a new Schedule A assessment, and that it did not do.

LORD EVERSHED M.R. It has been agreed on both sides that the case before the court falls within, and is governed by, section 175 of the Income Tax Act, 1952. The question, therefore, is one of the interpretation, as applied to the facts of the case, of section 175.

The taxpayers here are " entitled . . . to . . . rent payable " under a lease . . . to which this section applies." They are, therefore, chargeable to tax under Case VI of Schedule D in respect of " the excess . . . of the amount which would have been " the amount of the assessment of the unit for the purposes of " Schedule A, as reduced for the purposes of collection, if the " annual value of the unit had been determined (in accord- " ance . . . with the provisions of Part III of this Act) by reference " to that rent and the other " (relevant) " terms of the lease . . . " over," in this case, " the actual amount of the assessment of " the unit for the purposes of Schedule A " (viz., £10 15s.) " as " reduced for the purpose of collection." I have set out the material language, with the insertion of the word " relevant "

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before the phrase " terms of the lease " and of the figure of the actual amount of the Schedule A assessment; and I have emphasised what appear to me to be the most important words.

It was conceded clearly (as I understood) by Mr. Monroe that the necessary calculation or reassessment has to be made every year—not, that is to say, notionally in 1946 or at the beginning or end of the tax year in question (1953–54), and so as to persist for the whole period of the lease, or for the period for which the actual assessment of £10 15s. lasts, or for any other indefinite period. It also seems to me clear that what I will call the Schedule A reassessment (which the section postulates as the " top figure " for the purposes of arriving at the subject-matter to be taxed) is to be based on the actual rent and other relevant terms of the lease—which I take to mean, in this case, the royalty provisions. You are therefore, in my view, not required in accordance with section 82 of the Act to look for or discover a rack rent properly so called. For the purpose of the calculation which section 175 requires, the rent plus royalty (in the present case) actually paid or assumed or contemplated as payable takes the place of the rack rent. If the present lease provided for a rent (in the ordinary way) greater than the actual Schedule A assessment but less than the true rack rent, the lease rent would clearly, in my view, form the basis of the Schedule A reassessment and not the true rack rent. The result, in my view, is that, in spite of the reference in section 175 to Part III of the Act, the case is outside the strict language of section 82, paragraph (2). In other words, it is neither a (2) (*a*) nor a (2) (*b*) case—and in this respect, like my brethren, I have ventured to differ from Upjohn J., as he then was.

So far, as it seems to me, and as a result of the discussion before us, there is no real dispute between the parties. The sole issue appears to be this: the Crown say: " You arrive each year " at the top figure by reference solely to the actual rent and " royalty figures for that year "; the taxpayers say, " No; you " arrive each year at a valuer's figure of annual value at the date " of the valuation, based on the known facts as to rent and royalty " but not arithmetically limited to the figures of rent and " royalty for the year in question."

Common sense at any rate seems to point to the two figures being the same. But there appears no doubt from the fact that the case has come before us, and from what Mr. Monroe has said (and I therefore assume), that the taxpayers' figure will in practice be found to be somewhat less than that based on the Crown's view. Which, then, is right? It is upon this matter that I confess to having felt greater difficulty than my brethren, and to have doubted whether we should not prefer, as I understand the judge did, the taxpayers' method of assessment.

The reasons for my doubt are as follows: true, the relevant premises for the reassessment are the rent and royalty figures

and not a rack rent, so that the case is neither a (2) (*a*) nor a (2) (*b*) case; still, apart from the substitution of these rent and royalty figures for the rack rent, you are directed by section 175 to make your assessment in accordance with Part III of the Act. What is more, you are directed by section 175 to arrive at your reassessment by determining the annual value of the unit: and this conception of "annual value" is, according to section 82, inherent in all Schedule A assessments. If the rent under the present lease were a flat rent of £681 per annum, there being no royalties, there would, of course, be nothing in it; but if the rent were a flat rent but increasing, say, every three or five years, then I am not satisfied that you would not in any year work on the basis of an average for the term rather than upon the actual rent payable in any particular year (see the case of *Inland Revenue Commissioners* v. *Dickson's Executors* [4]). If this is right, then it may be said that a similar principle of valuation should apply in the present case. I have also felt the force of the argument that the contrary view involves the result that you are construing section 175 as though it had said that the "top figure" in any year was the actual sum received in that year for rent, including royalty, subject to the deduction appropriate to a Schedule A assessment: and the section does not in terms so provide. You find instead the express reference to "annual "value," which is of the essence of the Schedule A code. If this view were right, then the question that, in respect of the year 1952–53, the assessors would have to answer is: "What is the annual value, this year, of this unit (according to Schedule A principles) on the basis that the rent it commands is the fixed rent and royalties payable now and henceforth according to the subsisting lease? In other words, the "top figure" would be arrived at by the taxpayers' method of assessment.

This difficult and somewhat artificial case has required section 175 of the Act to be applied to circumstances to which I cannot think it was ever intended to be applicable. I have therefore, and in deference to the view taken by the judge, thought it right to express my doubt, and my reason for it. But I have in the end thought that the claims of simplicity and common sense should prevail, and I am not therefore prepared to dissent from the clear conclusion to which my brethren have arrived. I agree with them that the appeal should be allowed.

LORD EVERSHED M.R. I should like to register my own disapproval of the form of order made below. "It is ordered that "the case be remitted for them to adjust the assessments in "accordance with the judgment of the court." It is not right. The order must be self-contained. These things are so much a mystery that it may be that counsel say it is difficult to understand what the order should be, but you must try.

[4] (1928) 14 T.C. 69.

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Orr. I appreciate what your Lordships are saying about that. I can only say that this form of order, so far as I can discover, has been used for a long time. I do not know of any case in which it has produced any difficulty.

LORD EVERSHED M.R. It is not right; and what you have just said I confess sounds very likely to be true: just because this has gone on in Revenue cases for the last century and a half, it has got to go on. It is time it was stopped. We also ask you to consider—this is another matter—that to entitle an action "The trustees of the (blank) Settled Estates," if they are not a corporation sole, or something of the sort, again is wrong.

Orr. I find it impossible to say anything about that, my Lord.

LORD EVERSHED M.R. Would you please see that these things are not repeated out of sheer adherence to tradition?

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Peake & Co.*

B. A. B.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1960
April 11.
Lord Parker C.J., Ashworth and Salmon JJ.

REGINA *v.* COKAR.

Crime — Evidence — System — Acquittal on previous charge — Cross-examination as to previous charge—Whether permissible—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (i).

At the trial of the appellant for entering a dwelling-house by night with intent to steal, the appellant admitted climbing in through an open window of a dwelling-house at midnight, where he was found shortly afterwards by the occupant asleep in a chair before the fire. The defence was that the appellant had entered merely for warmth and in order to sleep. In spite of objection by the defence, the prosecution was permitted to cross-examine the appellant as to a previous occasion when he had been charged, but acquitted, to show that he knew it was no offence to be found on private premises for an innocent purpose. The appellant was convicted and sentenced to 18 months' imprisonment. On appeal against conviction on the ground, inter alia, that cross-examination as to previous proceedings resulting in an acquittal was contrary to section 1, proviso (*f*) (i) of the Criminal Evidence Act, 1898[1]:—

[1] Criminal Evidence Act, 1898: s. 1: "Every person charged with an "offence . . . shall be a competent "witness for the defence at every "stage of the proceedings, . . . Provided as follows: . . . (*f*) A "person charged and called as a witness in pursuance of this Act shall

Held, that section 1, proviso (*f*) of the Act of 1898 completely prohibited any suggestion to an accused person that he had previously been charged, whatever the result of the charge, and that the exception contained in paragraph (i) only operated to lift the prohibition when it was sought to prove the commission of an earlier offence or conviction when proof of such offence or conviction was admissible evidence; but that it was impossible under that exception to question the accused in regard to a charge of which he had been acquitted.

Dictum of Lord Sankey L.C. in *Maxwell* v. *Director of Public Prosecutions* [1935] A.C. 309, 320; 50 T.L.R. 499; 24 Cr.App.R. 152, 172, H.L. explained.

APPEAL against conviction.

The appellant, Jottai Cokar, a native of West Africa and a man of poor intelligence, was charged at County of London Sessions on February 9, 1960, with entering the dwelling-house of one James Ballantyne by night on January 14, 1960, with intent to steal.

The evidence was that at about midnight on January 14 he climbed through the open window of the house in Portland Grove, London, S.W.8, into a room in which Ballantyne was sleeping. Shortly afterwards Ballantyne woke up and found the appellant asleep in an armchair before the fire with his, Ballantyne's, coat over him. The appellant had apparently made no attempt to steal anything and there was loose money in the room which had not been touched. The defence put forward on behalf of the appellant was that he had entered the room to sleep because he was not feeling well, and had not intended to steal anything.

The prosecution sought to show that the appellant knew that it was no offence to be found on private premises for an innocent purpose, such as sleeping, and the deputy-chairman, F. H. Cassels, Esq., in spite of objection by the defence, permitted questions to be put to the appellant in cross-examination as to a previous occasion when he had been found on private premises and charged with entering the premises with intent. On that occasion he had been acquitted. The appellant was convicted and sentenced to 18 months' imprisonment. He appealed against conviction on the ground, inter alia, that cross-examination in relation to the previous proceedings in which he had been acquitted had been prejudicial and contrary to section 1 (*f*) of the Criminal Evidence Act, 1898. He also appealed against sentence.

Marilyn E. Wigoder for the appellant.

Michael Corkrey for the prosecution.

" not be asked, and if asked shall not " be required to answer, any question " tending to show that he has com- " mitted or been convicted of or been " charged with any offence other than " that wherewith he is then charged, " or is of bad character, unless—(i) the " proof that he has committed or been " convicted of such other offence is " admissible evidence to show that he " is guilty of the offence therewith " he is then charged; . . ."

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The following cases were cited in argument: *Maxwell* v. *Director of Public Prosecutions*[2]; *Stirland* v. *Director of Public Prosecutions*.[3]

LORD PARKER C.J. This is in some ways a curious case. The appellant, a native of West Africa, was convicted at the County of London Sessions of entering a dwelling-house by night with intent to steal, and he was sentenced to 18 months' imprisonment. From that conviction he appeals to this court by leave of the court. [His Lordship stated the facts and continued:] The sole issue was: Had the appellant entered that night with intent to steal?

The appellant was a man of poor intelligence. He was cross-examined, and the answers he gave were very unsatisfactory and not by any means always to the point. The suggestion which the prosecution sought to make was that he, the appellant, knew that it was no offence if he was just found sleeping on the premises. Again, the answers were: "I do not know," and answers of that sort, and ultimately leave was sought to cross-examine the appellant as to a previous occasion on which he had been found on private premises and had been charged. In fact he had been acquitted, but it was sought to introduce this evidence to show that on the occasion of the previous charge he must have learned that to be on premises for an innocent purpose, such as sleeping, was in law no offence. The questions were allowed and the appellant was ultimately convicted.

Whether or not those questions should have been allowed depends on the true interpretation of section 1 of the Criminal Evidence Act, 1898, and, in particular, proviso (*f*), by which it is provided: "A person charged and called as a witness in pursu- "ance of this Act shall not be asked, and if asked shall not be "required to answer, any question tending to show that he has "committed or been convicted of or been charged with any "offence other than that wherewith he is then charged, or is of "bad character." There is a complete prohibition of suggesting to an accused person that he has been previously charged, whatever the result of the charge. The exceptions are threefold and, as is well known, the second and third exceptions are cases where the prisoner has put his character in issue by attacking the evidence of the prosecution or giving evidence himself of good character. No question of that sort is concerned in this case, and the sole question is whether the questions became admissible by reason of the first exception, contained in paragraph (i) of proviso (*f*), which is in these terms: "Unless—(i) the proof that he "has committed or been convicted of such other offence is admis- "sible evidence to show that he is guilty of the offence therewith "he is then charged." That, as is well known, is directed to the common class of case where evidence of previous convictions is

[2] [1935] A.C. 309; 50 T.L.R. 499; 24 Cr.App.R. 152, H.L.

[3] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13, H.L.

admissible to show system, and matters of that sort. It is to be observed that the exception deals only with the case where proof that the accused has "committed or been convicted" of another offence is admissible evidence. There is no reference in the exception to being "charged" and, accordingly, it seems to this court that the prohibition against any of the matters in the first part of proviso (*f*) is only lifted when it is sought to prove that the accused has committed or been convicted of the other offence. Provided that proof of that other offence is admissible evidence, it would be clearly proper as leading up to proof of conviction to say to the prisoner: "Were you charged?" and, if the answer is "Yes," "Were you convicted?"; but it seems to this court quite impossible, under exception (i), to question a man in regard to a charge in respect of which he was acquitted.

Reference has been made to *Maxwell* v. *Director of Public Prosecutions*,[1] and, in particular, to a passage in the speech of Lord Sankey L.C.,[2] where he said: "It does not result from this "conclusion that the word 'charged' in proviso (*f*) is otiose: "it is clearly not so as regards the prohibition; and when the "exceptions come into play, there may still be cases in which a "prisoner may be asked about a charge as a step in cross-"examination leading to a question whether he was convicted on "the charge." Pausing there, if exception (i) came into play and it was sought to prove that the accused had been convicted of the previous offence, it would be perfectly possible leading up to that to ask him in the first place whether he had been charged. Lord Sankey continued: "or in order to elicit some evidence as to "statements made or evidence given by the prisoner in the course "of the trial on a charge which failed, which tend to throw doubt "on the evidence which he is actually giving, though cases of this "last class must be rare and the cross-examination permissible only "with great safeguards." The court has not found it altogether easy to understand what Lord Sankey was referring to in that last passage, but it might well cover the case where the prohibition has been lifted by the prisoner putting his character in issue. True, he could not then be asked about the charge resulting in acquittal as negativing good character because, as has been said, such a charge or acquittal is merely a misfortune and does not tend to show bad character. But, the prohibition having been removed, it would be possible then to refer to a charge on which the prisoner had been acquitted in order to bring up evidence as to statements made at that trial which tended to conflict with the evidence which he was giving in the current trial. Read in that way, this court does not think that *Maxwell's* case[3] is in any way a proposition for the fact that questions may be put in regard to a charge resulting in an acquittal when the sole ground for removing the prohibition is exception (i), namely, proof that he has been charged and convicted of another offence.

[1] [1935] A.C. 309; 50 T.L.R. 499; 24 Cr.App.R. 152, H.L.

[2] [1935] A.C. 309, 320.

[3] Ibid.

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In these circumstances, the court feels that cross-examination in this case on the lines referred to was wrongly allowed. It was clearly a matter which was bound to have a considerable influence on the jury, and the court feels that in all the circumstances the only possible course is to quash the conviction. Accordingly, the appeal is allowed and the conviction quashed. The prisoner is discharged.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

E. M. W.

[COURT OF APPEAL.]

C. A.
1960
March 25.
Lord Evershed M.R., Pearce and Harman L.JJ.

WALLS *v.* PEAK (VALUATION OFFICER).

[LVC/872/1958.]

Rating—"Dwelling-house"—Meaning—Rooms let singly for residential purposes—Whether used for purposes of private dwelling or private dwellings—Whether "substantially . . . whole of the available "accommodation . . . used for . . . lettings"—Valuation for Rating Act, 1953 (1 *& 2 Eliz. 2, c.* 42), *s.* 3 (2).

The Valuation for Rating Act, 1953,[1] by section 3 (2) provides that a hereditament used for the letting of rooms singly for residential purposes shall be deemed not to be used for the purposes of a private dwelling or private dwellings (and, therefore, by subsection (1) not used as a "dwelling-house") if "the whole, or substantially "the whole, of the available accommodation is used for such let-"tings; . . . 'the available accommodation' means so much of "the accommodation in the hereditament . . . as is suitable for "being used for the letting of rooms singly for residential purposes."

A ratepayer appealed against the assessment as a flatlet house of a hereditament containing 17 rooms of which seven were let singly

[1] Valuation for Rating Act, 1953, s. 3: "(1) Subject to the provisions "of this section, in this Act—the "expression 'dwelling-house' means "a hereditament used wholly for the "purposes of a private dwelling or "private dwellings; . . . (2) For the "purposes of this Act a hereditament "which is used for the letting of "rooms singly for residential purposes "shall be deemed not to be used for "the purposes of a private dwelling "or private dwellings if the whole, or "substantially the whole, of the "available accommodation is used for "such lettings; but save as aforesaid "a hereditament shall not be deemed "for the purposes of this Act to be "used otherwise than wholly for the "purposes of a private dwelling or "private dwellings by reason that one "or more rooms therein are let for "residential purposes. In this sub-"section 'the available accommoda-"tion' means so much of the "accommodation in the hereditament "in question as is suitable for being "used for the letting of rooms singly "for residential purposes."

S. 4: "(4) This section shall not "apply to . . . a hereditament where "the premises not used wholly for the "purposes of a private dwelling or "private dwellings are or include "premises used for the purposes of a "hotel, inn, guest-house or boarding-"house or for the letting of rooms "singly for residential purposes."

for residential purposes. Four other rooms were suitable for letting but were retained for use by the ratepayer and his family. The Lands Tribunal confirmed the assessment, holding that in order to discover how much accommodation was "available" for letting, there had to be excluded any rooms suitable for letting which were required for use by the ratepayer and his family. Accordingly, the tribunal decided that the whole of the "available accommodation" was let singly for residential purposes. The ratepayer appealed:—

Held, that on the true construction of section 3 (2), the "available accommodation" meant all those rooms which were suitable for being used for single lettings, irrespective of actual user by the ratepayer and his family. Applying that test, substantially the whole of the available accommodation was not used for the lettings indicated, and therefore the premises should be valued as a dwelling-house.

Decision of Lands Tribunal reversed.

APPEAL from the Lands Tribunal (Mr. H. P. Hobbs).

Marshall Byllam Walls (hereinafter called "the ratepayer") appealed from a decision of the Local Valuation Court for Bournemouth given on February 19, 1958, confirming the assessment of a hereditament, 23, Florence Road, Boscombe, of £250 gross value, £205 rateable value. The hereditament was described as a flatlet house, garage and premises.

It was agreed at the hearing that if the hereditament fell to be valued as a "flatlet house" these values were correct, but that if, as the ratepayer submitted, it should be valued as a dwelling-house, then the assessment should be £110 gross value.

The description of the property was agreed as follows: "1. Detached property constructed in brick with tiled roof, with "accommodation on three floors." The accommodation comprised: "Ground floor: Conservatory porch to side entrance; "entrance hall with staircase. (1) Front bed-sitting room fitted "gas point. (2) Front dining room, fitted domestic boiler and "airing cupboard. (3) Kitchen, off . . . No. (2), fitted sink, gas "cooker and old range. (4) Larder off . . . No. (3). (5) Small open "yard, off . . . No. 3, giving access to rear fuel store w.c. (6) Rear "sitting room, fitted gas point. (7) Rear bedroom with corner "bay, fitted gas point. First floor: (8) Front bed-sitting room "(No. 3), fitted lavatory basin and gas point. (9) Front bed-"sitting room (No. 4), fitted lavatory basin and gas point. "(10) Rear bed-sitting room (No. 1), fitted lavatory basin and gas "point. (11) Rear bed-sitting room (No. 2), fitted lavatory basin "and gas point. (12) Bathroom fitted bath, geyser, w.c. and "lavatory basin. (13) Separate w.c. Second floor: (14) Front "bedroom (No. 7), fitted lavatory basin and gas point. (15) Front "bedroom (No. 8), fitted lavatory basin and gas point. "(16) Rear bed-sitting room (No. 5), fitted lavatory basin and "gas point. (17) Rear bed-sitting room (No. 6), fitted lavatory "basin and gas point. Outside: (12) detached wood and c.i. "garage with concrete floor. (19) Lean-to wood with c.i. roof "shed."

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The ratepayer and his family occupied the dining room, sitting room, kitchen and larder, one bedroom on the ground floor and two rooms on the second floor. The bathroom was used by everybody. One room on the ground floor, the four rooms on the first floor and two rooms on the second floor were let off as flatlets.

The ratepayer submitted that 12 rooms in the house were suitable for letting singly, and since only seven were so let, this could not be regarded as " the whole, or substantially the whole," and the house ought to be assessed as a private dwelling-house.

For the valuation officer it was submitted that three questions had to be answered: (1) How many rooms were suitable for letting singly? (2) How many rooms were available for letting singly? and (3) How much of the available accommodation was in fact let singly, and did this constitute " the whole, or substantially the " whole," of the available accommodation? As in his view the accommodation occupied by the ratepayer and his family was not available, this left only seven rooms; all these were let singly and, accordingly, the hereditament should be valued as a flatlet house.

On the question of the interpretation of the section, the tribunal agreed with what was said by the tribunal in *Wellington* v. *Woodward*,[2] the relevant part of which reads: " A hereditament " ceases to be a dwelling-house if the whole, or substantially the " whole, of the available accommodation is let. ' Available " ' accommodation ' means such accommodation as is ' suitable ' " for the letting of rooms singly for residential purposes. The " section is loosely worded, but I think it also implies suitable " accommodation that is ' available ' in the ordinary meaning of " the word: the proprietor and his staff must live somewhere. " The tribunal said in *Buckley* v. *Tudge*[3] that the available " accommodation means ' so many of the total number of rooms " ' as in the holiday season are available for letting after the needs " ' of the permanent staff have been met.' Unless the staff " quarters are deemed unavailable, it seems to me that virtually " no premises where rooms are let singly would qualify for assess- " ment other than as a private dwelling."

Every case must rest upon the facts of that particular case. In *Buckley* v. *Tudge*[3] the tribunal found as a fact " that in the " holiday season only two, or at the most three, of the nine bed- " rooms are reserved for the permanent residents, that the " ' available accommodation ' comprises not less than six bed- " rooms, and that the whole or substantially the whole of this " accommodation is used for letting," and, consequently, found that the premises were a boarding-house.

In *Wellington* v. *Woodward*[4] the letting of bedrooms was of a slightly unusual character: " In May, 1956, the appellant agreed " with the proprietor of a nearby hotel that the five bedrooms on " the first floor of his house would be available for letting to the

[2] (1959) 52 R. & I.T. 73; LVC/1843/1957; 4 R.R.C. 169, 171.

[3] (1957) 51 R. & I.T. 156; LVC 798/1957; 3 R.R.C. 24.

[4] 52 R. & I.T. 73.

" hotel guests "; and as regards the rest of the house: " In this " case there were on the ground floor three sitting rooms and a " kitchen. During the period when the hereditament was a " boarding-house the third sitting room and the kitchen were " sufficient for the appellants to live in: it is not uncommon in " holiday resorts, during the season, for the owner of a house to " occupy only a small part and let the remainder. When the " hereditament ceased to be a boarding-house I think the dining " room and lounge both became superfluous: that is to say, they " became available in the ordinary sense of the word.

" But were the dining room and the lounge ' suitable ' for " letting singly for residential purposes—which presumably means " as bedrooms? The answer again depends upon what is custom- " ary in the locality. In a seaside resort it is common practice " for householders to let their ground-floor rooms as bedrooms to " holiday-makers. Lack of running water and the need to go " upstairs to the bathroom and w.c. would be no bar to such a " letting. Had the appellant wanted to let these two rooms, I do " not think he would have had any difficulty in doing so." On these particular facts the tribunal decided: " The accommodation " in this house therefore, available for letting within the meaning " of the Act, comprised five bedrooms upstairs and two rooms " downstairs. Five rooms out of seven rooms is not ' substantially " ' the whole ' of the accommodation."

During the hearing it was suggested that there was some inconsistency in the above two decisions, but the tribunal was of opinion that in both cases the interpretation set out in *Wellington* v. *Woodward* [4] had been followed. The difference in the answer arises solely from the difference in the facts.

The tribunal was of opinion that the considerations applying to a house where rooms are let off were not necessarily the same as those applying to a boarding-house. In this case the tribunal found that eleven rooms were suitable for letting singly. Three rooms on the ground floor—not the dining room, because in that room there was a domestic boiler for the whole house—four rooms on the first floor, and four rooms on the second floor. For the purpose of being let off as a flatlet a wash basin was very desirable, but a gas point or other cooking facility was essential.

The tribunal found that only seven rooms were both suitable and available for letting singly. In premises of that kind, it was usual for the proprietor or a caretaker to live in the house, and where this was so, his needs should be met before rooms come into the category of being available. The size of the ratepayer's family—the proprietor, his wife, a grown-up son and a grown-up daughter—made it desirable that the three rooms on the ground floor, as well as the two second-floor rooms, should be retained.

Seven rooms being available for letting singly, and seven rooms being so let, the whole of the available accommodation was used

[4] 52 R. & I.T. 73.

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for letting singly, and the hereditament had to be assessed as a flatlet house, and the appeal was dismissed.

Frank A. Stockdale for the ratepayer.
J. Raymond Phillips for the valuation officer.

In addition to the cases referred to in the judgment of Lord Evershed M.R., the following were cited in argument: *Green* v. *Wood*[5]; *Buckley* v. *Tudge*.[6]

LORD EVERSHED M.R. This appeal has raised a question of the construction of section 3 of the Valuation for Rating Act, 1953, which, I must say, has left me with a most unhappy feeling that the parliamentary intention may, in the end, have been defeated. But it is the function of the court to construe the language of the Act. As I think Blackstone said, if Parliament plainly enacts that which is unreasonable, there is nothing that the judges can do to put it right.

Section 3 of the Act opens thus: "(1) Subject to the pro- "visions of this section, in this Act—the expression 'dwelling- "'house' means a hereditament used wholly for the purposes of a "private dwelling *or private dwellings*" (in the plural).

Subsection (2): "For the purposes of this Act a hereditament "which is used for the letting of rooms singly for residential "purposes shall be deemed not to be used for the purposes of a "private dwelling or private dwellings if the whole, or substan- "tially the whole, of the available accommodation is used for "such lettings; but save as aforesaid a hereditament shall not be "deemed for the purposes of this Act to be used otherwise than "wholly for the purposes of a private dwelling or private dwellings "by reason that one or more rooms therein are let for residential "purposes."

Then comes the pregnant sentence: "In this subsection 'the "'available accommodation' means so much of the accommoda- "tion in the hereditament in question as is suitable for being used "for the letting of rooms singly for residential purposes."

The case relates to premises situate in Florence Road, Boscombe, near Bournemouth, a part of the country which, no doubt, during the holiday season at any rate, is attractive to visitors. The total number of rooms on the ground, first and second floors, and excluding two outside sheds and excluding also the porch and the entrance hall, is 17. From those some deductions must be made for present purposes, namely, a kitchen, a larder, an open yard which contains or gives access to a fuel store and a water closet, a bathroom and a separate water closet. The exclusions that I have made leave a total number of rooms which must be considered in the case as 12.

The facts as found are that at the relevant period or relevant time—a phrase to which I will return in a moment—the present

[5] (1845) 7 L.R.Q.B. 178. [6] 3 R.R.C. 24.

appellant and his family were occupying, of the total number of 12, the following: the front dining room on the ground floor, which was fitted with a domestic boiler; the rear sitting room on the ground floor; the rear bedroom on that floor; and two front bedrooms on the second floor—a total of five rooms. The other seven rooms, consisting of a bed-sitting room on the ground floor and six bed-sitting rooms on the first and second floors, all fitted with lavatory basins and gas points, were let individually, separately, singly, for the purpose of residences or private dwellings. On that finding of fact, the question is whether the house in question is excluded from being described as a dwelling-house or as " a hereditament used wholly for the purposes of a private " dwelling or private dwellings " by virtue of subsection (2).

The view of the Lands Tribunal—and let me say at once that it has support from earlier decisions of the tribunal which were quoted, and it has a certain common sense as well—was that this house, when one analysed its occupation in the way I have done, could fairly be said to be excluded, to be deemed not to be used for the purposes of a private dwelling, because the available accommodation was substantially, if not wholly, used for the purpose of letting the rooms singly; and the tribunal quoted certain language used in an earlier case in which the meaning of the essential words in subsection (2) was discussed. The passage cited was: " A hereditament ceases to be a dwelling-house if the " whole, or substantially the whole, of the available accommoda- " tion is let. ' Available accommodation ' means such accom- " modation as is ' suitable ' for the letting of rooms singly for " residential purposes. The section is loosely worded, but I think " it also implies suitable accommodation that is ' available ' in " the ordinary meaning of the word: the proprietor and his staff " must live somewhere." (*Wellington* v. *Woodward*.[1])

The reasoning was to this effect, therefore, that in construing this phrase " available accommodation " one must first exclude from one's mind so much of the accommodation as the proprietor and his family, in the ordinary case, require for themselves. If one does that in the present case, and if one excludes the dining room—and it is agreed that it should be excluded, because it contained the domestic boiler—the result is that of the seven remaining available rooms all of them were let for residential purposes, so that (on this view) the terms of the subsection were satisfied. The question is whether that conclusion is justified.

It will be observed that one result of that construction would appear to be this, that if a family in the normal course requires to occupy every room in the house—I exclude kitchens, offices and that sort of thing—but one, and that one is let for residential purposes, then it will be said that subsection (2) applies and the house is excluded. Results not much less startling no doubt arise from the opposite view. I would also say here that problems,

[1] (1959) 52 R. & I.T. 73.

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which fortunately do not now call for determination, may also arise in considering at what point of time the subsection supposes you should form your view. The phrase is "a hereditament "which is used for the letting of rooms." It is, I suppose, notorious that a hereditament may well be used to a substantial extent for the letting of rooms at one season of the year and not at all at another; but fortunately we are not called upon to consider that matter.

For my part, I think there is really no escape from the proposition which Mr. Stockdale put forward, founding himself upon the plain and unambiguous words of the subsection, and in particular the last three lines of it: "In this subsection 'the "'available accommodation' means so much of the accommoda- "tion in the hereditament in question as is suitable for being "used for the letting of rooms singly for residential purposes." I can see no escape from substituting for the words "available "accommodation" in the fifth line of the subsection the expanded definition; and if that is done it seems inevitably to follow that, excluding the dining room, eleven of the rooms of the house constitute accommodation in the hereditament suitable for being used for the letting of rooms. Seven only are let. And I cannot think it possible to say that seven out of eleven is "substantially "the whole." If that is right, it is the end of the case.

Mr. Phillips gallantly has tried to introduce some means whereby, notwithstanding the language, some sensible result can be introduced. He has suggested that one first ought to see whether this is a dwelling-house at all within the section. One difficulty, I think, in his way is that that, of course, is not the point which is submitted for our consideration. If Mr. Phillips is right, it might be possible that a tribunal would find as a fact that a particular building was not a dwelling-house; and if it did, that might be the end of it. But I feel, on the whole, that there is considerable difficulty in the way of this view. The language of the section is, "the expression 'dwelling-house' means a "hereditament used wholly for the purposes of a private dwelling "*or private dwellings*"; and, with the experience of the Rent Acts behind us, it might, I should have thought, be difficult to say that a hereditament was not used wholly for the purpose of private dwellings when it contained quite a number of private dwellings each consisting of sublet single bed-sitting rooms; and, indeed, the language of subsection (2), to my mind, proceeds upon that premise.

It is true that there may be some inconsistency between the last words of subsection (4) of section 4 and what is said in this section. But we can only answer this case by construing the language of subsection (2) of section 3 of the Act in the light, of course, of the proper context. And what is, I think, the essence of the tribunal's finding is that it limits the phrase "available accommodation" to so much of the accommodation as

is not only suitable but is also left available for letting when regard is had to the normal requirements of the proprietor.

As I say, it is with some regret that I cannot find justification for that expansion of the language. In the circumstances I feel compelled to say that the proprietor here has not been brought within the subsection; that it is not, on the facts, established that substantially the whole of the available accommodation in this house was used for the lettings indicated, and I would therefore allow the appeal.

I should have added that some argument was addressed to the last few lines of the main part of the subsection, "but save as "aforesaid a hereditament . . ." But on analysis it has seemed to me that these lines really carry it no further.

PEARCE L.J. I agree. Either contention can produce a very unsatisfactory result, and neither has more appreciable merit than the other; but on the literal construction of the Act the appeal must, I think, prevail.

One must read into the first paragraph of subsection (2), in place of the words "available accommodation," the words set out in the second paragraph as being the definition of the words "available accommodation" namely, "so much of the accom- "modation in the hereditament in question as is suitable for being "used for the letting of rooms singly for residential purposes." I see no justification for then adding again to the subsection, so read, the word "available," for which the definition has been substituted, and using that word "available" in a slightly different sense.

I think that the construction put forward by the appellant follows what was really the intention at the back of the draftsman's mind, although the subsection as phrased has not satisfactorily carried it out. There are three categories of dwelling-house in this connection. There is first the dwelling-house as defined under the main part of section 3, namely, that which is used wholly for the purpose of a dwelling-house. Then one has the second category, which is envisaged in subsection (2) in the words following "save as aforesaid," namely, the dwelling-house that shall not be deemed to have ceased to be a dwelling-house merely because one or more rooms are let therein for residential purposes. And one has the third category which is described in the opening words of subsection (2), where the whole, or substantially the whole, of the available accommodation is used for such letting purposes and, accordingly, the premises have ceased to be a dwelling-house.

But on any view the wording of the subsection can produce an unsatisfactory result. I agree that the appeal should be allowed.

HARMAN L.J. I also agree. Where the language is so unsatisfactory, as this is, the only way is to follow the language and leave

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the effect for the decision of the legislature. It is not for this court to attempt legislation on its own.

Appeal allowed with costs; legal aid taxation of the ratepayer's costs as between solicitor and client.
Leave granted to appeal to the House of Lords conditional upon the valuation officer not asking for costs or seeking to disturb the order as to costs in the Court of Appeal.

Solicitors: *Walmsley & Stansbury for E. W. Marshall Harvey & Dalton, Bournemouth; Solicitor for Inland Revenue.*

E. D.

[COURT OF APPEAL.]

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Lord Evershed M.R., Pearce and Harman L.JJ.

INLAND REVENUE COMMISSIONERS *v.* COLLCO DEALINGS LTD.

SAME *v.* LUCBOR DEALINGS LTD.

Revenue—Income tax—Double taxation relief—Residents in Eire—Irish company resident in Eire—Transfer of share capital of English companies to Irish company—Payment to Irish company of dividend on shares of English companies paid wholly out of profits accumulated before transfer—Deduction of British income tax—Whether Irish company entitled to repayment of British income tax—"Dividend "stripping"—Whether Irish company "a person entitled under "any enactment to an exemption from income tax"—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 349 (1) (2) (3) (4); *Sch.* 18—*Finance* (*No.* 2) *Act*, 1955 (4 & 5 *Eliz.* 2, *c.* 17), *s.* 4 (1) (2).
Statute—Construction—Treaty—Conflict with—Double taxation relief.
Statute — Construction — Extraterritorial effect — Tax Act — Effect on resident of Eire.

On October 31, 1957, a company resident in the United Kingdom sold to an Irish company, incorporated in Eire in 1957 and never resident in the United Kingdom, the whole of the issued share capital in two English companies. Subsequently there were paid to the Irish company interim dividends on the shares in both companies amounting respectively to £174,500 and £104,000, and paid wholly out of profits accumulated before the Irish company acquired the shares. The Irish company claimed exemption from British income tax by virtue of section 349 and paragraph 1 (*a*) of Schedule 18 to the Income Tax Act, 1952.[1] The Crown refused

[1] Income Tax Act, 1952, s. 349: "(1) The confirmation, by section 23 "of the Finance Act, 1926, section 21 "of the Finance Act, 1928, and section "37 of the Finance Act, 1948, of the "agreements in force at the passing of "this Act between the United King- "dom and the Republic of Ireland "which are set out in Part I of the "Eighteenth Schedule to this Act is

exemption, contending that section 4 (2) of the Finance (No. 2) Act, 1955, applied, and deducted from the respective amount income tax of £74,162 10s. and £44,200. The Irish company appealed to the special commissioners, contending that the words "a person "entitled under any enactment to an exemption from income tax" in section 4 (2) of the Act of 1955 should be limited and controlled so as to exclude residents of Eire who were excluded from the ambit of British income tax by the Treaty of April, 1926, with the Government of Eire:—

"not affected by the repeal, by this "Act, of the said sections 23, 21 "and 37. (2) Accordingly the first "of the said agreements, as modi- "fied by the second and third of the "said agreements, shall, for any year "of assessment for which, under the "law of the Republic of Ireland, it has "effect with respect to exemption and "relief from Republic of Ireland tax, "have effect with respect to exemption "or relief to be granted from United "Kingdom tax, and the references in "the said agreements to enactments "repealed by this Act shall be taken "for that purpose to be references to "the corresponding provisions of this "Act. . . . (3) For the purpose "of giving effect to the said agree- "ments, this Act, in relation to—(*a*) "persons resident in the United King- "dom, whether or not also resident "in the Republic of Ireland; and (*b*) "persons entrusted with payment to "persons so resident; and (*c*) claims "by persons resident in the Republic "of Ireland, shall, for any year for "which the said agreements are in "force, have effect subject to the "modifications set out in Part III of "the said Eighteenth Schedule. (4) "The deduction to be given to an "individual under section 220 of this "Act (which relates to the relief "known as the reduced rate relief) "shall not, where relief is given under "section 27 of the Finance Act, 1920, "as set out in Part II of the said "Eighteenth Schedule, be less than "it would have been if the relief had "not been given. (5) The power con- "ferred by subsection (7) of section 27 "of the Finance Act, 1920, as set out "in Part II of the said Eighteenth "Schedule, to make regulations shall "be deemed for the purposes of sec- "tion 1 of the Statutory Instruments "Act, 1946, to be a power conferred "by an Act passed after the com- "mencement of that Act and shall be "exercisable by statutory instrument."

Sch. 18: "Agreements, etc., for "avoidance of double taxation in the "case of the Republic of Ireland. "Part I. Text of Agreements. Agree- "ment made April 14, 1926, between "the British Government and the "Government of the Irish Free State "in respect of double income tax. "The British Government and the "Government of the Irish Free State, "being desirous of concluding an "agreement for the reciprocal exemp- "tion from income tax and super-tax "of persons who are resident in Great "Britain (including Northern Ireland) "or in the Irish Free State but are "not resident in both countries and "for the reciprocal granting of relief "from double taxation in respect of "income tax (including super-tax) to "persons who are resident in both "countries, and being desirous of "making such supplemental, conse- "quential and incidental provisions as "appear necessary or proper for the "purposes of such agreement, have "agreed as follows: 1.—(*a*) Any per- "son who proves to the satisfaction "of the Commissioners of Inland "Revenue that for any year he is "resident in the Irish Free State and "is not resident in Great Britain or "Northern Ireland shall be entitled "to exemption from British income "tax for that year in respect of all "property situate and all profits or "gains arising in Great Britain or "Northern Ireland and to exemption "from British super-tax for that "year."

Finance (No. 2) Act, 1955, s. 4: "(1) Where a person engaged in carry- "ing on a trade which consists of or "comprises dealings in shares or other "investments becomes entitled to "receive a dividend or a holding of "shares of any class to which this sec- "tion applies, being shares sold or "issued to him or otherwise acquired "by him after October 26, 1955, and "not more than six years before the "date on which the dividend becomes "payable, and the dividend is to any "extent paid out of profits accumu- "lated before the date on which the "shares were so acquired, then, if "those shares, or those shares together "with—(*a*) any other shares the divi- "dend on which is payable to that per- "son and which were sold or issued to "him or otherwise acquired by him

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Held, that the claim to exemption made by the Irish company had to be founded on some enabling provision in an English statute, which would necessarily be subject to review by Parliament. The exemption relied on, contained in section 349 of the Income Tax Act, 1952, had been modified by section 4 (2) of the Finance (No. 2) Act, 1955, in unambiguous terms which could not on the true construction be limited so as to leave unaffected the rights of Irish residents. There was no inconsistency between the modification and the continued confirmation in general terms of the Treaty of April 9, 1926.

Decision of Vaisey J. [1959] 1 W.L.R. 995; [1959] 3 All E.R. 351 affirmed.

APPEAL from Vaisey J.

Collco Dealings Ltd. (hereinafter called the "Irish company") appealed to the special commissioners from the refusal of the Inland Revenue Commissioners to grant exemption from United Kingdom income tax in respect of certain dividends received from English companies. The Irish company, which was at all times resident in Eire and not in the United Kingdom, claimed to be entitled to exemption from British tax by virtue of section 349 and paragraph 1 (*a*) of Part I of Schedule 18 to the Income Tax Act, 1952. The Inland Revenue Commissioners' refusal of the claim was based on the provisions of section 4 (2) of the Finance (No. 2) Act, 1955, and the question for the special commissioners' decision

"after the said October 26 and not more than six years before the date on which the dividend becomes payable, and (*b*) in a case where the trade is under the same control as another trade which consists of or comprises dealings in shares or other investments, any shares the dividend on which is payable to the person engaged in carrying on that other trade and which were sold or issued to him or otherwise acquired by him after the said October 26 and not more than six years before the date on which the dividend becomes payable, and (*c*) any such shares as are to be brought into account under subsection (3) of this section, amount to ten per cent. or more of the issued shares of that class, the net amount of the dividend received on the shares in the holding shall, to the said extent to which it was paid out of profits accumulated before the shares were acquired, be brought into account in computing the profits or gains or losses of the trade as if it were a trading receipt which had not borne tax. (2) Where a person entitled under any enactment to an exemption from income tax which extends to dividends on shares becomes entitled to receive a dividend on a holding of shares of any class to which this section applies, being shares sold or issued to him or otherwise acquired by him after the said October 26 and not more than six years before the date on which the dividend becomes payable, and the dividend is to any extent paid out of profits accumulated before the date on which those shares were so acquired, then, if those shares, or those shares together with—(*a*) any other shares the dividend on which is payable to that person and which were sold or issued to him or otherwise acquired by him after the said October 26 and not more than six years before the date on which the dividend becomes payable, and (*b*) any such shares as are to be brought into account under subsection (3) of this section, amount to ten per cent. or more of the issued shares of that class, the exemption shall, to an extent proportionate to the said extent to which the dividend is paid out of profits accumulated before the date on which the shares were acquired, not apply to the dividend: Provided that if any annual payment is payable by that person out of the dividend, that annual payment shall be deemed as to the whole thereof to be paid out of profits or gains not brought into charge to tax, and section 170 of the Income Tax Act, 1952, shall apply accordingly."

was whether the Irish company was " a person entitled under any " enactment to an exemption from income tax " within the meaning of that section, or did not come within those words because it was a resident of Eire.

According to the case stated the following facts were agreed: (a) The Irish company was incorporated in the Republic of Ireland on May 29, 1957, and was at all material times resident in the Republic of Ireland and not in the United Kingdom. (b) On October 31, 1957, 1,000 ordinary shares of £1 each, fully paid, in Carpets and Textiles (Wholesale) Ltd. (being the whole of the issued share capital of that company), were sold by Matrim Finance Ltd. to, and acquired by, the Irish company. (c) On November 1, 1957, an interim dividend of £174 10s. per share, subject to deduction of income tax, was declared by Carpets and Textiles (Wholesale) Ltd., and became payable, as a result of which the Irish company received a gross dividend of £174,500 from which United Kingdom income tax of £74,162 10s. had been deducted. (d) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the Irish company. (e) Carpets and Textiles (Wholesale) Ltd. was a company incorporated on April 1, 1950, under the Companies Act, 1948, and was throughout resident in the United Kingdom. (f) The ordinary shares in Carpets and Textiles (Wholesale) Ltd. acquired as aforesaid were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection (8) (*c*) thereof.

(g) Also on October 31, 1957, 2,000 ordinary shares of £1 each, fully paid, in a company then known as Afco Agencies Ltd. and subsequently as A. F. Finance Ltd., and hereinafter called " Afco " (being the whole of the issued share capital of that company) were sold by Matrim Finance Ltd. to, and acquired by, the Irish company. (h) On November 1, 1957, an interim dividend of £52 per share, subject to deduction of income tax, was declared by " Afco " and became payable, as a result of which the Irish company received a gross dividend of £104,000 from which United Kingdom income tax of £44,200 had been deducted. (i) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the Irish company. (j) " Afco " was a company incorporated on March 1, 1951, under the Companies Act, 1948, and was throughout resident in the United Kingdom. (k) The ordinary shares in " Afco," acquired as aforesaid, were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection (8) (*c*) thereof.

It was also admitted by counsel for the Crown during the hearing that repayments of income tax at the full standard rate had been made by the Crown to Irish residents between 1945 and 1948 on dividends from which income tax had been deducted when payment was made by companies resident in the United Kingdom which had received double taxation relief. Counsel for the Irish

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company did not contend that it would be liable to pay Irish tax in respect of the dividends in question.

It was contended on behalf of the Irish company that the wide words of section 4 (2) were to be limited and controlled on well-known principles so as to exclude residents of Eire who were by treaty excluded from the ambit of British income tax.

It was contended on behalf of the Inland Revenue Commissioners that section 4 (2) applied to the Irish company, notwithstanding that it was a resident of Eire and that it was not entitled to the exemption claimed.

The special commissioners gave their decision in writing as follows: "1. The question for our decision is whether the words "'a person entitled under any enactment to an exemption' in "section 4 (2) of the Finance (No. 2) Act, 1955, apply to persons "resident in Eire and not in the United Kingdom to whom "exemption from British tax was granted by the various sections "re-enacted by section 349 of the Income Tax Act, 1952. It is "clear that the general words quoted are wide enough to cover "Eire residents so entitled to exemption, but the very wideness "and generality of the words lets in the argument that they are "to be controlled and limited in their application under certain "well-recognised principles of construction.

"2. We are unable to accept the argument that the general "policy of the income tax legislation compels us to impose the "limitation asked for. We have, however, come to the conclu-"sion that Eire residents have to be excluded from the wide "application of the words of section 4 (2) by reason of two "principles of construction which have found expression in the "decided cases. In the first place it appears to be settled law "that if possible a construction is not to be given to general words "in a statute which would have the effect of imposing the will "of Parliament upon persons not within its jurisdiction: see "*Colquhoun* v. *Heddon* [2]; *Ex parte Blain* [3]; and we consider that "Parliament, by entering into the treaty of April, 1926, with "the Government of Eire, in effect relinquished jurisdiction in "matters of income tax over residents of Eire who are not also "residents of the United Kingdom. That this is so is, we con-"sider, emphasised by paragraph 7 of the treaty. In the second "place, if the inroad contained in section 4 (2) upon the exemp-"tion to tax is effective against residents of Eire, it would in "our opinion be a breach of the treaty which afforded absolute "exemption from British tax to such residents, and it appears to "be a recognised principle of English law that words in an Act "of Parliament are not to be construed in a sense which would "create a breach of a treaty between this country and another "unless such words are so explicit as to allow of no other inter-"pretation. The principal authority for this view appears to be "the case of *Reg.* v. *Wilson* [4]; and, although the actual decision

[2] (1890) 25 Q.B.D. 129, 134; 6 T.L.R. 331, C.A.
[3] (1879) 12 Ch.D. 522, C.A.
[4] (1877) L.R. 3 Q.B. 42.

" in that case can be explained on the ground that the Order in " Council itself imposed limitations upon the extradition powers " in accordance with section 2 of the Extradition Act, 1870, " Cockburn C.J., in his judgment, used words which seem to us " to recognise such a principle as axiomatic.

" 3. The view we have taken of the proper construction of " section 4 (2) appears to us to receive strong confirmation from " the course of legislation with regard to the liability of Eire " residents prior to the Act of 1955. The Finance (No. 2) Act, " 1945, uses words in section 52 which have on their face the " widest application and would in their natural meaning apply to " Eire residents. But when the treaty of July 21, 1947, was " subsequently concluded, by which the two countries mutually " agreed that the limitation upon repayments set out in section 52 " was to be applied to Eire residents, it was thought necessary " to give effect to that treaty so far as English taxation was " concerned by section 37 of the Finance Act, 1948. This seems " to us an indication that section 52 was not considered by the " legislature, despite its wide terms, to apply to Eire residents.

" 4. In our opinion, therefore, section 4 (2) of the Finance " (No. 2) Act, 1955, has no application to the [Irish] company " and it is entitled to repayment of tax deducted from the " dividends in question. We accordingly make an order for " repayment of the sum agreed upon between the parties, namely, " £118,362 10s. 0d."

On appeal, Vaisey J. reversed the decision of the commissioners, holding that the Irish company was within section 4 (2) of the Act of 1955 and, accordingly, was not entitled to the exemption claimed. The Irish company appealed.

The issues raised by the appeal in *Inland Revenue Commissioners* v. *Lucbor Dealings Ltd.* were similar.

J. G. Foster Q.C. and *P. Shelbourne* for the Irish company.

Sir Reginald Manningham-Buller Q.C., *A.-G.*, *E. Blanshard Stamp* and *Alan S. Orr* for the Crown.

In addition to the cases mentioned in the judgments, the following were cited in argument: *The Le Louis* [5]; *The Annapolis* [6]; *Colquhoun* v. *Brooks* [7]; *In re A. B. & Co.* [8]; *Ostime* v. *Australian Mutual Provident Society* [9]; *Whitney* v. *Inland Revenue Commissioners* [10]; *Astor* v. *Perry* [11]; *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ltd.* [12]; *Holani Te*

[5] (1817) 2 Dods. 210.
[6] (1861) 1 Lush. 295.
[7] (1889) 14 App.Cas. 493; 5 T.L.R. 728; 2 T.C. 490, H.L.; (1889) 21 Q.B.D. 52, C.A.
[8] [1900] 1 Q.B. 541; 16 T.L.R. 238, C.A.
[9] [1959] 3 W.L.R. 410; [1959] 3 All E.R. 245, H.L.
[10] [1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88, H.L.
[11] [1935] A.C. 398; 50 T.L.R. 110; 19 T.C. 255, H.L.
[12] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531; 33 T.C. 259, H.L.

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Heuheu Tukino v. *Aotea District Maori Land Board* [13]; *Archer-Shee* v. *Garland* [14]; *Theophile* v. *Solicitor-General* [15]; *Attorney-General* v. *Prince Ernest of Hanover* [16]; *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners*.[17]

LORD EVERSHED M.R. stated the facts and continued: Apart from legislation passed in 1955 the Irish company would either certainly or in all probability have been able to recover from the English Revenue not, as we were informed, the actual tax which had been paid in respect of the accumulated profits, but a sum of income tax (which might even have been larger) calculated by grossing up this vast dividend; but the right so to recover such a sum must—and I put this early in my judgment and in the forefront of it—depend upon some statutory right to be found in English legislation.

A series of agreements had been made between representatives of the Governments, on the one side, of the United Kingdom, and on the other side of what was formerly the Irish Free State and later became the Irish Republic. Those agreements were confirmed in both countries by appropriate legislation. So far as this case is concerned, it will only be necessary to pay regard, except in passing, to the English legislation contained in the consolidating Income Tax Act, 1952, and section 349 of that Act in particular, and in section 4 of the Finance Act, 1955, to which I have earlier alluded. But in order to make more clear the history and, I hope, the arguments, it is necessary to have in mind that the first of the agreements which I have mentioned was made in the year 1926 between the representatives of the two Governments I have named. It is now to be found in Schedule 18 of the Income Tax Act, 1952. The effect of it, so far as relevant, was that a person who should prove to the satisfaction of the Inland Revenue Commissioners in England that he was a resident in the Irish Free State and not a resident in Great Britain or Northern Ireland should be entitled to exemption from British income tax for the year in question in respect of properties situated in and profits and gains arising in or from Great Britain and Northern Ireland, and also to exemption from British super-tax for the same year. There was a corresponding arrangement for the benefit of English residents as respects property in the Irish Free State. That was the purpose of the agreement, and it was executed by Ministers on both sides.

Article 8 provided as follows: "This agreement shall be "subject to confirmation by the British Parliament and by "—the Irish Free State Parliament—" and shall have effect only if and "so long as legislation confirming the agreement is in force in

[13] [1941] A.C. 308, J.C.
[14] [1931] A.C. 212; 47 T.L.R. 171, H.L.
[15] [1950] A.C. 186; 66 T.L.R. (Pt. 1) 441; [1950] 1 All E.R. 405, H.L.
[16] [1957] A.C. 436; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49, H.L.
[17] [1956] A.C. 39; [1955] 3 W.L.R. 451; [1955] 3 All E.R. 97; 36 T.C. 136, H.L.

"both countries." That, it is hardly necessary to say, was necessary in order that individual citizens of the two countries should, in fact, enjoy the rights which the agreement intended to confer or provide.

That is the agreement, the intended benefit of which the Irish company in this case asserts. The agreement was later modified twice during the relevant period. The first modification came about in the year 1928 and was rendered desirable or necessary because there was in this country substituted for what was called super-tax a new designation, surtax, so that the provision to which I referred above, if and so far as implemented by appropriate United Kingdom legislation, would be inapposite since it referred to super-tax and not surtax. In the same way in 1947 another agreement was made between representatives of the two countries in order to deal with this sort of case: an English company might not in truth have paid British income tax at the standard rate because, owing to arrangements applicable between this country and other countries also enshrined in English legislation, the English company in question might only have paid a smaller rate, called "net United Kingdom rate"; and the agreement signed in July, 1947, was intended to make applicable to Irish residents comprehended by the original agreement the net United Kingdom rate of tax instead of the standard British income tax rate, where applicable.

I have mentioned these later agreements in order that the history may be understood. But, as I said earlier, the claim here rests upon the effect (as implemented in legislation) of the agreement of 1926, and we are not in this case concerned with the later modifications save to the extent that part of Mr. Foster's forcible argument for the Irish company turned in some measure upon what happened in 1945, 1947 and 1948 in connection with this so-called "net United Kingdom rate," and to that argument I shall presently return.

The agreement of 1926 was, in accordance with the contemplation of article 8, implemented by English legislation shortly afterwards. That legislation was later reproduced in section 349 of the consolidating Act, the Income Tax Act, 1952. [His Lordship read the relevant parts of the section and continued:]

Part III of Schedule 18 is headed: "Provisions for giving "effect to agreements set out in Part I of this Schedule," including, of course, the agreement of 1926, and it is true to say that it is substantially what one would call a series of mechanical provisions to make appropriate for the cases contemplated the relevant parts of the fiscal legislation in England, which is notoriously complex, in particular to make applicable the terms of Schedule D for the purposes of taxation computations, and so forth. We have not examined closely the precise effect of these provisions, and I am not suggesting that they in any real way qualify the prima facie right which would be given to an Irish resident by section 349 (2), standing alone, that is to say, by the

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statement that the agreement and the rights intended to be enjoyed by Irish residents should have effect in England. I only observe that by the terms of subsection (3) for the purpose of giving effect to the agreements, the Act should for any year have effect subject to certain modifications. It is sufficient to say that in so far as there was any modification of the rights intended to be conferred, it would obviously not go to the root of the matter, but would be a modification based rather on procedural considerations. Still, I mention it for reasons which may later become more apparent.

It is plain enough so far that what the English Parliament did in 1952 was to say that the terms of the agreement of 1926, as stated in Part I of Schedule 18, should be incorporated in the English law as part of the Income Tax Act, 1952, and so should take effect and be effective in English law. It is clear and must not be forgotten (and, indeed, I have already stated it) that if an Irish citizen desires to take advantage of the benefit which the agreement of 1926 intended that he should enjoy, he must be able to invoke for that purpose some provision of the English law, more particularly in this sort of case, some provision of an English statute, and his right in England to enjoy the benefit, to be able to have this exemption (which means to be able to recover income tax) depends upon and depends exclusively upon the section which I have read.

In the course of opening the case Mr. Foster referred a good deal to matters of international law and international comity, and some references were made to cases. Gracefully, Mr. Foster did not cite all the cases which were cited to Vaisey J., but it must be quite clear, first of all, that it is competent to the legislature of the United Kingdom to impose income tax in respect of profits or gains which arise in the jurisdiction, and that competence is in no way qualified because the profits and gains may be enjoyed by someone who is himself not so resident. If, therefore, Parliament decides that tax at a certain rate should be levied in respect of that class of property, or, alternatively, decides that in certain cases persons who might otherwise suffer the tax should be entitled to exemption, it cannot be said that Parliament is trying to exert a jurisdiction over foreigners in the sense that it is trying to legislate outside the proper jurisdiction of the English Parliament. The point is to emphasise that the fact that a person who has a statutory right to an exemption in respect of income tax, a statutory right to recover, may be a foreigner, is of itself quite irrelevant, and does not appear to me to involve any question of comity or international law.

So, as I think, the effect of section 349 is on the face of it to say this, by enacting as part of the municipal law of England the agreement of 1926, that Irish residents may have certain rights to recover tax which is exigible in respect of property in England or profits and gains arising in England. In so far as Parliament chose in 1952 to confer that statutory right, prima facie it must be

equally clear that Parliament by some later statutory provision can modify or wholly revoke or repeal it. Putting it quite briefly, what is said here on behalf of the Crown and was the view formed by Vaisey J., is that in the Act of 1955 Parliament in the exercise of its undoubted sovereign power did so qualify the statutory right which section 349 had conferred. [His Lordship read section 4 (2) of the Finance (No. 2) Act, 1955, and continued:] That subsection was intended to strike at this so-called "dividend-stripping" practice. There is no doubt that the shares in Carpet and Textiles (Wholesale) Ltd. were shares of the class covered by the subsection.

Prima facie, therefore, the case would appear simple enough. The Irish company was a person who was entitled under an enactment, namely, section 349 of the Income Tax Act, 1952, to an exemption, which was qualified by section 4 (2) of the Act of 1955. The subsection did not take the exemption away altogether, but it said, as regards dividends in respect of particular classes of shares, that the person specified would not get the full privilege, he would not be entitled to recover the whole amount of the tax but only a certain proportion of it.

The point, as Vaisey J. observed, is, when it is finally analysed, short, and on the face of it, as I venture to think, it is simple. But the argument which the Irish company has put forward is, first, to this effect: the Irish company says that one cannot in a case of this kind give to the language which I have read from section 4 of the Act of 1955 its natural effect, because to do so would in some way strike at, would involve a breach of, an agreement between this country and another sovereign state; and that is something which offends against the comity of nations. I do not propose, with all respect to Mr. Foster, to take much time upon that submission. It suffices, as I think, to say two things: first, that what Mr. Foster called "treaties" were these agreements of which the agreement of 1926 is the relevant one, and on the face of that agreement, its effect and continued effect depended, and was expressed to depend, upon confirmation by the legislatures of the two countries, so that the agreement itself contemplated on its face that either side might at some time, if they thought fit, by the exercise of their sovereign legislative power put an end to it. Secondly, as I repeat once more, so far as the Irish company's rights in this case are concerned, they must depend upon some provision giving effect to them in an English statute which necessarily must be subject to review and modification by later legislative enactments.

At this stage I should, perhaps, refer to the way in which the matter was decided by the commissioners in the case stated, their decision being in favour of the Irish company. They said in paragraph 2 of their decision as set out above: "In the first place it "appears to be settled law that if possible a construction is not "to be given to general words in a statute"—and the reference is, of course, to section 4 (2) of the Act of 1955—"which would

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" have the effect of imposing the will of Parliament upon persons " not within its jurisdiction, . . . and we consider that Parliament, " by entering into the treaty of April, 1926, with the Government " of Eire, in effect relinquished jurisdiction in matters of income " tax over residents of Eire. . . ."

I am quite unable to accept the proposition there stated, and Mr. Foster before us did not at all support it. I have already said with regard to English income tax that there is no question of imposing the will of Parliament on persons not within its jurisdiction; still less can it be said, in my judgment, that the treaty of April, 1926, had the effect that the English Parliament relinquished jurisdiction in matters of income tax over residents of Eire.

The case, however, went on: " In the second place, if the " inroad contained in section 4 (2) upon the exemption of tax is " effective against residents of Eire, it would, in our opinion, be a " breach of the treaty which afforded absolute exemption from " British tax to such residents; and it appears to be a recognised " principle of English law that words in an Act of Parliament are " not to be construed in a sense which would create a breach of a " treaty between this country and another unless such words are " so explicit as to allow of no other interpretation." Then a reference follows to *Reg.* v. *Wilson.*[1]

It is upon that basis, though his expression of the point was not quite the same, that Mr. Foster has founded his argument. But there has seemed to me, I confess, one grave difficulty which the argument has to face, the difficulty which in the end must be, in my judgment, fatal to it. The opening words of section 4 (2) of the Act of 1955 which I have already read are: " Where a " person entitled under any enactment." The difficulty that I have indicated is this: on the face of it, " any enactment " obviously means any Act of the United Kingdom Parliament. If the words are not to have that meaning, then, what is the qualified meaning which is to be given to them? In some cases (and there was an illustration of what I am saying in *Reg.* v. *Manchester Justices* [2]), it was possible in the light of the relevant context to limit the phrase " Acts of Parliament " to mean special Acts of Parliament as distinct from general Acts of Parliament; but no such qualified definition appears here to be possible. It must in the end be said, as I think, by Mr. Foster, that " any " enactment " has to be construed as " any enactment except an " enactment which affects Irish residents." I am not saying that that is necessarily impossible. If the context and the relevant sections require it, that might be the answer. But it is obviously, as I think, a construction involving very grave difficulty. Put the other way round, as it seems to me, the phrase " under any " enactment " prima facie means, and is quite unambiguously referring to, any United Kingdom Act of Parliament, and section

[1] (1877) L.R. 3 Q.B. 42. [2] (1855) 5 E. & B. 702.

349, part of the Act of 1952, is therefore, on the face of it and, as I think, unambiguously, comprehended in the phrase "any "enactment."

But the case has been put, and I venture to think it is the only way it could be put, in this fashion: it is said that if one looks at subsection (2) of section 349 of the Act of 1952 there is there in clear and express terms confirmation of the agreement of 1926, and a statement by the legislature that it is to have effect so long, at any rate, as it has corresponding effect in the Republic of Ireland. The argument goes on to contend that the terms of section 4 (2) of the Act of 1955 do not boldly and clearly say: "The agreement shall no longer have effect," but they purport to qualify the rights given under the agreement by section 349 while leaving, as it were, the general confirmation contained in section 349 (2) upon the statute book; and so it is said that there is created an inconsistency.

In my judgment, the answer to the point is this: subsection (2) states, no doubt quite clearly, that the agreement of 1926, the terms of which are incorporated in Schedule 18, shall have effect, and Parliament later said, as it was entitled to do, "The effect shall be modified." It is true that the modification might have been taken by those representing the Republic of Ireland to involve a breach and, therefore, a repudiation of the whole agreement, and that would mean an end of it. On the facts as we have seen them, that point was not taken, and it does not seem to me to follow at all that any modification of the statutory rights which section 349 (2) conferred necessarily is inconsistent with the continued confirmation in general terms of the agreement of 1926. But Mr. Foster has also supported this part of his contention by referring to something which I earlier anticipated, namely, the agreement of 1947, and the place it took in the history of this matter between the two countries. It will be recalled that the purpose of the agreement of 1947 was to substitute in appropriate cases for the standard rate of British income tax which the Irish resident could recover, a less figure called "the "net United Kingdom rate." That net rate had been brought into the income tax code, so to speak, in England by the Finance (No. 2) Act, 1945. Section 52 of the Act of 1945, so far as relevant, provided: "Notwithstanding anything in the Income "Tax Acts, no relief or repayment in respect of the tax "deducted"—and so on—"shall be allowed at a rate exceeding," the net United Kingdom rate.

Mr. Foster's point was to this effect: In so far as that provision applied to an Irish resident, it qualified the right which he had under section 23 of the Finance Act, 1926, to recover at the full standard British income tax rate, and, therefore, just as section 4 of the Act of 1955 created an inconsistency, as he says, with section 349 of the Act of 1952, so the provisions of section 52 of the Act of 1945 which I have read were inconsistent with section 23 of the Act of 1926, "and if they were given effect to,"

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says Mr. Foster, " they would involve a breach of the agreement, " if not its termination. And observe," says Mr. Foster, " in those circumstances what was done." It was apparent on the findings in the case and from the later events, such as the agreement of 1947 and the later enactment in England in 1948, that the English Revenue authorities and, as Mr. Foster says, Parliament itself, proceeded on the basis that section 52 of the Act of 1945 did not, in truth, affect or qualify the statutory right given to Irish residents by the Finance Act, 1926.

Mr. Foster invokes that in support of the view that the Act of 1955 should similarly be construed now. Mr. Foster does not go so far as to say that the view taken by Parliament in 1945 and 1948 of the effect or construction of the section of the Act of 1945 is necessarily conclusive as to what the right view of that construction is, but he says it does, after all, lend support to the view that the construction for which he contends is one that has been and can reasonably be accepted.

I think one answer to that argument is this: that the apparent view taken by the English Revenue and, if you like, by the English Parliament when it enacted this Act of 1948 to implement the agreement of 1947, is equally consistent with the view that whatever the right construction of section 52 of the Act of 1945 might have been, the Revenue and Parliament, for reasons which they no doubt thought good, did not think it desirable to invoke against the Irish resident the qualifying effect of section 52 of the Act of 1945. They cannot, as I think, put it higher than that. If that is right, then it does not seem to me that the matter with which we are concerned is really further advanced. So, I come back to this, and agreeing once more with Vaisey J.'s statement, the point is indeed short, the question is: having in mind the obvious competence, the acknowledged competence, of the English Parliament to qualify any statutory right to exemption or repayment of English income tax which any person may have, be he a charity, a foreigner, or what you will, can one give, in all the circumstances of this case, to the phrase " in any enactment," a meaning, can one impose upon it some qualification, which will have the result that the section will not apply to the Irish company as being a person otherwise entitled to the specific relief which section 349 of the Act of 1952 conferred upon him?

I have come, like Vaisey J., I must confess, to a clear conclusion that one cannot, and in those circumstances and without, I hope, being disrespectful to the argument by abstaining, as I do, from citation of the other cases which were mentioned to us, I would conclude that this appeal fails and must be dismissed.

PEARCE L.J. I agree with what my Lord has said. The relevant words of section 4 (2) are clear and simple. It is argued that they are so wide and general as to contain a possible ambiguity, or to invite some limitation, but they refer to what the judge described as a very limited and well defined class of the

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community. In spite of Mr. Foster's forcible argument, I see no warrant for reading into the words "a person" or "any enactment" the respective glosses that have been suggested.

In my view the judge was right in the conclusion at which he arrived and the appeal should be dismissed.

HARMAN L.J. I agree, and with all deference to the eloquent argument presented to us, I thought this a plain enough case. The Irish resident who wishes to obtain exemption from tax arising upon a dividend payable in this country must go to the English Parliament to obtain it. What Parliament has given Parliament may take away, and that it has done to the limited extent which the Act of 1955 proposes in a limited class of cases, and in order to stop an abuse. It would be astonishing if that abuse, no longer available to a person resident in England, could still be perpetrated by those resident in the Irish Republic. Of course, if Parliament had chosen to say that should be so, it could do so, but it is very unlikely that it did intend to do so, and, in my view, it has put a stop to it in the plainest terms which apply no less to the stranger than to the citizen in this country.

Appeals dismissed with costs.
Leave to appeal to the House of Lords granted in both cases.

Solicitors: *R. M. Bull & Co.; Solicitor of Inland Revenue.*

E. D.

[BRISTOL ASSIZES.]

POPE *v.* D. MURPHY & SON LTD.

[1956 P. 933.]

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Damages—Personal injuries—Life shortened—Damages to include wages which would have been earned during natural working life, notwithstanding injuries shorten life.

The plaintiff was injured in a motor accident and suffered injuries which shortened his expectation of life. In an action brought by him for damages for, inter alia, loss of future earnings, the defendants contended that damages under this head could only be based upon the expectation of life which was left to the plaintiff as a result of the accident:—

Held, that the proper approach to the question of loss of earning capacity was one which compensated the plaintiff for what he had in fact lost; that what he had lost in this case were prospective earnings for the remainder of his normal expectation of working life; accordingly, it was wrong to limit the damages for loss of future earnings to the period of the shortened expectation of life.

[Reported by A. D. RAWLEY, Esq., Barrister-at-Law.]

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Harris v. *Brights Asphalt Contractors Ltd.* [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395 not followed.

Phillips v. *London & South Western Railway Co.* (1879) 5 Q.B.D. 78; (1879) 4 Q.B.D. 406; (1879) L.R. 5 C.P.D. 280; *Roach* v. *Yates* [1938] 1 K.B. 256; [1937] 3 All E.R. 442; and *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.* [1955] 1 W.L.R. 1049; [1955] 3 All E.R. 205 considered.

ACTION.

On January 1, 1956, the plaintiff, Ivor Pope, was driving a motor-car on the road between Newport and Chepstow when a motor-vehicle, owned by the defendants, and driven by a man named Francis, crashed head-on into the plaintiff's car. As a result the plaintiff suffered severe injuries and his expectation of life was shortened. In an action for damages for personal injuries the plaintiff sued to recover, inter alia, loss of future earnings. At the trial the defendants contended, on the authority of *Harris* v. *Brights Asphalt Contractors Ltd.*,[1] that damages for loss of future earnings could only be awarded for the period of life which was left to the plaintiff as a result of the accident, and that he was not entitled to recover damages in respect of loss of wages which he would have earned during his natural life had it not been shortened by the accident.

The facts are more fully stated in the judgment.

N. R. Fox-Andrews Q.C. and *F. Cyril Williams* for the plaintiff.
D. P. Croom-Johnson Q.C. and *J. A. Rutter* for the defendants.

In addition to the cases referred to in the judgment the following were cited in argument: *Billingham* v. *Hughes*[2]; *Williamson* v. *John I. Thornycroft & Co. Ltd.*[3]

STREATFEILD J. On January 1, 1956, an appalling crash took place on the road between Newport and Chepstow. A Ford car driven by the plaintiff was negotiating a right-hand bend in the hours of darkness when the defendants' motor-car, driven by a man named Francis, came round what to him was a left-hand bend, obviously swinging out on to the wrong side of the road, and crashed head-on into the plaintiff's car. I was shown a picture of the damage, and the impact must have been quite terrific, just as terrific as the plaintiff's injuries have proved to be very serious.

Liability for this unfortunate crash, which cost Francis his own life, is now admitted. I indicated at an early stage that, in any event, the question of the plaintiff's special damage was likely to prove so complicated and to involve so prolonged an examination of the documents and accounts that it was obviously inappropriate to deal with that part of the case during the assize. Accordingly, I intimated, and counsel for both parties agreed that

[1] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.
[2] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.
[3] [1940] 2 K.B. 658; [1940] 4 All E.R. 61.

it is the convenient course, that that part of the plaintiff's claim must be the subject of an inquiry into damages, either by an official referee or some other tribunal agreed by the parties. I am concerned to consider what is the proper figure for general damage which the plaintiff has suffered by reason of his serious injuries.

Mr. Fox-Andrews, on behalf of the plaintiff, has, I think, correctly analysed the position under different heads. First of all, the plaintiff is entitled to damages for his actual physical injuries. Secondly, for the pain and suffering which he has already endured —and be it noted that he has endured it already for something like three and a half years—and also for the pain and suffering which he is likely to have to endure in the future for such time as he may remain alive. Thirdly, damages for loss of the normal amenities and enjoyment of life. Fourthly, future medical expenses, as to which I have little evidence, and I have to do my best by way of what amounts almost to guesswork. Then I added a head of damage which Mr. Fox-Andrews accepted, that the plaintiff was entitled to claim for loss of expectation of life under the principles laid down in *Benham* v. *Gambling*.[1] The last head of damage is the one which has given rise to considerable controversy in this case, the appropriate figure representing the court's estimate of what the plaintiff would have earned for the rest of his working life but for this accident. That, in effect, is Mr. Fox-Andrews' submission, and I will deal with that later.

His Lordship considered the first four heads and continued:]

Then there is the head of damage for loss of expectation of life, which, in my view, is quite a different thing from loss of future earning capacity. It is, within the principle of *Benham* v. *Gambling*,[2] simply the loss of enjoying a happy life. In accordance with that decision, it is, of course, not a head of damage which in these days demands a very high figure.

Mr. Fox-Andrews puts the last head of damage, namely, loss of future earning capacity, as the appropriate figure representing the court's estimate of what the plaintiff would have earned for the rest of his working life but for the accident. Mr. Croom-Johnson, on the other hand, contends that the court is only entitled to measure his loss of earning capacity by the amount of working life which is left to him.

[His Lordship considered the figures, and continued:]

Now the question is, over what period of time must his earning capacity be measured? Is it to be measured over the period of time during which he would have reasonably expected to work if there had not been an accident; or is it to be said that a wrongdoer, a tortfeasor, is enabled to say: "I have reduced your "expectation of life from, say, 20 years down to five. You are "entitled to a nominal sum for loss of expectation of life as such, "but with regard to your prospective loss of earnings, you are "only entitled to claim them over the period of time that I, the

[1] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7, H.L.

[2] Ibid.

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" wrongdoer, have left for you. You are not entitled to claim " in respect of the period which, but for my wrong, you would " reasonably have expected to earn that income " ? If that indeed is the law, then I respectfully suggest that it would be very unjust, because, after all, the object of damages, as I understand them and always have done, is to do the best they can to compensate a man who has been injured, for what he has lost. What he has lost, as it seems to me, is not only the ability to earn £x a year, but the ability to earn it over that period of time that he might reasonably expect to.

Mr. Croom-Johnson has submitted to me, and I think rightly, that it is wrong to assess damages on a purely annuity basis, although that is very often rightly regarded as being the spring-board, subject to adjustments. In the ordinary way, assuming that a man's expectation of life has not been reduced, the court makes up its mind what the man would be likely to earn over the period of time. It takes his earning capacity, his wages, his emoluments, and it may start by multiplying by the number of years over which he is likely to earn it, or, alternatively, by looking up the tables of expectation of life and seeing what is the sum, not as the final figure, but as the jumping-off-point. I agree with Mr. Croom-Johnson that it would be quite wrong to accept any annuity basis as the final figure, because I would then have to take into account that the plaintiff would be receiving in a lump sum what otherwise he would be receiving week by week, or month by month, over a long period of time, so there is a discount for that reason. I would also have to discount it because of the ordinary changes and chances of life. He might suffer some other accident or disaster, not by reason of any tort of the defendants but possibly by reason of somebody else's tort or by his own misfortune, or he might die. I would have to take all of those matters into account in discounting a figure which otherwise might have given him an annuity.

The result would be compensation for what the man himself had lost, that is to say, a reasonable figure for his diminished earning capacity over the period of time during which otherwise he would reasonably expect to earn it, having regard to all those changes and chances of life. But it is one thing to take into account those changes and chances of life, namely, his death or disablement by some other injury, and quite another thing to say that I must take into account the changes and chances of life brought about by this very accident, namely, the reduction of his earning capacity and his expectation of life. I am bound to say that that is how it appears to me. The question is, is that the law?

My attention has been drawn particularly to the judgment of Slade J. in *Harris* v. *Brights Asphalt Contractors Ltd.*[3] In that case Slade J., deciding this matter, came to the conclusion, for

[3] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.

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the reasons which he set out, that damages for prospective loss of earnings could only be based upon the expectation of life which was left to the man as a result of the particular injuries.

Mr. Croom-Johnson has relied upon that case and he has submitted to me, quite rightly, that the court does not compensate a dead man, and I agree that it does not. What I am here doing is to compensate a live man for what he has now lost. The question is, what has he lost? Has he lost whatever was his normal expectation of life, possibly 20 years, or is he only entitled to it over five or 10 years? The decision of Slade J., being at nisi prius, is not, of course, binding upon me.

There is a useful discourse upon this part of the law in Kemp and Kemp on the Quantum of Damages, vol. 1 (1954), beginning at p. 78. I think that the first case which has any bearing upon the matter is *Phillips* v. *London & South Western Railway Co.*[4] It was a case which was twice tried and it appears in other reports. At the first trial Field J., in directing the jury, said, amongst other things, this[5]: "Now how are you to deal with loss of future "income? . . . I say . . . that you are not to give the value of an "annuity of the same amount as the plaintiff's average income "for the rest of the plaintiff's life. If you gave that you would "be disregarding some of the contingencies. You must take all "things into consideration, and endeavour to see if you can what "is the proper mode of dealing with them. An accident might "have taken the plaintiff off within a year. He might have lived, "on the other hand, for the next twenty years, and yet many "things might have happened to prevent his continuing his "practice. If it had been a question of trade or business, bankruptcy might have supervened. That does not come into "account here, and I only give it by way of illustration of what "must pass through your minds for the purpose of seeing what "sum is to be given. It is given, recollect, once for all, and "once only, you must not forget that, and it must be given "on the fairest estimate you can make of what the probable "continuance of the plaintiff's professional income would have "been." I draw attention to these words[6]: "The damages to "which a man is entitled are the consequences of a wrongful "act by which he suffers. The consequences of the wrongful "act here are undoubtedly that Dr. Phillips has been and is "prevented from earning such a sum of money as you think "he would have been likely to earn if this accident had not "happened." There is not a trace in that direction to the jury of an indication that the jury are only entitled to consider the income that the plaintiff would have earned during a shorter period of life.

In the Court of Appeal James L.J. in the same case said[7]: "That comes to this, you are to consider what his income would

[4] (1879) 5 Q.B.D. 78; 4 Q.B.D. 406, C.A.
[5] 5 Q.B.D. 78, 81, C.A.
[6] Ibid. 82, C.A.
[7] Ibid. 87, C.A.

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" probably have been, how long that income would probably have " lasted, and you are to take into consideration all the other " contingencies to which a practice is liable. I do not know how " otherwise the case could be put."

Then there was *Roach* v. *Yates*,[8] which Slade J. in *Harris's* case [9] analysed with great care. In *Roach* v. *Yates* Slesser L.J. said this [10]: " First, then, the plaintiff's loss of wages may be " noticed. Criticism has been made of the suggestion that one " method of estimating his loss under that head is to consider " what he would have earned during his life. Speaking for " myself, I see no justification for approaching that problem by " starting with the assumption that he would only have lived so " long as the accident has now allowed him to live." Those words seem to be the very reverse of Mr. Croom-Johnson's present submission. Slesser L.J. continued [11]: " I think the proper " way of approaching the problem is that which was followed in " *Phillips* v. *London & South Western Railway Co.*,[12] the leading " case on this matter—namely, first to consider what sum he " would have been likely to make during his normal life if he " had not met with the accident."

So that at least Slesser L.J. in that case came firmly down on the side of *Phillips* v. *London & South Western Railway Co.*,[12] that the measure of damage is the probable income that the plaintiff would have had during his normal earning life, subject of course to the ordinary deductions in respect of the ordinary changes and chances of life. I have looked at the judgments of the other two members of the Court of Appeal, and, although they do not in terms state this to be so, it does not appear from their judgments that they are in fact dissenting in any way from the proposition of Slesser L.J. which I have just read.

Then came Slade J.'s decision, and my attention has been drawn to various criticisms which are respectfully made by the authors of Kemp and Kemp. The criticism of the authors of Kemp and Kemp, which is adopted by Mr. Fox-Andrews, appears at p. 91, and in my view is very forcible: " The first reason given is " that it cannot be right to award damages for loss of earnings " for a period during which ex hypothesi the plaintiff is not alive " to earn them. In earlier passages in his judgment Slade J. " expresses much the same sentiment when he speaks of 'imag- " 'inary earnings' after the plaintiff's death. But all awards " for loss of earnings are in respect of imaginary earnings in the " sense that as a result of his injuries the plaintiff cannot earn " these earnings. It is the power to earn what he earned before " the accident which has been taken away from him. If he had " not been injured the plaintiff could reasonably expect to earn " money for the rest of his working life; his pecuniary loss is " that he cannot earn money for that period. Why should the

[8] [1938] 1 K.B. 256; [1937] 3 All E.R. 442, C.A.
[9] [1953] 1 Q.B. 617.
[10] [1938] 1 K.B. 256, 268, C.A.
[11] Ibid. C.A.
[12] 5 Q.B.D. 78; 4 Q.B.D. 406, C.A.

" wrongdoer be freed from compensating the plaintiff for the " pecuniary loss which he has caused him just because, at the " same time, he has also shortened the plaintiff's life? Slade J. " speaks of restitutio being impossible in the sense that nothing " can lengthen the plaintiff's life by the period by which it has " been shortened by the accident. We entirely agree. But why " should not the wrongdoer make restitution where it is possible? " He can easily make restitution for the pecuniary loss which he " has inflicted on the plaintiff. General principles require that a " wrongdoer should compensate his victim for the injuries caused " to him, and that, where the injury results in a pecuniary loss " to the injured person, that person should be compensated in " full for such loss."

Unless there is good reason for my rejecting that criticism, I am bound to say for my part that I fully agree with it; because if I were to accede to Mr. Croom-Johnson's argument upon this, the result would obviously be that the tortfeasor here would be taking advantage of his own wrong and he would be saying: " I " reduced your working life to only five years, and you shall only " have compensation for those five years," quite forgetting that a much longer period was the true reduction in earning capacity.

Lastly, I have to consider *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.*,[13] a decision of the Court of Appeal which is, of course, binding upon me. In that Lord Evershed M.R., as it seems to me, was considering Slade J.'s judgment in *Harris* v. *Brights Asphalt Contractors Ltd.*[14] from an entirely different point of view. He was not considering the question of over what period of time, and the case did not concern over what period of time, a man might be losing his earnings; it was a case which was concerned entirely with whether a man could claim compensation in respect of his loss of opportunity of providing for his family, of saving for his family. On reading those pages of the judgment it does not appear to me that the matters of criticism which I have referred to in Kemp and Kemp, which prima facie strike me as being correct, were ever brought to the notice of the Court of Appeal or were ever considered by it. As it seems to me, *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.*[15] is on quite a different point, and in so far as the Court of Appeal said, as the Master of the Rolls did say, that he thought that Slade J. had decided rightly, it seems that the rightness of his decision was from an entirely different point of view from that which is presented to the court in this case. I do not think, therefore, that *Richards* v. *Highway Ironfounders (West Bromwich) Ltd.*[16] operates as a Court of Appeal confirmation of the judgment of Slade J. Possibly the present case will give the Court of Appeal the opportunity of further considering it.

[13] [1955] 1 W.L.R. 1049; [1955] 3 All E.R. 205, C.A.
[14] [1953] 1 Q.B. 617.
[15] [1955] 1 W.L.R. 1049.
[16] Ibid.

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Having regard to the criticisms of Slade J.'s judgment in *Harris* v. *Brights Asphalt Contractors Ltd.*[17] set out in Kemp and Kemp, not only in the passage that I have actually read, which seems to me to be the most forcible, I have come to the conclusion, with great regret, that I cannot find myself on principle in agreement with Slade J. In my view the proper approach to this question of loss of earning capacity is to compensate the plaintiff, who is alive now, for what he has in fact lost. What has lost is the prospect of earning whatever it was he did earn from his business over the period of time that he might otherwise, apart from the accident, have reasonably expected to earn it. For that reason, therefore, I do not think that it is right for me to say, as Mr. Croom-Johnson invited me to, that the plaintiff's measure of damage can only be spread over a matter of five years or possibly a little more. I think that, apart from the accident and again, of course, subject to the ordinary changes and chances of life, he is entitled to claim damages over his normal expectation of life. If I were to hold anything else, I feel very strongly that I should be giving the tortfeasor here, the defendant, the benefit of his own wrong, and that I decline to do.

On those principles I have the very difficult task, as it always is, of assessing the damages under the different heads, and I feel that, in order that the parties may understand how I have set about it, it would be right for me to give separate figures for the different heads of damage on which Mr. Fox-Andrews has based his case.

I am not going to give a separate figure for the plaintiff's injuries, pain and suffering and loss of amenities; those I take all together. He has in fact endured this pain for three-and-a-half years, and according to Mr. Lucas he has certainly got to face another five years, possibly more; of course, he may be wrong and it may be less. For those three items, the figure of damages which I fix is the sum of £9,500; for future medical expenses, the sum of £250. For loss of expectation of life under the principle of *Benham* v. *Gambling*,[18] £250. For the loss of earning capacity over the period of time that the plaintiff otherwise might reasonably have expected to earn, I fix the sum of £5,000. On the other hand, if I am wrong as to that last matter and Mr. Croom-Johnson is right, that last figure would have been £2,500 instead. But as it is, so far as this part of the case is concerned, that is, general damages, the total sum that I award is the sum of £15,000.

Judgment for the plaintiff.

Solicitors: *Wansbroughs, Robinson, Tayler & Taylor, Bristol; Cartwright, Taylor & Corpe, Bristol, for S. Garelick & Co., Cardiff.*

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[17] [1953] 1 Q.B. 617.

[18] [1941] A.C. 157; 57 T.L.R. 177; [1941] 1 All E.R. 7.

[COURT OF APPEAL.]

TSAKIROGLOU & CO. LTD. *v.* NOBLEE THORL G.m.b.H. ALBERT D. GAON & CO. *v.* SOCIÉTÉ INTER-PROFESSIONELLE DES OLÉAGINEUX FLUIDES ALIMENTAIRES.

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Feb. 16, 17, 18, 19;
March 28.

Sellers, Ormerod and Harman L.JJ.

Sale of Goods—C.i.f.—Route—"Usual and customary"—Customary route blocked—Availability of alternative route—Whether alternative route must be used.

Contract—Frustration—C.i.f. contract—Usual and customary route via Suez blocked—Whether performance "a thing radically different "from that which was undertaken by the contract"—Whether parties "must have made" contract on basis of continued availability of canal.

Contract — Performance — Customary manner — Time when manner customary.

"Shipment."

Contract — Frustration — Fact or law — Finding by jury or arbitrator regarding commercial or fundamental difference.

Fact or Law.

Arbitration—Special case—Findings of fact—Primary facts—Whether court bound by findings of fact.

By a written contract dated October 4, 1956, sellers in the first appeal agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Hamburg during November/December, 1956. On November 2, the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The alternative route round the Cape of Good Hope was more than four times as long, and freightage by this route far more costly. The sellers failed to ship the goods, and in arbitration proceedings, the umpire held that the sellers were in default and the appeal board upheld the umpire's award.

Diplock J. held himself bound by the finding of the appeal board that "the performance of the contract by shipping the goods on a "vessel routed via the Cape of Good Hope was not commercially or "fundamentally different from its being performed by shipping the "goods on a vessel routed via the Suez Canal."

By a written contract dated October 12, 1956, sellers in the second appeal agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Nice during October/November, 1956. By a further written contract dated October 31, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Marseilles during November, 1956.

The sellers similarly failed to ship the goods owing to the closure of the Suez Canal; and in arbitration proceedings they were held in default by the umpire, who was upheld by the appeal board. Ashworth J. held that a c.i.f. contract was not frustrated ipso facto if the usual or customary route was rendered impossible; and that the voyage round the Cape of Good Hope was not such as to render performance by that route a thing radically different from that which was contemplated by the contract.

On appeal:—

Held, (1) that a term that shipment should be via Suez should not be implied into the contracts (post, pp. 873, 879, 882).

(2) That the obligation of the sellers was not confined to shipping

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by a route usual and normal at the time of the contract; when the Suez route became unusable their duty was to put the goods on a vessel destined to the required port by a reasonable and practicable route if available (post, pp. 874, 875, 879–880).

L. Sutro & Co. v. *Heilbut Symons & Co.* [1917] 2 K.B. 348; 33 T.L.R. 359 considered.

Per Harman L.J. Why it should be necessary to imply such words as "by the usual and customary route," I do not see (post, p. 883).

(3) That the shipment was not prevented by war or force majeure within the meaning of the contracts; placing the goods on board a vessel for the right destination was not prevented (post, pp. 874, 883).

(4) That although the route via the Cape involved a change in the method of the performance of the contract, it was not such a fundamental change from that undertaken under the contract as to entitle the sellers to say that the contract was frustrated (post, pp. 877, 881, 885).

Dictum of Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham U. D. C.* [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L. applied.

Carapanayoti & Co. Ltd. v. *E. T. Green Ltd.* [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115 overruled.

Semble. That the finding of the arbitration tribunal in the first case that shipment via the Cape was not commercially or fundamentally different from shipment via the Canal was not binding on the court (post, pp. 878, 882, 884, 886).

Decisions of Diplock J. [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45 and Ashworth J. [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693 affirmed.

APPEALS respectively from Diplock J.[1] and Ashworth J.[2]

Both appeals arose out of special cases stated by the Board of Appeal of the Incorporated Oil Seed Association.

In the first appeal, by a contract in writing dated Hamburg, October 4, 1956, between Tsakiroglou & Co. Ltd. of Khartoum as sellers, and the respondents, Noblee Thorl G.m.b.H. of Hamburg/Harburg as buyers, through agents, the sellers agreed to sell and the buyers to buy about 300 tons of Sudanese groundnuts in the shell basis 3 per cent. admixture new crop 1956/57 at £50 per 1,000 kilos including bags c.i.f. Hamburg. Shipment November/December 1956 with payment cash against documents on first presentation for 95 per cent. of the amount of provisional invoice balance to be paid after the analysis on final invoice. The contract form was to be the Incorporated Oil Seed Association Contract No. 38 with arbitration in London, and that contract was signed by the Hamburg agents.

In the second appeal, by a contract in writing dated October 12, 1956, between Albert D. Gaon & Co., of Sudan, as sellers, and the Société Interprofessionelle des Oléagineux Fluides Alimentaires, as buyers, through agents, the sellers agreed to sell and the buyers to buy about 1,500 tons of Sudan groundnuts in shell

[1] [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.

[2] [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693.

1955/56 crop at £49 10s. per ton c.i.f. Nice, shipment October/November, 1956. By another contract in writing dated October 31, 1956, the sellers agreed to sell and the buyers to buy about 1,000 tons of Sudan groundnuts in shell 1955/56 crop at £54 5s. per ton c.i.f. Marseilles, shipment November, 1956.

Form No. 38 of the Incorporated Oil Seed Association Forms of Contract (hereinafter called "I.O.S.A. Contract No. 38") was incorporated in all three contracts. Clause 1 of I.O.S.A. Contract No. 38 provided for "Shipment from a West African port . . . by "steamer or steamers (tankers excluded) direct or indirect with or "without transhipment." It was found as a fact in the case stated in the Tsakiroglou case that Port Sudan should be implied, and in the case stated in the Gaon case that both parties intended that the words "Sudanese port" should be substituted for "West African port." Clause 6 of the Tsakiroglou contract and clause 8 of the Gaon contracts provided: "In case of prohibition "of import or export, blockade or war, epidemic or strike, and in "all cases of force majeure preventing the shipment within the "time fixed, or the delivery, the period allowed for shipment or "delivery shall be extended by not exceeding two months. After "that, if the case of force majeure be still operating, the contracts "shall be cancelled."

On October 29, 1956, the Israelis invaded Egypt; on November 1, Britain and France commenced military operations and on November 2, the Suez Canal was blocked to shipping and remained blocked until April 9, 1957.

No goods were shipped under any of the contracts, the sellers claiming that they were prevented from doing so by events which had occurred in the Middle East.

When the contracts of October 4 and October 12, 1956, were entered into the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to either Hamburg, Nice or Marseilles was via the Suez Canal. After the closing of the Canal the shortest and a practicable route to those ports was via the Cape of Good Hope. The sea route via Suez to Hamburg was approximately 4,386 miles, and via the Cape 11,137 miles, and to Nice and Marseilles the comparative distances were approximately 2,300 miles and 10,500 miles respectively.

From November 10, 1956, a 25 per cent. freight surcharge was placed on goods shipped on vessels proceding via the Cape of Good Hope and this was increased to 100 per cent. on December 13, 1956.

The sellers' claim that the contracts were at an end because of the closure of the Suez Canal was not accepted by the buyers.

In arbitration proceedings in the Tsakiroglou case, the umpire, by an award dated February 20, 1957, awarded that the sellers were in default and should pay to the buyers as damages the sum of £5,625 together with £79 15s. cost of the award. The sellers were dissatisfied with the award, and a board of appeal appointed

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to hear the appeal on January 28, 1958, dismissed the appeal and upheld the umpire's award.

Diplock J.[3] upheld the decision of the board of appeal.

In the Gaon case the umpire by two awards dated October 23, 1957, awarded that the sellers were in default under both contracts, and should pay to the buyers as damages for the said default the difference between the contract price in each case and a price of £62 5s. per ton, together with interest at 5 per cent. from the date of the awards. The sellers, being dissatisfied with the awards, appealed to the board of appeal of the association in accordance with the association's rules. The board of appeal, by an award in the form of a special case, confirmed the umpire's award.

Ashworth J.[4] upheld the decision of the board of appeal.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers.

John Megaw Q.C. and *J. F. Donaldson* for the buyers in the *Tsakiroglou* case.

Sir David Cairns Q.C. and *S. O. Olson* for the buyers in the *Gaon* case.

The following cases, not cited in the judgments, were referred to in argument: *Comptoir Anversois* v. *Power, Son & Co.*[5]; *Fairclough, Dodd & Jones Ltd.* v. *J. H. Vantol Ltd.*[6]; *British Launderers' Research Association* v. *Hendon Borough Rating Authority*[7]; *Bowes* v. *Chand*[8]; *Frenkel* v. *MacAndrews & Co.*[9]

Cur. adv. vult.

March 28. The following judgments were read:

SELLERS L.J. These two appeals were heard together by the consent of the parties, as they both relate to contracts of sale of groundnuts in the shell for shipment, cost, insurance, freight from Port Sudan, which were were unperformed at the time of the blockage of the Suez Canal on November 2, 1956, and the sellers, the appellants in these appeals, relying on that event as sufficient justification, failed to make shipment within the contract periods of the goods sold, and claimed that they were no longer bound to do so. In respect of each contract the sellers had the groundnuts available for shipment and had arranged reservations of shipping space to the respective destinations via the Suez Canal. These reservations were cancelled by the shipowners and the sellers made no other arrangements in fulfilment of these contracts, and

[3] [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.
[4] [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693.
[5] [1920] 1 K.B. 868; 36 T.L.R. 101, C.A.
[6] [1957] 1 W.L.R. 136; [1956] 3 All E.R. 921, H.L.
[7] [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21, C.A.
[8] (1877) 2 App.Cas. 455, H.L.
[9] [1929] A.C. 545; 45 T.L.R. 311, H.L.

apparently did not attempt so to do. It was established in both the cases that shipment could have been made via the Cape of Good Hope although, no doubt, it would have involved a greater cost.

The main issue is whether the respective contracts required the sellers to ship the goods via the alternative route of the Cape when the anticipated route via the Suez Canal was closed This has been decided in favour of the buyers in each case by the umpire, and by the Board of Appeal of the Incorporated Oil Seed Association, and by Diplock J. in the *Tsakiroglou* case [1] and Ashworth J. in the *Gaon* case.[2] In the former case Diplock J. felt that the matter was concluded by the findings of the appeal tribunal.

[His Lordship having stated the facts, continued:] The effect of the blockage of the Suez Canal on shipowners was obvious, for the relatively short route through the Canal was denied them, and for destinations such as we are considering in these cases a different and much more prolonged journey had to be substituted, But the question is, what effect that had on the contract of sale between the parties here.

The sellers contended that the contract in each case should be read as if it contained the provision "shipment from Port "Sudan via the Suez Canal." Further, the Tsakiroglou Company had sought an extension of two months, relying on clause 6 of the contract alleging that they were prevented from making the shipment by war or force majeure. The buyers refused. [His Lordship read clause 6.] The comparable clause in the Gaon contract was clause 8, and it was similarly relied on. These two questions can conveniently be considered together.

It was submitted that although the contract of sale did not state the route by which the goods were to travel, it was in the circumstances to be implied that they would be shipped by the Suez Canal, which was the usual and normal route and the route in the contemplation of the parties at the making of the contract. Shipment, too, it was said, meant the intended shipment, the one for which they had contracted and made provision, and as that was not available by circumstances beyond their control the extension ought to have been granted.

If the sellers had stipulated expressly for shipment via Suez in these contracts they would, no doubt, have been on strong ground in the events which arose, but they did not so stipulate, and I can see no adequate ground on which to imply into the contracts any such term or requirement. The sales were for future shipments and the circumstances at the time of shipment would be more important to the parties than at the time of the making of the contract. It is true that the cost of the freight was included in the price. This is a risk which falls on the

[1] [1959] 2 W.L.R. 179; [1959] 1 All E.R. 45.

[2] [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693.

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seller under such a contract, and whilst he may have to pay more freight than he contemplates at the time of contracting, unless he has made a firm engagement of freight before he makes his sale, he may, on the other hand, find that he has to pay less.

In *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[3] which was the first of what counsel described as the " Suez " cases to come before the courts, McNair J. held that where a contract provides that the performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. I agree with McNair J.'s opinion and the reasoning by which he supported it that the obligation of the sellers is not confined to shipping by a route usual and normal at the time of the contract.

Mr. Roskill relied on the judgments in *L. Sutro & Co.* v. *Heilbut Symons & Co.*,[4] and especially the dissenting judgment of Scrutton L.J. to support his argument on the terms to be implied into the contract, but the point which arises here was not there under consideration. In that case the sea route and the overland route were both in use at the time of the contract and at the time of its performance. I do not think one can deduce any real support from the case for the argument. There has been unanimity amongst the judges who have considered this submission, and I am in full agreement with their views in rejecting it.

Although there were hostilities in Egypt and in the region of the Suez Canal at the material times, there has been no finding of war, and I think it is clear that neither war nor force majeure prevented shipment of the contract goods. Shipment means physically putting the goods on board a vessel, and, if there was a duty on the sellers to put the contractual goods on board a vessel for a voyage round the Cape to the contractual destination, there was nothing to prevent them doing so and clause 6 does not protect them.

There is no finding that after the Suez route was closed, and at any time for shipment under these contracts, there was any normal route for shipping from Port Sudan to the ports concerned. The Cape route, the sellers said, was and remained an emergency route. They therefore relied on the statement (on p. 39) of " C.I.F. Contracts " in the 2nd ed., the last by Judge Kennedy: " In the absence of express terms in the contract the " customary or usual route must be followed. A usual route need " not be the invariable route. In one case a route followed in one " half of the recorded cases was held to be a usual or customary " route "—and it was said that as there was no usual or customary route the contract could not be performed by the sellers.

[3] [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

[4] [1917] 2 K.B. 348; 33 T.L.R. 359, C.A.

The case referred to was *Evans, Sons & Co.* v. *Cunard Steamship Co. Ltd.*,[5] on which, in the argument before us, both sides in their turn relied. It was a claim by a shipper against a shipowner who had carried his goods on a rather prolonged and devious journey, having taken them on board on an outward journey which continued to its end before turning round to come home and then going by way of Constantinople, as it was in those days. The case turns on the obligations which the shipowner had entered into with the plaintiff and its bearing, if any, in the present dispute seems indirect. Willes J. said, however, in the course of his judgment: "If that is the only voyage practicable, that must "be the voyage in the business sense agreed upon."

The passage in Kennedy seems to assume that there would be a usual route but the trade may be new, or the usual route—if there was only one usual route—may become, as here, no longer available or may, I suppose in changing circumstances, fall into disuse. I would accept the buyers' submission that when the Suez route became unusable the sellers' duty was to put the goods on a vessel destined to the required port by a reasonable and practicable route, if there is such an alternative when the contract is properly regarded. If in a c.i.f. contract no route were expressly specified, or if no usual or normal route had impliedly been established as the route to be taken under the contract, as in the case of a new trade between two new ports, then clearly it would seem that the implication would be that the parties intended the goods to be sent by a reasonable and practicable route. But here there had undoubtedly been a usual route.

The buyers contended that shipment via the Cape of Good Hope was the most practicable and the best route available at the respective times for shipment after November 2, 1956, and that it has not been shown that the sellers could not have made shipments accordingly. At the most it would have cost them more freight. That I think is true. The question is whether such shipment would have been reasonable and practicable so as to bring it within the sellers' contractual obligation or whether, as the sellers contended, the contracts could not be performed as intended and, therefore, each contract was at an end on the ground, it was said, that it had been frustrated.

Ashworth J. put the question in this way[6]: "In my judgment "in considering whether a contract of this type has been "frustrated by the disappearance of the usual or customary route, "one has to decide (inter alia) whether an alternative route "existed, and, if so, whether performance by that route would "'render it a thing radically different from that which was "'undertaken by the contract' to quote the words of Lord "Radcliffe in *Davis Contractors Ltd.* v. *Fareham U. D. C.*[7]"

[5] (1902) 18 T.L.R. 374.
[6] [1959] 3 W.L.R. 628.
[7] [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145, H.L.

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I think that is the question which arises here. What are the differences, one may ask, from the point of view, not of a shipowner who is required to send his ship on a different and greatly longer route, but of the parties to a c.i.f. contract.

The obligations of the parties to such a contract of sale in its ordinary form are well defined and are conveniently summarised by McNair J. in *Green's* case.[8] This form of contract no doubt developed commercially because it had advantages for both parties and it has long been used, often with adaptations and variations. Where a considerable journey by sea is involved, the contract and the goods are not, as it were, in suspense. The seller can, in various ways, raise money on the goods he has shipped almost at once and the buyer, once he has taken up and paid for the documents, can deal with the goods by transferring the documents before the goods have arrived at the port for delivery. These factors minimise the disadvantages of delay in receiving the goods on the buyer's side, and delay in receiving payment on the seller's side whilst the goods are on the high seas. The bill of lading on which the goods are carried is, no doubt, a vital document in the transaction, in conjunction with an insurance policy to cover the risks of transit, and an invoice to describe the goods shipped and their cost.

But it is the importance of the route which the goods will take which is an issue in this case. It is conceded by the sellers that a mere increase of freight is a burden which would fall on them. Circumstances might arise in which freights might go up very substantially for the "usual and normal route" or they might go down. These variations normally affect the seller and not the buyer. They are his risk or advantage. Once the seller has shipped the goods and obtained the necessary documents and passed them to the buyer, he is no longer concerned with the sea voyage of the goods except to the extent, in some cases, of the final settlement of the balance of the payment for the goods when the delivered weights have been ascertained, which cannot be regarded as a substantial or fundamental matter in the contract.

The sellers' conduct, in these cases, in performance of the contracts would not have differed. They had the goods available. They had to put the goods on board a vessel at Port Sudan and get a bill of lading to the port of delivery in respect of each consignment on shipment within the contractual date and then take out an insurance cover and make out the invoice. The only difference would have been the journey of the vessel after she left Port Sudan, and any extra cost involved in arranging the contracts of affreightment and insurance.

From the buyer's point of view goods on a longer sea journey would be subjected to a longer period in the hold of a ship and possibly to the rigours of cold or heat, and the goods would not arrive as early as the buyer would have contemplated by the

[8] [1959] 1 Q.B. 131, 143.

" usual route." In the present cases the equator would have been crossed twice, but this apparently would have had no ill effect on these goods, and the date of arrival might have been delayed some three or four weeks according to the speed of the vessel engaged.

Mr. Roskill, for the sellers, put his point graphically when he said that, if the sellers had shipped the contract goods via the Cape of Good Hope whilst the Suez Canal was an available route, it would have been a breach of contract. Why then is it not a totally different contract to ship by that route when Suez was closed?

I think the answer is that the changed circumstances gave rise to a change in the performance of the contracts by the sellers, but it is not so fundamental a change that it can be said to be commercially different or of such a character that the parties at the time of the making of the contract, if they had considered the position, would have said with one voice that in those circumstances their bargain would be at an end.

If by April, 1957, the route by the Cape of Good Hope had become a " usual route," I cannot think that the sellers would have been in default in the absence of express stipulation in shipping via Suez when it opened again, although they might have got an advantage of a lower freight. It would not have been a fundamentally different contract of sale.

I agree with the view of Ashworth J. and regret that it is contrary to the view taken by a very experienced commercial judge, McNair J., in very similar circumstances in *Green's* case.[9] It is, however, the same opinion as that held by those engaged in or very familiar with the trade who have formed the respective arbitration tribunals in these cases, in one of which—the Gaon case—there was an express finding: " If after the closing of the " Suez Canal the sellers had shipped the goods via the Cape of " Good Hope the buyers could not have rejected the documents." They might not, one may assume, have so found if the longer voyage would have caused the goods to deteriorate appreciably in quality or perhaps even in weight, or if the delay would have been unduly prolonged.

As the view I have taken of these appeals agrees with the finding in the Tsakiroglou case that " the performance of the " contract of shipping the goods on a vessel routed via the Cape of " Good Hope was not commercially or fundamentally different " from its being performed by shipping the goods on a vessel " routed via the Suez Canal," it is not necessary to decide whether Diplock J. was bound to accept that finding in the case as conclusive, as a " special verdict " of a jury, as he put it. It will not affect the result of this appeal. The pronouncement was made in the time-honoured but not very satisfactory form of a special case " so far as it is a question of fact we find and as far as it is a " question of law we hold." How far was it a question of fact?

[9] [1959] 1 Q.B. 131.

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Very largely, no doubt. But it must, in my opinion, be the ultimate function of the court to say whether on the facts found, and in all the circumstances, there arises frustration of a contract or adventure. Ashworth J., I think rightly, treated like findings in the Gaon case as mixed findings of law and fact.

Mr. Roskill argued forcefully that if it were otherwise a tribunal, by such a finding of fact, if so it is to be regarded, could state the parties out of court in a frustration case, and there could be conflicting decisions on precisely similar contracts and facts. I apprehend that if the present decision of this court is right, then a decision of an arbitrator or umpire on similar facts in answer to the same question would be wrong in law.

In *Jackson* v. *Union Marine Insurance Co. Ltd.*,[10] on which Diplock J. relied, although Brett J. put as a third question to the jury "whether such time was so long as to put an end in a "commercial sense to the commercial speculation entered upon "by the shipowner and the charterer," that judge in a judgment with which Keating J. agreed reviewed many authorities, including directions to and findings of juries, and as I understand it considered whether the jury's verdict could stand as a matter of law, and held that it did. Bovill C.J. took a contrary view.

I agree with Diplock J. that this finding of fact made by the appeal tribunal was of the utmost relevance in answering the ultimate question of law, and on the view of the law which Ashworth J. applied (and with which I agree) it was conclusive, because it was that issue of fact which answers the question of law in this particular case, and there is evidence to support it and no misdirection.

It was argued for the buyers that the second Gaon contract dated October 31, 1956, should, in any event, be decided in favour of the buyers, but I doubt if I should have treated that contract differently, if I had accepted generally the sellers' argument. It would seem that the situation at Suez had worsened considerably at that date in fact, but to what extent to the knowledge of the parties at the time of contracting, does not seem sufficiently clear to justify a discrimination.

I would dismiss both the appeals.

Ormerod L.J. The contract in each of these cases was in the same form, and, with the exception of one of the findings in the case stated in what has been referred to as the "Tsak" case, there is no difference of substance in the considerations affecting them. By the consent of the parties the two appeals were heard together. It is convenient to deal with them together in this judgment apart from some mention of what has been called the "special finding" in the "Tsak" case.

None of the contracts contained any express provision as to the route to be followed. The sellers, therefore, based their

[10] (1873) L.R. 8 C.P. 572; (1874) L.R. 10 C.P. 125, D.C.

argument to a very large extent on the submission that there must be implied a term that the customary or usual route must be followed. It was not disputed that, at the time the contracts were entered into, the customary or usual route was through the Suez Canal. Before the time of performance the Canal had been blocked by the Egyptian authorities, and shipping by that route was therefore impossible. There was no finding that, at the time when the contract should have been performed, any other customary or usual route had been established, although there was an alternative route available by the Cape, by which goods could be shipped from Port Sudan to their respective destinations in Europe.

The sellers had in each case submitted to the judge at the trial that there should be implied a term that the goods would be shipped via Suez. In neither case had this submission found favour, and it was not pressed by the sellers in this court. It was, however, strongly submitted by Mr. Roskill on behalf of the sellers that a term should be implied that the goods would be carried by the customary or usual route, that this route was via Suez, and, as it was not available at the time of performance, the contracts were thereby frustrated. He submitted that the fact that an alternative route was available was immaterial. If the customary or usual route was not available at the time of performance the contract was thereby frustrated.

The buyers did not dispute that a contract of this kind implied in the ordinary way a term that the goods would be taken by the customary or usual route. But it was submitted that this only applied if there was such a route available, and that if in the absence of such a route there was left a practicable or commonsense route the contract must be taken to imply that the carriage must be by that route. So far as the parties knew, the Canal was open for traffic at the time when the contracts were made, but the question arises whether that is the date to be considered.

In *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*,[11] the first of the cases arising out of the Suez crisis to come before the court, McNair J. said[12]: "In principle, it seems to me that where a "contract expressly, or by necessary implication, provides that "performance, or a particular part of the performance, is to be "carried out in a customary manner, the performance must be "carried out in a manner which is customary at the time when "the performance is called for. This is particularly so in the "case of forward contracts like many c.i.f. contracts which call "for performance at some future date, when one bears in mind "that in mercantile matters custom and usage are subject to rapid "change: see the speech of Lord Wright in *Reardon Smith Line "Ltd.* v. *Black Sea and Baltic Insurance Co. Ltd.*[13]" I agree with this opinion as expressed by McNair J., and it follows that

[11] [1959] 1 Q.B. 131.
[12] Ibid. 145.
[13] [1939] A.C. 562; 55 T.L.R. 929; [1939] 3 All E.R. 444, H.L.

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these appeals must be considered in relation to the conditions existing at the date when the contracts were due for performance, and not when they were made.

There would seem therefore to be two questions to be considered: (1) In view of the fact that no customary or usual route was available at the time of performance, were the contracts frustrated? If the answer to this question is "Yes" then, of course, it is the end of the matter. But if the answer be in the negative, then (2) would shipment of the goods by the alternative route via the Cape be sufficient performance under the contracts? Ashworth J., in his judgment, addressed himself to the proper question when he said [14]: "In my judgment, in considering "whether a contract of this type has been frustrated by the dis- "appearance of the usual or customary route, one has to decide "(inter alia) whether an alternative route existed, and, if so, "whether performance by that route would 'render it a thing "'radically different from that which was undertaken by the "'contract' to quote the words of Lord Radcliffe in *Davis Con- "tractors Ltd.* v. *Fareham U. D. C.*" [15]

In dealing with the first question, Mr. Roskill cited the well-known passage from Kennedy on C.I.F. Contracts, 2nd ed., p. 39: "In the absence of express terms in the contract the customary "or usual route must be followed." Mr. Roskill agreed that this passage in Kennedy was the only authority for the proposition with the possible exception of the judgments in *L. Sutro & Co.* v. *Heilbut Symons & Co.*[16] This was a case of a c.i.f. contract made in 1916 for the sale of rubber to be shipped "by "vessel or vessels (steam or motor) from the East to New York "direct and/or indirect, with liberty to call and/or tranship at "other ports." The sellers made a declaration under the contract for the shipment of 15 tons to Seattle, a port on the Pacific coast, whereby they would go to New York by train. It was held by this court, Scrutton L.J. dissenting, that the proposed route was inconsistent with the terms of the contract, which was a contract for the carriage of goods by sea and not by land. In my judgment, this case does not help the sellers. It was dealing with a proposed route which was different in kind from anything contemplated by the buyers. The authority of the passage in Kennedy, however, has not been questioned by the buyers in these cases, nor, indeed, by the court.

But Mr. Roskill seeks to go further and say that if the usual route cannot be followed for reasons for which the parties cannot be held responsible, then the contract must be at an end. This is tantamount to saying that it was a term of the contract that the goods should be shipped via Suez. It means that the parties must be taken to have said at the time they entered into the contract: "It is agreed that these goods shall be shipped by the "customary or usual route provided that it is available at the time

[14] [1959] 3 W.L.R. 628.
[15] [1956] A.C. 729.
[16] [1917] 2 K.B. 348.

" of performance. If it is not, the contract is at an end even " though there is an alternative practicable route available." That such would be the mind of the parties seems to me to be most unlikely, and I can find no reason for the implication urged by Mr. Roskill. In my judgment, the proper implication is that the goods should be sent by the alternative route provided that performance by that route would not " render it a thing radically " different from that which was undertaken by the contract."

In *Green's* case McNair J. said[17]: " I feel no doubt at all " that the continued availability of the Suez route was a funda- " mental assumption at the time when the contract was made, " that to impose upon the sellers the obligation to ship by an " emergency route via the Cape would be to impose upon them a " fundamentally different obligation which neither party could, " at the time when the contract was made, have dreamed that " the sellers would be required to perform and that, if the parties " to the contract had thought of the matter at the time, both, " as reasonable men, would have accepted at once that, if the " Canal was closed for an indefinite period at a time when " the sellers were not in breach for failure to ship earlier, the " contract would be off."

Like my brethren and Ashworth J., I differ with reluctance from the view of a judge with such great experience of this branch of the law, but I have come to the firm conclusion that the second question should be answered in the affirmative, and that shipment by the Cape route would not be a performance radically different from that undertaken by the contract. It is true that the distance is much greater, and the expense would be increased, particularly if shipment was delayed, as we were told that freights were increased as time went on, but these matters of themselves are not necessarily sufficient, in my judgment, to transform the nature of the undertaking in the manner submitted by Mr. Roskill. The views of the commercial men engaged in these arbitrations are helpful in considering this problem, and it is significant that they all take the view that shipment round the Cape would be a proper tender under these contracts. I would dismiss both the appeals.

It remains to refer to what has been described as the " special " finding " in the " Tsak " case. Paragraph VI of the findings of the case stated reads as follows: " The performance of the con- " tract by shipping the goods on a vessel routed via the Cape of " Good Hope was not commercially or fundamentally different " from its being performed by shipping the goods on a vessel " routed via the Suez Canal." This finding appears only in the case stated in the " Tsak " case, and Diplock J. came to the conclusion that it was a finding of fact with which he should not interfere. He based his conclusion largely on the decision in *Jackson* v. *Union Marine Insurance Co.*[18] In that case the question at issue was whether the time required to do the

[17] [1959] 1 Q.B. 131, 149.

[18] L.R. 10 C.P. 125.

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necessary repairs to a ship was so long as to put an end in any commercial sense to the adventure. It is to be noted that in *Jackson's* case [18] the issue was the single one of time, and the question the jury had to answer was really one of degree. That is not the case here. The arbitrator has found, presumably on all the facts before him, and on his own knowledge of the conditions of the trade, that shipment by the Cape would not be fundamentally different from shipment through Suez.

This finding appears to be decisive of the question whether the contract has been frustrated and, therefore, to involve a question of law, or at the least to be a question of mixed fact and law, and I would have thought that the judge would have been entitled to come to a different conclusion had he thought fit. However, I have already come to the conclusion that this appeal should be decided in the same way as the appeal from Ashworth J., and it is unnecessary therefore to consider the matter further.

I would dismiss both the appeals.

HARMAN L.J. I take Gaon's case first. The sellers there take four points: (1) There should be read into the contracts by implication the words "via Suez." (2) There should be read into the contracts by implication the words "by the usual and customary route." (3) The exception clause absolves the shippers from delivery. (4) The closure of the Canal frustrated the commercial object of the adventure and operated as a solvent of the contracts.

As to (1). This was not pressed before us. It was rejected by Ashworth J. and, indeed, by all the judges who have considered these Suez cases. I need say no more than that I can see no excuse for writing in words which do not appear, and are not necessary either to the understanding or to the effectiveness of the contracts. They could only be inserted by invoking the doctrine of rectification which, on the facts, could not be supported.

As to (2). It was conceded in the court below, and I think admitted before us, that these words are to be read in ordinary circumstances into c.i.f. contracts. Where the parties differed was that the sellers argued that, where the usual and customary route proved to be unavailable at the time when performance of the contract became due, the contract was automatically at an end because their only obligation was to ship by the customary route and no other, while the buyers' case was that where the usual and customary route was, for whatever reason, unavailable at the time of performance, that did not of itself absolve the sellers, who remained bound to ship the goods by any alternative route which was available, so long as that route was not altogether outside what must be supposed to be the contemplation of the parties. For myself I feel some embarrassment at this argument. It assumes that there is some magic about shipping contracts and

[18] L.R. 10 C.P. 125.

that the ordinary rules do not apply. I am unwilling to accept this. The contracts here by their express terms bound the sellers to sell the goods to the buyers, and to deliver them by ship sailing within a fixed period to a European port, nothing being said about the port of departure, though the conditions annexed were appropriate to dispatch from a West African port. It was, however, agreed that both parties would know that an East African port was intended and that Port Sudan was the only such port available for the export of these goods. The sellers' duty, therefore, was to ship the goods from Port Sudan to the named Mediterranean port by a ship leaving within the given period. Why it should be necessary to imply such words as " by the usual and " customary route," I do not see. No doubt, as the case stated finds, both parties assumed that the goods would be shipped via Suez, that being the obvious way in normal circumstances. No doubt also it was for the sellers to ship by the route most likely to effect their obligation within a reasonable time, and this would normally involve shipment by the customary route because shipment by some other route would not be reasonable and, therefore, would not be performance of the contract. It might be, of course, that it was essential for the buyer to receive the goods within a given time, which could only be done by sending them via Suez; moreover, the goods might be of a nature which would not stand a route twice crossing the Equator. Considerations of this sort would require express mention in the contracts unless, indeed, evidence were available to show that both parties knew of them. There is not a word of such evidence and, in any event, it would not lie in the sellers' mouth to allege as an excuse for not shipping the goods provisions which could only be inserted or implied in order to protect the buyer to whom the choice between the two routes was a matter of indifference. Mr. Roskill's argument had the merit of simplicity, but in effect it is the same as argument No. (1) above. It goes like this: The route must be the usual and customary route; the only such route mentioned in the case is the Suez route; no one suggested that the Cape route had become the usual and customary route at any relevant time; therefore, the only obligation on the seller was to ship by Suez, and, that having become impossible, he is relieved of his bargain. This, in effect, is to write " via Suez " into the contract, and it is therefore the same as argument (1) which I have already rejected.

As to (3). The exceptions clauses in these contracts raise once more exactly the same point. They speak of force majeure preventing the shipment within the time fixed. Now if " ship- " ment " means placing the goods on a ship bound for the right destination, as I think it must, and if by the contract the destination may only be reached through Suez, then shipment became impossible when the Canal closed because there was no ship destined for the Mediterranean ports via the Canal, and this would represent force majeure preventing the shipment. If, however, you are not to write " via the Canal " into the contracts, there is

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no prevention because the evidence shows quite clearly that goods were being shipped during the contract period from Port Sudan to European destinations via the Cape, and that this route was available to the shippers who, in fact, freely availed themselves of it under other contracts.

As to (4). Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied on with success. It is, in fact, a kind of last ditch, and, as Lord Radcliffe says in his speech in the most recent case (*Davis Contractors* v. *Fareham U. D. C.*[19]), it is a conclusion which should be reached rarely and with reluctance. The doctrine used to be spoken of as that of "frustration of the "adventure," which seems to me to be more accurate than the modern expression "frustration of the contract." I agree with Sir David Cairns' submission that frustration is of two kinds; one brought about by the physical impossibility of performance as in *Taylor* v. *Caldwell*,[20] where the commercial adventure was a performance in a building which did not exist when the time came for it; or in the coronation cases, where the object of the adventure was to provide a view of a coronation procession which did not proceed; and, secondly, where the adventure is frustrated by the mere passage of time as in *Jackson's* case,[21] or in *Bank Line Ltd.* v. *Arthur Capel & Co.*[22] In both these cases the voyage which was the subject-matter of the adventure could eventually be undertaken, but at a distance of time so far removed from that contemplated by the contract that it was a different thing altogether.

I have always favoured the view that this doctrine when analysed proves to depend on the true construction of the contract. A man may only be released under this doctrine if he can truly say with the Virginian hero "Non haec in foedera veni"—as we were reminded at the Bar—"This was not the bargain I made; the "contract properly construed does not provide for the event which "has happened and is therefore not binding because it has no "application." Hardship or unexpected expense falling on one of the parties to a commercial adventure can never excuse him from it so long as the adventure remains recognisably that upon which the parties embarked.

The appeal tribunal which stated the case here, after finding as a fact that the sellers could have shipped the contracted goods within the contract period, and that it would have been more expensive to ship via the Cape rather than via the Canal, concluded that this did not make the performance of the contracts commercially impossible. This last is, I think, a conclusion of law from the facts found and is not binding upon this court, but the opinion expressed must necessarily be of great weight because it is the opinion of commercial men well acquainted with the

[19] [1956] A.C. 727.
[20] (1863) 32 L.J.Q.B. 164.
[21] L.R. 10 C.P. 125, D.C.
[22] [1919] A.C. 435; 35 T.L.R. 150, H.L.

situation. It was said that this impossibility is a question of degree, and in so far as it is, the question is one of fact, but in the end the question of frustration or no is one for the court, and in my judgment Ashworth J. came to a correct conclusion and one with which I agree.

I must face the fact that this involves disagreeing with the decision of McNair J. in *Green's* case,[23] for I cannot see any distinction between that case and this. Both arise out of the same events; both concern c.i.f. contracts, and, though the form of the contracts and their dates differ to some extent, I do not think the differences are relevant. It is true that in *Green's* case [23] the contract was made on September 6 when, perhaps, the storm clouds did not so far cover the horizon as at the dates involved in the instant case, namely, October 12 and still more October 31, but it was found as a fact that on October 12 the parties still assumed that the Canal would be available. There is no such finding as to October 31, by which time hostilities likely to affect the Canal had already begun, but there is nothing to justify the view that the Cape route was even then contemplated. I do not feel that *Green's* case [23] can be distinguished on the mere ground of difference in date.

I admit that dissent smacks of temerity, but I am consoled by the fact that all the commercial arbitrators have negatived frustration, and that McNair J. alone among the judges who have considered the problem was of the other opinion. This opinion when questioned proves to depend on a mere consideration of the length of the voyage. This, no doubt, was an important difference, and after November 9 involved the sellers in an unexpected expense, but as I have already pointed out, neither the date of arrival nor the physical circumstances of the voyage can be supposed to be circumstances vitally affecting the practicability of the adventure. Both these events affect the interest of the buyer and are indifferent to the seller, who is not warranted in sheltering behind them in order to save, what is alone affected, his pocket.

The case shows clearly that trade in these goods between these ports was not stopped by the closure of the Canal; it was merely diverted, and I am quite unable to agree that the doctrine of frustration can relieve the sellers from their obligations.

I would dismiss this appeal.

As to the Tsakiroglou case, Diplock J. did not feel himself at liberty to consider whether he would have treated it as a case of frustration. Having concurred in the findings of McNair J. in *Green's* case [24] so far as the time of performance is the relevant one and not the time of the contract, he found himself confronted by what has been called the " special finding " of the appeal board in paragraph 12 (vi) of the case stated. I need not repeat the words of this special finding, which the judge treated as a finding

[23] [1959] 1 Q.B. 131.

[24] [1959] 1 Q.B. 131.

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of fact like an answer given by a jury in answer to a judge's charge. The judge therefore treated himself as bound by this finding, and, interpreting it as being equivalent to a finding that the adventure was frustrated, he held himself bound to accept it. I do not think I should have taken this view. The finding seems to me to be, in fact, the expression of an opinion to the effect that the one voyage was not commercially or fundamentally different from the other. At the highest it was, I think, the finding of a secondary fact, namely, an inference from the primary facts. Such an inference is, as I understand it, open to review in an appellate court. In my judgment, therefore, the judge should have treated himself as free to express his own opinion on this question. Had he done so he might have felt bound to follow McNair J. This case, however, if the special finding be ignored, seems to me indistinguishable from Gaon's case, in which Ashworth J. refused to follow McNair J., a decision with which I agree.

In my judgment, therefore, Diplock J. came to the right conclusion, though by a different and mistaken route.

Appeals dismissed with costs.

Leave to appeal to the House of Lords on terms imposed on the sellers.

Solicitors: *Richards, Butler & Co.; Bernard Samuel Berrick & Co.; Rowe & Maw.*

I. G. R. M.

[COURT OF APPEAL.]

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March 31; *April* 1.
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[1958 H. No. 1288.]

Damages—Personal injuries—Special damage—Award of lump sum disablement gratuity—Proportion which had "accrued" in respect of industrial injury benefit—Amount to be deducted from loss of earnings—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 *Geo.* 6, *c.* 62), *ss.* 7, 12 (1) (2) (3) (4) (5) (6)—*Law Reform (Personal Injuries) Act*, 1948 (11 & 12 *Geo.* 6, *c.* 41), *s.* 2 (1) (6) (*c*)—*National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations*, 1957 (*S.I.* 1957, *No.* 2074), *Sch.* 1, *Pt. II.*

Costs—Payment into court—Lesser sum awarded—Issue on which plaintiff succeeded—Contributory negligence contested—Whether plaintiff entitled to costs of contested issue—Exercise of discretion—R.S.C., Ord. 22, *r.* 6.

The plaintiff, a machine operator, was injured owing to breach by his employers of their duty under section 14 (1) of the Factories Act, 1937. Thirteen weeks after the injury, the degree of his disability was assessed, under section 12 of the National Insurance (Industrial Injuries) Act, 1946,[1] and the regulations made thereunder, at 14 per cent. "for life," and he received a lump sum gratuity of £210. He was then aged 36 and his expectation of life was agreed at 35 years.

In an action by the plaintiff against his employers the judge awarded him £550 as general damages; but he deducted from the agreed special damage, on his construction of section 2 (1) of the Law Reform (Personal Injuries) Act, 1948,[2] one-half of the lump sum disablement gratuity. Section 2 (6) [which provides that: "For the purposes of this section . . . (*c*) an industrial "disablement grauity shall be treated as benefit for the period "taken into account by the assessment of the extent of the disable-"ment in respect of which it is payable"] was not cited nor referred to by the judge. On appeal by the plaintiff:—

Held, that on the true construction of section 2 (6) (*c*) of the Act of 1948, read with section 12 of the Act of 1946, the amount of a disablement gratuity for life which the court had to take into account under section 2 (1) of the Act of 1948 as "the value of "any rights which have accrued or probably will accrue to" the injured person "therefrom in respect of industrial injury benefit ". . . for the five years beginning with the time when the cause "of action accrued . . . " was one-half of such proportion of the gratuity as the five-year period (or the unexpired portion of that period) bore to the injured person's expectation of life, or to any lesser period specified for the duration of the gratuity. Accordingly, on the agreed expectation of 35 years' life the deduction from the gratuity of £210 should be one-half of £30 (post, pp. 894, 896).

[1] National Insurance (Industrial Injuries) Act, 1946, s. 12: "(4) The "period to be taken into account by "an assessment of the extent of a "claimant's disablement shall be the "period (beginning not earlier than "the end of the injury benefit period, "and limited by reference either to "the claimant's life or to a definite "date) during which the claimant has "suffered and may be expected to "continue to suffer from the relevant "loss of faculty: . . . (5) An assess-"ment shall state the degree of "disablement in the form of a per-"centage and shall also specify the "period taken into account thereby "and, where that is limited by refer-"ence to a definite date, whether the "assessment is provisional or final: "". . . (6) Where the extent of the "disablement is assessed for the "period taken into account as "amounting to less than twenty "per cent., disablement benefit shall "be an industrial disablement "gratuity (in this Act referred to as "a 'disablement gratuity')—(*a*) of "an amount fixed, in accordance with "the length of the said period and "the degree of disablement, by a pre-"scribed scale, . . . The scale "prescribed for the purposes of this "subsection shall be the same for all "persons . . ."

[2] Law Reform (Personal Injuries) Act, 1948, s. 2: "(1) In an action for "damages for personal injuries (in-"cluding any such action arising out "of a contract), there shall in assess-"ing those damages be taken into "account, against any loss of earn-"ings or profits which has accrued or "probably will accrue to the injured "person from the injuries, one half "of the value of any rights which "have accrued or probably will accrue "to him therefrom in respect of "industrial injury benefit, indus-"trial disablement benefit or sick-"ness benefit for the five years "beginning with the time when the "cause of action accrued. . . . (6) "For the purposes of this section— ". . . (*c*) an industrial disablement "gratuity shall be treated as benefit "for the period taken into account "by the assessment of the extent of "the disablement in respect of which "it is payable."

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Per Sellers and Ormerod L.JJ. When benefits have been assessed and are ascertainable the words "shall be taken into account" in section 2 (1) mean "shall be deducted"; and where the court has to assess the value of any rights which "probably will accrue" the court will take them into account by way of an estimated allowance (post, p. 894).

Per Upjohn L.J. Section 2 (1) does not require any exact calculation to be made, and where evidence is lacking the court will make a rough and ready assessment of the proper proportion of the gratuity to be taken into account (post, p. 897).

Perez v. *C.A.V. Ltd.* [1959] 1 W.L.R. 724; [1959] 2 All E.R. 414 approved.

Roberts v. *Naylor Brothers Ltd.* [1959] 1 W.L.R. 718; [1959] 2 All E.R. 409 overruled.

Decision of Finnemore J. reversed in part.

The employers had before trial paid into court under R.S.C., Ord. 22, r. 6,[3] a sum in excess of the total damages awarded by the judge. At the trial they admitted liability for breach of statutory duty but contested, unsuccessfully, the issue of contributory negligence. The plaintiff claimed, on the authority of the note to R.S.C., Ord. 22, r. 6, and the cases there cited (Annual Practice, 1960, at p. 535), that he was entitled to the costs of the issue on which he had succeeded. The judge awarded the employers their costs from the date of their payment in, but granted the plaintiff leave to appeal from that order.

Per curiam. The question whether a plaintiff who has recovered a sum less than that paid into court before trial is entitled to the costs of an issue on which he has succeeded is a matter wholly in the discretion of the trial judge. The cases cited in the note to R.S.C., Ord. 22, r. 6, are not authorities which require a judge to grant such costs, or which require the Court of Appeal to intervene if he fails to do so (post, p. 896).

APPEAL from Finnemore J.

A milling machine operator, Thomas Moffat Hultquist, then aged 36, sustained an accident at work on December 9, 1957, as a result of which the whole of the index finger of his right hand had to be amputated. The cosmetic result was excellent, and he was left with a reasonable though impaired grip. He was away from work for 13 weeks until March, 1958, when he went back to his skilled employment, suffering no loss of wages and still able to do his job.

His total loss of wages during the 13 weeks was £197 18s. 6d. He received for that period, under the provisions of the National Insurance (Industrial Injuries) Act, 1946, and the regulations made thereunder, £61 1s. 6d. industrial injury benefit; and as from March 16, 1958, a disablement gratuity of £210, that being a

[3] R.S.C., Ord. 22, r. 6: "Except "in an action to which a defence of "tender before action is pleaded or in "which a plea under the Libel Acts, "1843 and 1845, has been filed, no "statement of the fact that money "has been paid into Court under the "preceding Rules of this Order shall "be inserted in the pleadings and "no communication of that fact shall "at the trial of any action be made "to the Judge or Jury until all questions of liability and amount of debt "or damages have been decided, but "the Judge shall, in exercising his "discretion as to costs, take into "account both the fact that money "has been paid into Court and the "amount of such payment."

final assessment of 14 per cent. loss of faculty stated to be "for "life," calculated in accordance with the relevant provisions of Schedule 1, Part II, of the National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations, 1957 (S.I. 1957, No. 2074). His actuarial expectation of life was agreed at 35 years.

He brought an action against his employers, the Universal Pattern and Precision Engineering Co. Ltd., claiming damages for alleged negligence and breach of the statutory duty to fence the milling machine securely, as required by section 14 (1) of the Factories Act, 1937. His claim for special damages was agreed at £197 18s. 6d. for loss of wages. The employers denied negligence and breach of statutory duty, and alleged, alternatively, contributory negligence by the plaintiff. In September, 1958, after medical reports had been agreed, they paid into court under R.S.C., Ord. 22, r. 6, the sum of £700.

At the trial before Finnemore J. at Lewes Assizes on March 16, 1959, the employers admitted liability for breach of statutory duty but contested the issue of contributory negligence. The trial judge held that the plaintiff had not been guilty of contributory negligence and awarded him £550 by way of general damages.

The judge then considered the question as to what deductions fell to be made from the special damages of £197 18s. 6d. under the Law Reform (Personal Injuries) Act, 1948, s. 2 (1). It was agreed that half of the accrued industrial injury benefit of £61 1s. 6d., namely £30 10s. 6d., fell to be deducted under that subsection.

On the deduction to be made from the lump sum disablement gratuity of £210, the judge said that there had been conflicting decisions among judges of the Queen's Bench Division as to whether section 2 (1) of the Act of 1948 required the whole of that sum or only a certain proportion of it to be taken into account, but that he would follow his own earlier decision in an unreported case in 1958 (*Watkin* v. *C. A. Parsons & Co. Ltd.*[4]), that when a lump sum payment had been made within the five-year limit the whole of that sum should be taken into account as money due under a right which had accrued during the five years. He accordingly deducted half the lump sum gratuity or £210, namely £105, thus reducing the special damages to £62 7s. 6d. That sum, together with the award of £550 general damages, produced an award of £612 7s. 9d. total damages for the plaintiff.

As the sum of £700 paid into court exceeded that award, counsel for the plaintiff submitted that the note to R.S.C., Ord. 22, r. 6, in the Annual Practice, 1960 (at p. 535),[5] and the

[4] (1958) Unreported, January 15 (Newcastle Assizes).

[5] "If defendant in an action for "unliquidated damages denies lia- "bility but pays money into court, "and plaintiff proceeds with action, "there are two distinct issues "raised, namely (*a*) whether the "defendant is under any liability to "the plaintiff, and (*b*) whether the

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authorities there cited, supported the submission that the plaintiff should have his costs down to the date of the payment in, and the subsequent costs on the issue of contributory negligence on which he had succeeded. For the defendants it was submitted that they should have the costs of the action since the date of payment in, "in the ordinary way," and that under R.S.C., Ord. 65, costs were always in the discretion of the court. Finnemore J. ordered that the plaintiff should have his costs up to the time of the payment in, and that the defendants should have their costs thereafter; but he granted leave to the plaintiff to appeal on that order, expressing the view that it was an important point. The plaintiff appealed (a) against the quantum of general damages awarded; (b) against the judge's application of section 2 (1) of the Act of 1948 to the lump sum disablement gratuity; and (c) against the order as to costs.

Rose Heilbron Q.C. and *John Stocker* for the plaintiff.
Fenton Atkinson Q.C. and *H. Tudor Evans* for the employers.

The following cases, in addition to those referred to in the judgments of the court, were cited during argument: *Powell* v. *Vickers, Sons & Maxim Ltd.*[6]; *Gray* v. *Jones*[7]; *Wagstaffe* v. *Bentley*[8]; *Donald Campbell & Co.* v. *Pollak*[9]; *Findlay* v. *Railway Executive*[10]; *Fitzgerald* v. *Thomas Tilling Ltd.*[11]

Cur. adv. vult.

SELLERS L.J. stated the facts set out above and said that on the first ground of appeal that the general damages of £550 should be substantially increased, the medical reports had been agreed, and the only task for the judge was to assess the appropriate damages. He had done so fairly and adequately, and his Lordship could see no reason for disturbing the assessment. His Lordship continued: The second ground of appeal is more involved and raises, for the first time in this court, a question on which there has been a conflict of judicial opinion; Finnemore and Paull JJ. have taken one view, and Stable, Ashworth and Edmund Davies JJ. another. Mr. Atkinson has contended that neither view is correct and he has submitted an alternative.

The special damage claimed by the plaintiff was £197 18s. 6d. loss of wages, and this was an agreed sum, but from this sum

"sum paid in is sufficient to cover "the liability, if any. If the plaintiff "succeeds in recovering from the "defendant an amount which carries "costs, even though it is less than "the sum paid into court, he succeeds "on the first of those issues, and is "entitled to the whole costs of the "action down to payment in, and the "subsequent costs of the issue on "which he has succeeded."

[6] [1907] 1 K.B. 71; 23 T.L.R. 78.
[7] (1939) 55 T.L.R. 437; [1939] 1 All E.R. 798.
[8] [1902] 1 K.B. 124, C.A.
[9] [1927] A.C. 732, 812; 43 T.L.R. 787, H.L.
[10] [1950] W.N. 570; 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969, C.A.
[11] (1907) 96 L.T. 718, C.A.

certain deductions have to be made, and it is here that the controversy has arisen. While he was off work the plaintiff received industrial injury benefit amounting to £61 1s. 6d., and at the end of that period of benefit he was awarded an industrial disablement gratuity of £210. The extent of disablement resulting from the loss of faculty was assessed at 14 per cent. for the period from March 16, 1958, for life. It was a final assessment.

The deductions arise under the Law Reform (Personal Injuries) Act, 1948, from which I cite the relevant provisions. [His Lordship read section 2 (1) and continued:] No difficulty arises in respect of the accrued injury benefit of £61 1s. 6d. It was accepted that credit should be given for half of that, namely, £30 10s. 9d. With regard to the disablement gratuity Finnemore J. has treated that as received and accruing within five years of the accident, and has allowed half of £210, namely £105, to be credited against the loss of wages, making a total of £135 10s. 9d., and so reducing the special damage to £62 7s. 9d.

The appellant submitted that it is erroneous on the facts of this case to take into account half of the gratuity of £210 because this sum was not an industrial disablement benefit for the five years beginning with the time when the cause of action occurred, but was a gratuity for life. The expectation of life of the appellant was agreed at 35 years and, therefore, the portion of the gratuity to be attributed to the first five years was one-seventh of £210, namely £30, and the appropriate credit was half of that, namely £15. The two credits together on this basis would amount to £45 10s. 9d. which, deducted from the loss of wages of £197 18s. 6d., would give special damages of £152 7s. 9d., making the total damages £702 7s. 9d. As £700 had been paid into court this became a vital figure on the question of costs.

In arriving at his decision Finnemore J. followed his own judgment in *Watkin* v. *C. A. Parsons & Co. Ltd.*,[1] and after considering a judgment to the contrary of Stable J. in *Meagher* v. *Parnall (Jute) Ltd.*[2] These two cases were considered and extracts were cited from them in *Roberts* v. *Naylor Brothers Ltd.*,[3] where Paull J. took the same view as Finnemore J., and also in the next case in the same reports, *Perez* v. *C.A.V. Ltd.*,[4] where Edmund Davies J. held, agreeing substantially with the unreported decision of Stable J., that the proper deduction under section 2 (1) from a plaintiff's loss of earnings to be made in assessing his special damage was such proportion of one-half of a life disablement gratuity as the years unexpired of the five-year period bore to the plaintiff's expectation of life at that time.

In another unreported case, *de Ridder* v. *Ford Motor Co. Ltd.*,[5] Ashworth J. took the same view as Stable and Edmund Davies

[1] (1958) unreported, January 15.
[2] (1958) unreported, March 3 (Bristol Assizes).
[3] [1959] 1 W.L.R. 718, 721; [1959] 2 All E.R. 409.
[4] [1959] 1 W.L.R. 724; [1959] 2 All E.R. 414.
[5] (1958) unreported, October 3.

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JJ., and held that " for " in the phrase " for the five years " does not indicate that all money received in the period of five years has to be deducted in the proportion of one-half, but that the court is faced with the task of assessing the benefit attributable to the loss during that period.

The vexed question which brought about this difference of opinion was thought by at least some of the judges mentioned to have been a difficulty which had not occurred to the draftsman of the Act of 1948. But, although it does not appear to have been referred to in the argument of counsel, or in any of the several judgments delivered on this point, section 2 (6) (*c*) of the Act in question provides that for the purpose of section 2 " an industrial " disablement gratuity shall be treated as benefit for the period " taken into account by the assessment of the extent of the " disablement in respect of which it is payable." By this provision, as I read it, the draftsman had anticipated and had provided for the uncertainty which the earlier part of the same section, that is, subsection (1), might contain. If this provision had been read there might well have been unanimity among the judges and agreement with the view expressed by Edmund Davies J. in the only reported case to this effect.[4]

Mr. Atkinson, while recognising the applicability of section 2 (6) (*c*), submitted that to interpret it correctly one had to consider the structure of the provision of these benefits and payments; and the effect was, he alleged, that the benefit all accrued within seven years, and this worked out at 11s. 8d. a week or £30 a year, and therefore, for the five-year period, the total benefit of the gratuity would be £150, and half of that would give a credit of £75.

In order to follow this argument it is necessary to refer in some detail to the provisions made for compensating persons disabled in industry in substitution for the benefit of the Workmen's Compensation Acts.

The National Insurance (Industrial Injuries) Act, 1946, provided a system of insurance against personal injury caused by accident arising out of and in the course of a person's employment. By section 7 provision is made (inter alia) for (a) industrial injury benefit and (b) industrial disablement benefit. Section 12 states the circumstances in which an insured person shall become entitled to disablement benefit. By subsection (2) the extent of disablement has to be assessed by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty in accordance with principles laid down in the subsection. Subsection (3) provides that regulations may be made for further defining the principles of assessment and for treating a loss of faculty as a prescribed degree of disablement. Subsection (4) reads, without the proviso: " The period to be taken " into account by an assessment of the extent of a claimant's

[4] [1959] 1 W.L.R. 724.

" disablement shall be the period (beginning not earlier than the " end of the injury benefit period, and limited by reference either " to the claimant's life or to a definite date) during which the " claimant has suffered and may be expected to continue to suffer " from the relevant loss of faculty." Subsection (5) reads, without the proviso: " An assessment shall state the degree of " disablement in the form of a percentage and shall also specify " the period taken into account thereby and, where that is " limited by reference to a definite date, whether the assessment " is provisional or final." Subsection (6), of which I shall read only part, provides: " Where the extent of the disablement is " assessed for the period taken into account as amounting to less " than twenty per cent., disablement benefit shall be an industrial " disablement gratuity (in this Act referred to as a ' disablement " ' gratuity ')—(*a*) of an amount fixed, in accordance with the " length of the said period and the degree of disablement, by a " prescribed scale, but not in any case exceeding one hundred and " fifty pounds; and (*b*) payable, if and in such cases as regulations " so provide, by instalments. The scale prescribed for the pur- " poses of this subsection shall be the same for all persons, except " that a lower amount may be fixed thereby for cases where at the " beginning of the period taken into account by the assessment " the beneficiary is under the age of eighteen . . ."

The rates of disablement pension were set out in the Third Schedule to the Act of 1946, but these have been replaced by new rates established by the Second Schedule to the National Insurance (No. 2) Act, 1957. The current scale of disablement gratuities is contained in the National Insurance (Industrial Injuries) (Increase of Benefit and Miscellaneous Provisions) Regulations (S.I. 1957, No. 2074), First Schedule, Part II, which fixes the new amount of gratuity for degrees of disablement from 1 per cent. to 19 per cent. Under these provisions the maximum amount of disablement gratuity for disablement of less than 20 per cent. is £280. The weekly pension ranges from 85s. for 100 per cent. disablement to 17s. for 20 per cent. disablement, there being a reduction of 8s. 6d. a week for every 10 per cent. decrease in extent of disablement.

It is provided by the National Insurance (Industrial Injuries) (Benefit) Regulations (S.I. 1948, No. 1372), reg. 3: " Where " the extent of a claimant's disablement is assessed at any of " the degrees of disablement severally specified in the first column " of the Second Schedule to these regulations, the amount of any " disablement gratuity payable shall—(*a*) if the period taken into " account by that assessment is limited by reference to the claim- " ant's life or is not less than seven years, be the amount specified " in the second column of that Schedule as appropriate to that " degree of disablement; (*b*) in any other case, be an amount " which bears the same proportion to the amount so specified as " the period taken into account by the assessment bears to a

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"period of seven years, a fraction of a shilling being, for this "purpose, treated as a shilling."

It was therefore submitted for the respondents that as the lump sum payable for disablement gratuity was the same whether the assessment was for the claimant's life or for not less than seven years the gratuity was on the basis of a seven years' purchase and no more, and that was the only material period to be considered in assessing the benefit which had accrued for the five years since the accident.

Counsel submitted that section 2 (1) of the Act of 1948 when it refers to industrial disablement benefit has to be read in the light of section 2 (6) (*c*), and that the gratuity has to be treated as a payment of so much a week over seven years. On that basis there should be a credit of £75, and not either £105 as found by the judgment or £15 as claimed by the appellant. I do not so read the provisions. On the contrary, section 12 (5) of the Act of 1946 requires an assessment to state not only the degree of disablement in the form of a percentage (in this case 14 per cent. being the extent of the disablement), but also to specify the period taken into account thereby (in this case life). Subsection 6 (*c*) of the Act of 1948 requires the gratuity to be treated as benefit "for the period taken into account." Here that is for life and not for a period of seven years as the respondents contend.

This is the conclusion to which Edmund Davies J. came in the reported judgment, without reference to this vital subsection, and it is contrary to the views of Finnemore J. in this case.

The result is that where under section 2 (1) of the Act of 1948 there has to be taken into account against any loss of earnings or profits of the injured person one-half of the value of any rights which have accrued, or probably will accrue, to him therefrom in respect of industrial disablement benefit for the five years beginning within the time when the cause of action accrued, the amount of the disablement gratuity to be so taken into account should be half of such proportion of the gratuity as the five-year period (or the unexpired period thereof) bears to the injured person's expectation of life, if the gratuity is for life, or to any less period specified for the duration of the gratuity.

No point was taken before this court that the words "shall be "taken into account" meant anything other than "shall be "deducted," when the benefits have been assessed and so are ascertainable. All the judgments under review have so accepted it. I would agree with this view. But where the court has to assess the value of any rights which "probably will accrue" there can be no accurate assessment possible, and the court will then take them into account by way of an estimated allowance.

Mr. Atkinson made a further submission that, assuming that this construction is to be accepted, as £210 had in fact been received within the five-year period it could be invested in the purchase of an annuity or otherwise, and was worth something

more than the aggregate of a succession of payments paid as each week fell due. Far from this point having been taken at the trial, at which Mr. Atkinson was not present, it seems to have been agreed that if the plaintiff was right in principle on this matter the total benefit to be taken into account was half of £30. I find nothing in the Act to support the respondents' argument, and section 2 (6) (*c*) is against it; and, having regard to the small amounts of gratuity, decreasing to £28 for 1 per cent. disablement, and the unlikelihood of the recipients so treating the gratuity or of it being contemplated that they would do so, I think common sense requires the argument to be rejected.

I, therefore, would allow the appeal on this point and, by reducing the credit from the sum of £105 which the judge awarded to the sum of £15, the total damages for which judgment should be entered are £702 7s. 9d. As this sum is in excess of the £700 paid into court, the plaintiff is entitled to the costs of the trial in substitution for the judge's order.

The appellant's third point of appeal does not therefore arise, but as Finnemore J. gave leave to appeal I will make brief reference to the submission.

As the matter stood at the trial, judgment was entered as far as costs were concerned with costs to the respondents up to the date of the payment into court, the defendants to recover against the plaintiff their costs of defence from the date of payment into court, both to be taxed.

In the course of the argument the judge said: "I think the "proper course to follow here is the one I confess I was always "brought up on—which is, that the plaintiff has his costs up to "the time of payment in and the defendant has the costs there-"after." The appellant had asked for the costs of the issue of liability on which he had succeeded, and in this court it was submitted that he was entitled to these costs. In my experience also it is very rarely that a plaintiff in such an action as this and in similar circumstances is awarded the costs of the issue of liability. It is a matter in the discretion of the trial judge and, whichever way he might exercise it, this court would not intervene except in special circumstances within the decision of *Evans* v. *Bartlam*.[6]

The action of tort consists of wrongdoing and damage resulting therefrom: *J. R. Munday Ltd.* v. *London County Council*[7]; and the plaintiff must prove both to obtain a judgment. On the face of it, there can be no complaint and no ground for an order for costs of the issue of liability because the plaintiff has been called on to prove a case to establish his right to damages and has failed to get more than the amount in court. A payment into court is an offer to dispose of the action and, if accepted, prevents all further costs. A plaintiff who continues an action after a payment in takes a risk

[6] [1937] A.C. 473; 53 T.L.R. 689; [1937] 2 All E.R. 646.

[7] [1916] 2 K.B. 331; 32 T.L.R. 559.

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and cannot normally complain if he has to pay all the costs which his acceptance of the offer would have avoided.

Order 22, rule 6, took its present form in 1933, and provided that payment into court should not be disclosed "to the Judge "or Jury until all questions of liability and amount of debt or "damages have been decided, but the Judge shall, in exercising "his discretion as to costs, take into account both the fact that "money has been paid into Court and the amount of such "payment." Counsel for the appellant relied on a number of cases cited in the White Book [Annual Practice, 1960, at p. 535] in the notes to this rule, and submitted that the plaintiff was entitled to the costs of the issue on which he had succeeded. Those cases must be treated as relying on their special facts. I do not think they can be regarded at the present time as authorities which require a judge to grant such costs, or which require this court to intervene if he fails to do so. The whole question must be dealt with in the discretion of the judge in accordance with the rule.

I entirely agree with the order Finnemore J. made in the circumstances as they then existed, but, if I did not, I do not think that this court could in the circumstances of the case have altered it.

The appeal will be allowed and judgment entered for the plaintiff for £702 7s. 9d. with costs here and below.

ORMEROD L.J. I have had an opportunity of reading the judgment which has just been delivered by my Lord, and I am in full agreement with it. There is nothing I wish to add.

UPJOHN L.J. I agree. I am unable to accept Mr. Atkinson's ingenious arguments that on the true construction of section 2 (6) (*c*) of the Law Reform (Personal Injuries) Act, 1948, the period taken into account by the assessment of the extent of the disablement is the period of seven years merely because that is, in fact, the number of years on which the gratuity is calculated. It seems to me quite plain that the "period taken into account" is the period which by statute must be stated in the assessment of the extent of the disablement, and, in this case, that is a period for life.

It follows, therefore, that half of the gratuity in question, that is, the sum of £105, must be taken as spread over the period of the life of the appellant. How is that to be done in practice? There seemed to me during the course of argument much to be said for taking the view that one ought to treat this sum of £105 as representing a capital sum which must be treated as invested in a pension for the life of the annuitant, and that would involve some computation by reference to the mortality and annuity tables to see what annuity this sum would purchase for a man aged, in this case, 35 years. If that be done it cannot be doubted that a higher pension would result than a mere division of £105 by

C. A.
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the expectation of life of the annuitant; and that, in this particular case, would have an all-important effect on the question of costs.

However, it seems to me, looking at subsection (1) of section 2 of the Act of 1948, that no precise or exact calculations were intended to be made. The trial judge may have to take into account industrial injury benefits which will probably accrue, but which may not have been assessed or finally assessed at the date of judgment. Small sums are involved, and, in fact, it is most unlikely that the beneficiary would in fact purchase an annuity with his gratuity.

The figures to be taken into account for the purposes of subsections (1) and (6) (*c*) have to be determined by the judge, and he will do so on the evidence before him, exercising his own judgment and common sense. If, for example, a gratuity is assessed for life but there is no evidence before the judge as to the beneficiary's expectation of life, he will, no doubt, make some rough and ready assessment of the proper proportion of the gratuity to be taken into account, just as Ashworth J., in my judgment quite rightly, did in *de Ridder* v. *Ford Motor Co. Ltd.*[8]

In this case there was evidence before the judge of the appellant's expectation of life, and the parties actually agreed on the figure to be taken into account on the footing that the appellant's contention was correct in law. In my judgment, that figure should be adopted in this case, with the result that my Lord has indicated.

Appeal allowed.

Judgment entered for the plaintiff for the sum of £702 7s. 9d. with costs in the Court of Appeal and below.

Leave to appeal to the House of Lords refused.

Solicitors: *W. H. Thompson; Carpenters.*

M. M. H.

[8] (1958) unreported, October 3.

[CHANCERY DIVISION.]

PIKE AND OTHERS *v.* MICHAEL NAIRN & CO. LTD.

1960
March 22;
April 7.
Cross J.

[1959 P. 758.]

Practice—Originating summons—Service—Waiver—Originating summons by tenants for grant of new tenancy—Summons not served on landlords—Summons adjourned generally on tenants' application—No application by tenants to restore—Application by landlords to dismiss summons for want of prosecution—Whether landlords entitled to be heard—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *s.* 64 (1)—*R.S.C., Ord.* 53D, *r.* 5 (1) (2) (3), *r.* 6; *Ord.* 54, *r.* 4E.

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Tenants took out an originating summons, to which they made their landlords respondents, asking for a new tenancy of the demised premises under Part II of the Landlord and Tenant Act, 1954.[1] The summons stated that the landlords had given a notice purporting to determine the tenancy on June 24, 1959, and that they would oppose any application to the court for the grant of a new tenancy on the ground that they intended to demolish the premises or a substantial part thereof. The tenants did not serve the summons on the landlords, but themselves, on May 6, attended before the master and obtained an order that the summons stand over generally with liberty to restore. By chance a representative of the landlords' solicitors was present and heard the order made. The tenants never applied to restore the summons and on February 24, 1960, the landlords took out a summons asking that the tenants' originating summons be dismissed for want of prosecution. On a contention by the tenants that the landlords, not having been served with the originating summons, had no locus standi and could not be heard unless and until the tenants chose to serve it on them:—

Held, that defendants or respondents to an originating summons, which was analogous to a writ, could waive service of the summons on themselves and enter an appearance to it, and that, since R.S.C., Ord. 53D, r. 5 (1), provided that an appearance need not be entered, the landlords could, if they chose, claim to be heard on the summons. Accordingly, the summons must be referred back to the master with directions to hear it, after giving each side an opportunity to file evidence.

Per curiam. This case illustrates the urgent need for reform of the existing procedure in cases under Part II of the Landlord and Tenant Act, 1954, the unsatisfactoriness of which was pointed out

[1] Landlord and Tenant Act, 1954, s. 64: "(1) In any case where—"(*a*) a notice to terminate a tenancy "has been given under Part I or Part "II of this Act or a request for a "new tenancy has been made under "Part II thereof, and (*b*) an application to the court has been made "under the said Part I or the said "Part II, as the case may be, and "(*c*) apart from this section the effect "of the notice or request would be to "terminate the tenancy before the "expiration of the period of three "months beginning with the date on "which the application is finally disposed of, the effect of the notice or "request shall be to terminate the "tenancy at the expiration of the said "period of three months and not at "any other time."

R.S.C., Ord. 53D, r. 5: "(1) An "originating summons under any of "the preceding rules shall be instituted "in the matter of the property in question and of the Act under which the "claim or application is made and no "appearance need be entered thereto. "(2) Any such summons shall be "returnable at a date which will "allow at least 14 days to elapse "between the date of the service on "the respondent and the return date. "(3) No affidavit shall be filed in the "first instance in support of or in "answer to any such summons, but "on the return day or at any subsequent hearing such directions shall "be given as to the filing of affidavits "and otherwise as to the course of "the proceedings (including, if need "be, the giving of notice to other "persons or the making of other "persons parties to the proceedings) "as may appear expedient."

R. 6: "(1) Any person affected by "any proceedings on any originating "summons under r. 2 or r. 3 of this "Order may apply in Chambers to "be made a party to the summons "and the court or judge may give "such directions in the matter as may "appear necessary."

Ord. 54, r. 4E: "Every summons, not being an originating "summons to which an appearance is "required to be entered, shall be "served two clear days before the "return thereof unless in any case it "shall be otherwise ordered: Provided "that in case of summonses for time "only, the summons may be served "on the day previous to the return "thereof."

by the Committee on Chancery Chambers and the Chancery Registrars' Office in paragraphs 68 and 72 of their report. So long as the rules do not provide for the automatic dismissal of a summons which is not promptly served, there appears to be nothing to prevent an applicant from issuing a summons and putting it in his pocket; but where, as here, applicants obtain a return day and appear before the master, and the respondents do not appear, masters should in future inquire if the summons has been served, and, if it has not, direct service of it unless they are satisfied that the respondent knows of its issue and consents to its standing over.

PROCEDURE SUMMONS.

The following statement of facts is taken from the judgment of Cross J.: On April 13, 1959, the applicants, Oliver Noel Pike, Sam Rostron and Doreen Mary Pike, who claimed to hold a tenancy of certain premises at Greenwich from the respondents, Michael Nairn & Co. Ltd., took out an originating summons to which they made that company respondents, asking for the grant of a new tenancy of the premises under Part II of the Landlord and Tenant Act, 1954. It is stated in the body of the summons that on December 16, 1958, the respondents had given a written notice to the first two applicants purporting to determine the tenancy on June 24, 1959, and saying that they would oppose any application for the grant of a new tenancy on the ground that they intended to demolish the premises, or a substantial part of them. By virtue of section 64 (1) of the Landlord and Tenant Act, 1954, the issue of the summons had the effect of extending any existing tenancy of the applicants until the expiration of three months from the date when the application should be finally disposed of. Order 53D, rule 5 (1), provides that no appearance need be entered to an originating summons asking for a new tenancy under the Act of 1954. The summons issue in this case was therefore in the form prescribed in Appendix K, No. I.G., to the Rules of the Supreme Court. It called on the respondents to attend on the hearing of this application before the master at his room at the Royal Courts of Justice at the time specified in the margin—which was May 6, 1959, at 11.30 in the morning. It further informed them that they need not enter an appearance, but that if they did not attend by their solicitor at the time and place mentioned such order would be made and proceedings taken as the judge might think just and expedient.

The applicants did not serve the summons on the respondents at all, but they attended themselves before the master on May 6 and asked for and obtained an order that the summons should stand over generally with liberty to restore. By pure coincidence, a representative of the solicitors acting for the respondents happened to be in the master's room at the time waiting for another case in which he was engaged to come on, and heard what was done in this case on that occasion. No step was since taken by the applicants to restore the originating summons.

On February 24, 1960, the respondents took out a summons

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against the applicants in the pending proceedings asking for an order that the originating summons be dismissed for want of prosecution on the ground that the applicants had failed to serve it on the respondents or to take any steps to proceed with it since the date of its issue, or for such further or other order or direction as the court might think fit to make. The applicants contended that the respondents, not having been served with the originating summons, had no locus standi in the case at all and that, unless and until the applicants chose to serve the originating summons on them, they could not be heard.

G. Avgherinos for the respondent landlords.

R. E. Megarry Q.C. and *Leslie Joseph* for the applicant tenants.

The following cases referred to in argument were not cited in the judgment: *Kistler* v. *Tettmar* [2]; *Boltons* v. *Oppenheim* [3]; *Tennant* v. *London County Council* [4]; *Rhyl Amusements Ltd.* v. *Rhyl Urban District Council* [5]; *In re Tuck.* [6]

Cur. adv. vult.

April 7. CROSS J. read the following judgment, in which he stated the facts and continued: Order 54, rule 4 (*e*), provides that every summons, not being an originating summons to which an appearance is required to be entered, shall be served two clear days before the return thereof unless in any case it shall be otherwise ordered; but rule 5 (2) of Order 53D provides that an originating summons under the Act of 1954 shall be returnable at a date which will allow at least 14 days to elapse between the date of service on the respondent and the return date. Rule 5 (3) of the same Order provides that no affidavit need be filed in the first instance in support of or in answer to any such summons but that on the return day or at any subsequent hearing such directions shall be given as to the filing of affidavits and otherwise as to the course of the proceedings including, if need be, the giving of notice to other persons or the making of other persons parties to the proceedings as may appear expedient. These rules obviously assume that the applicant will serve the summons on the respondent at least 14 days before the return date, and that the respondent will have an opportunity of attending on that date before the master and making such representations as he wishes to make with regard to the future course of the proceedings. [His Lordship referred to the facts and continued:]

I should be very sorry to have to give effect to applicants' contention. By the mere issue of a summons under this Act the tenant extends his existing tenancy until the proceedings are

[2] [1905] 1 K.B. 39; 21 T.L.R. 24, C.A.

[3] [1959] 1 W.L.R. 685; [1959] 3 All E.R. 90.

[4] (1957) 121 J.P. 428, C.A.

[5] [1959] 1 W.L.R. 465; [1959] 1 All E.R. 257.

[6] [1906] 1 Ch. 692; 22 T.L.R. 425, C.A.

disposed of. If the rent which he is paying is less than the rent which he will have to pay under a new lease, if he gets one, he has an incentive to delay the proceedings as long as possible, and the worse his case the greater is the incentive. Since the rules do not provide that a summons shall lapse if not served within a specified time an obvious means of gaining time is to issue the summons and not serve it. There may, of course, be cases in which it is right that the application for a new tenancy should stand over pending the determination of some other issue between the parties with regard to the existing tenancy, but even in such cases the respondent should have an opportunity of being heard when the question of standing over the summons is being considered. I am, therefore, glad to say that, in my judgment, the applicants' submission is unfounded. The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him: see *Fell* v. *Christ's College, Cambridge* [1]; *Oulton* v. *Radcliffe*.[2] Counsel for the applicants, while conceding that a defendant to an action commenced by writ—which is the traditional process of the court—could enter an appearance without being served, contended that a defendant or respondent to an originating summons could not do so, since the originating summons is simply the creature of the Rules of Court made under the Judicature Act. In this connection he relied on the decision of Bacon V.-C. in *Fraser* v. *Cooper-Hall*.[3] In that case, defendants, who were thinking of bringing a counterclaim not only against the plaintiffs but also against a third person who was not a party to the action, delivered their defence and counterclaim, which named the third party as one of the defendants to the counterclaim, to the solicitors acting for the plaintiffs, who happened also to be the solicitors for the third party. These solicitors purported to enter an appearance on behalf of the third party to the counterclaim, though it had never been served on him under the rule which then corresponded to Order 21, rule 12. The judge held that although, for some purposes, counterclaims were to be treated as independent actions, someone who was not a party to an action who happened to hear that the defendants had printed and delivered to the plaintiffs a defence and counterclaim which named him as a defendant to the counterclaim, was not entitled to enter an appearance to the counterclaim as though the delivery of the counterclaim to the plaintiffs was equivalent to the issue of a writ against him. That case does not appear to me to have any bearing on this. An originating summons is strictly analogous to a writ; indeed, in some cases at least, proceedings started by originating summons are "actions" within the meaning of that word as used in the

[1] (1787) 2 Bro.C.C. 278.
[2] (1874) L.R. 9 C.P. 189.
[3] (1883) 23 Ch.D. 685.

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Rules of Court, and I see no reason why a defendant or respondent to an originating summons should not be able to waive service of the summons on him and enter an appearance to it. The applicants then point out that, even if this is so, the respondents in this case have not in fact entered an appearance, but Order 53D, rule 5 (1), provides that they need not do so, and therefore, in my judgment, they can, if they choose, waive service and claim to be heard on the summons.

Suppose that the respondents, having heard of the issue of this summons, had instructed their solicitors to appear for them on the return day—as the summons directed—and to oppose an adjournment, could the applicants have prevented the master from hearing them? Counsel for the applicants was forced to submit that they could, and in order to make his case consistent he was forced to go further and submit that the master would have had no power under rule 5 (3) to order the applicants to serve the summons on the respondents. This is a reductio ad absurdum of the whole argument. Order 53D, rule 6, provides that persons who have not been made parties to the summons in the first place may apply to the court to be joined as parties. It would be the height of absurdity if a man who has not been named as a party at all could claim to be heard, while a man who had been made a party had no locus standi because he had not been served.

Counsel for the applicants finally submitted that even if the respondents could be heard, they could not under the rules apply to dismiss the originating summons for want of prosecution unless the case amounts to an abuse of the process of the court. I have not heard the respondents on that point, and I express no view on it, nor do I express any view as to whether what the applicants have done or have not done in this case amounts to an abuse of the process of the court. Their failure to serve the summons on the respondents certainly calls for some explanation, but they may be able to give some explanation of it which does not involve an admission that they have abused the process of the court. All that I shall do is to send the summons back to the master with directions to him to hear it after giving each side an opportunity to file such evidence on it as they wish.

In conclusion, I would add this. The Committee on Chancery Chambers and the Chancery Registrars' Office have pointed out in paragraphs 68 and 72 of their recent report,[4] that the existing procedure in cases under Part II of the Landlord and Tenant Act,

[4] Report of the Committee on Chancery Chambers and the Chancery Registrars' Office (1960), Cmnd. 967: Para. 68: "Forms of Originating "Summons. These are multifarious "at present and have been increased "in recent years as can be seen by "the fact that Orders 53 to 55 are "continually being extended. We "can see no reason why proceedings "under statutes should be differentiated one from another nor why in "some cases it should be thought "right to name no plaintiffs or "defendants but only applicants and "respondents. This is a mere trap "for the unwary. Again there seems "no reason why in some cases no "appearance needs to be entered "while in others it may be required. "A striking example of the former is "in proceedings under Order 53D

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1954, is very unsatisfactory. This case illustrates how urgently it is in need of reform. So long as the rules contain no provision for the automatic dismissal of a summons which is not promptly served, there appears to be nothing to prevent an applicant from issuing a summons and putting it in his pocket. Where, however, as here, the applicants obtain a return day and appear before the master on it, and the respondents do not appear, I think that, in order to prevent abuse so far as possible, the masters should in future inquire whether the summons has been served, and if it has not been should direct service of it, unless they are satisfied that the respondent in fact knows of its issue and consents to its standing over.

Orders accordingly.

Solicitors: *Dodsworth & Co.; Clintons.*

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" (Landlord and Tenant Act, 1954, Part II). These are largely contentious, but no appearance is necessary, nor, indeed, is service of the summons, for a tenant who wishes to remain in occupation has only to issue a summons under the rule for time to run in his favour, and a landlord has no right to apply to dismiss it when he gets to hear of it."

Para. 72: "We think that to apply procedure by originating summons to such controversies as arise under, for instance, the Landlord and Tenant Act, 1954 (Part II), the Mines (Working Facilities and Support) Act, 1923, and very often under Ward of Court Proceedings was a retrograde step. We should like to see it reversed, but if it is to be retained, we think oral evidence should be ordered as soon as any conflict of fact appears to be likely."

[CHANCERY DIVISION.]

CHILD'S TRUSTEE CO. *v.* INLAND REVENUE COMMISSIONERS.

1960
March 16, 17;
April 6.

Cross J.

[1960 C. 176.]

Revenue—Estate duty—Property passing on death—Insurance policy—Life interest in policy beginning only on death of life assured—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (*d*), 3 (1) (2).

Revenue — Estate duty — Gift inter vivos — Consideration — Family arrangement—Deceased retaining no interest—Beneficiary forgoing rights against other beneficiaries—Whether policies "provided" by deceased—Evidence of consideration—Need to file—Finance Act, 1894, *s.* 2 (1) (*d*).

Before the execution of a disentailing deed and resettlement on April 30, 1940, lands, investments and capital moneys were held on trust for a father for life with remainder to his son in tail, subject to incumbrances on the fee simple, to 13 charges on the father's life interest secured by insurance policies on his life, to family charges and to two terminable rentcharges. Father and son agreed that £25,528 be raised out of capital and used to pay off 11 of the 13 charges; that a further £1,222 (making £26,750 in all) be

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so raised and paid to the father; that the rentcharges be extinguished and the father released from liability for them; that two of the policies which would revest in the father on the discharge of the charges on his life interest be converted by him into fully-paid policies for £8,100 and brought into settlement; and that, subject to remaining incumbrances and charges, the lands and the balance of investments and capital moneys be resettled on the father for life, subject to an annuity to the son for life with power to the son to appoint an annuity to his widow for life should he die in the father's lifetime to continue for his children's benefit should his widow also die therein with remainder to the son, for life, with remainder over.

Pursuant to that agreement, sufficient proceeds of sale were set aside, to provide the sums to be raised, the father converted the two policies into fully-paid policies, and on April 30, 1940, the son disentailed the lands and capital moneys and the father and son executed the resettlement. By the resettlement father and son appointed that the father thenceforth hold the settled lands subject as therein mentioned on trust that the son receive the annuity, and subject thereto for the father for life, and after his death for the son for life, with remainder in trust for the son's sons successively in tail male with remainders over. The balance of the investments and capital moneys was resettled and the two policies were brought into settlement, and the trustees were directed to hold the policies until the father's death, and thereon to collect the policy moneys and to hold them, subject to any appointment to the contrary, "upon the trusts and subject to the powers and provision upon and "subject to which capital moneys or investments representing the "same would be held."

On January 25, 1958, the father died, survived by the son. The Commissioners of Inland Revenue claimed duty on the policy moneys which then became payable, on the footing that they passed on the father's death under section 1 or section 2 (1) (*b*) of the Finance Act, 1894,[1] alternatively, under section 2 (1) (*d*), on the value of the son's life interest in them at the father's death. On a summons

[1] Finance Act, 1894, s. 2: "(1) "Property passing on the death of "the deceased shall be deemed to "include the property following, that "is to say . . . (*b*) Property in which "the deceased or any other person "had an interest ceasing on the death "of the deceased, to the extent to "which a benefit accrues or arises by "the cesser of such interest; but "exclusive of property the interest in "which of the deceased or other per-"son was only an interest as holder "of an office, or recipient of the "benefits of a charity, or as a cor-"poration sole . . . (*d*) Any annuity "or other interest purchased or pro-"vided by the deceased, either by "himself alone or in concert or by "arrangement with any other person, "to the extent of the beneficial "interest accruing or arising by sur-"vivorship or otherwise on the death "of the deceased."

S. 3: "(1) Estate duty shall not "be payable in respect of property "passing on the death of the deceased "by reason only of a bona fide pur-"chase from the person under whose "disposition the property passes, nor "in respect of the falling into posses-"sion of the reversion on any lease for "lives, nor in respect of the deter-"mination of any annuity for lives, "where such purchase was made, or "such lease or annuity granted, for "full consideration in money or "money's worth paid to the vendor "or grantor for his own use or bene-"fit, or in the case of a lease for the "use or benefit of any person for "whom the grantor was a trustee.

"(2) Where any such purchase was "made, or lease or annuity granted, "for partial consideration in money "or money's worth paid to the vendor "or grantor for his own use or bene-"fit, or in the case of a lease for the "use or benefit of any person for "whom the grantor was a trustee, the "value of the consideration shall be "allowed as a deduction from the "value of the property for the purpose "of estate duty."

by the trustees to determine whether they were accountable by reason of the father's death for estate duty in respect of the policies or, alternatively, in respect of the moneys due thereunder, and if so, to determine the extent of their liability:—

Held, (1) that, on the true construction of the resettlement, the father was not given a life interest in the policies, and did not take any interest in them by way of resulting trust, since they were held from the first on trust for those beneficially interested after his death, and the son's life interest in the policy moneys began only after the father's death (post, p. 910).

Westminster Bank Ltd. v. *Inland Revenue Commissioners* and *Wrightson* v. *Inland Revenue Commissioners* [1958] A.C. 210; [1957] 2 All E.R. 745 distinguished.

(2) That, as the policies were retained and never yielded any income during the father's lifetime, on his death nothing passed from the other beneficiaries to the son; all that happened was that what had been the son's reversionary life interest in the policy moneys became a life interest in possession, and that the other beneficiaries' interests in them became expectant only on the son's death, and the claim to duty on the capital of the policy moneys under section 1 or section 2 (1) (*b*) failed (post, p. 911).

In re Hodson's Settlement [1939] Ch. 343; 55 T.L.R. 357; [1939] 1 All E.R. 196, C.A.; *Westminster Bank Ltd.* v. *Attorney-General* [1939] Ch. 610; [1939] 2 All E.R. 72, C.A. and *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 1 All E.R. 403, H.L. considered.

(3) That where, as in the present case, it was part of the arrangement between father and son that the father bring the policies into settlement for the benefit of others as well as the son, the father could fairly be said to have "provided" them within the meaning of section 2 (1) (*d*) for the beneficiaries by arrangement with the son, even though the father received under the arrangement full consideration for everything which he gave up, including the policies. Although the father retained no interest in the policies, the son did not obtain an absolute interest, and from the remaindermen's point of view, the father was one of the providers of the policies, even though he might have driven a hard bargain with the son in insisting that they be brought into settlement. Accordingly, the duty was payable on the value of the son's life interest in the policy moneys under section 2 (1) (*d*) (post, p. 915).

Attorney-General v. *Hawkins* [1901] 1 K.B. 285; 17 T.L.R. 85, D.C. applied.

Lethbridge v. *Attorney-General* [1907] A.C. 19; 23 T.L.R. 123, H.L. distinguished.

Per curiam. Where plaintiffs in a case of this sort claim that the property in question is wholly or partially exempt from duty on the ground that full or partial consideration has been given to the deceased, they should file evidence with regard to the value of the consideration unless it is agreed with the commissioners (post, p. 915).

ADJOURNED SUMMONS.

On January 14, 1960, the plaintiffs, trustees of a resettlement dated April 30, 1940, made between Thomas Edmund Sotheron Estcourt ("Captain Estcourt") and his son, Thomas Desmond George Sotheron Estcourt ("Desmond") of the one part, and the plaintiffs of the other part, took out a summons asking whether they were accountable, by reason of the death on January 25, 1958,

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of Captain Estcourt, for estate duty in respect of policies of assurance on his life specified in the fifth schedule of the resettlement or either of them (or alternatively in respect of the moneys payable thereunder) and, if so, that the extent of their liability might, if and so far as necessary, be determined.

The following statement of the facts is taken from the judgment of Cross J.

Before the execution of a disentailing deed and a resettlement on April 30, 1940, certain lands, investments and capital moneys were held in trust for the late T. E. S. Estcourt ("Captain "Estcourt") for life, with remainder to his son, T. D. G. S. Estcourt ("Desmond") in tail, subject (a) to various incumbrances affecting the fee simple of the land; (b) to 13 charges on Captain Estcourt's life interest which were secured by policies of assurance on his life; (c) to certain family charges; and (d) to two small terminable rentcharges expiring in 1949 and 1951 created in favour of the inheritance under section 85 of the Settled Land Act, 1925. Captain Estcourt and Desmond, who could together dispose of the settled property as they liked subject to the incumbrances, entered into an arrangement of which the main terms were as follows: 1. A sum of £25,528 was to be raised out of the capital moneys and used to pay off 11 of the 13 charges on Captain Estcourt's life interest. 2. A further sum of £1,222 was to be raised out of capital and paid to Captain Estcourt. 3. The terminable rentcharges were to be extinguished, and Captain Estcourt released from his liability for outstanding instalments amounting to about £220. 4. Two of the policies on Captain Estcourt's life which would be revested in him on the discharge of the charges on his life interest were to be converted into fully-paid policies on his life for an aggregate sum of £8,100 and brought into settlement by him. 5. The lands and the balance of the investments and capital moneys were to be resettled in the usual way subject to the incumbrances on the fee simple of the lands and the existing family charges and the two remaining charges on Captain Estcourt's life interest, and also subject to an annuity of £500 per annum payable to Desmond for life, with power to him if he should die in his father's lifetime to appoint an annuity of £300 to his widow for life to continue if she too died in Captain Estcourt's lifetime for the benefit of his children.

In pursuance of this arrangement Desmond, on April 30, 1940, disentailed the lands and capital moneys with the consent of Captain Estcourt, and on the same day a resettlement was executed by them under the joint power reserved to themselves by the disentailing deed. The resettlement was made between Captain Estcourt and Desmond of the one part, and Child's Trustee Co. as trustees of the other part. After reciting the agreement which was described to be by way of family arrangement, and the fact that in pursuance of it the trustees had set aside proceeds of sale of certain investments sufficient to provide the sums to be raised out of capital, and that the two policies

in question had been duly converted into fully-paid policies, Captain Estcourt and Desmond irrevocably appointed that the settled lands should thenceforth be held by Captain Estcourt subject to the incumbrances on the fee, the family charges and the two subsisting charges on his life interest, but discharged from the terminable rentcharges, upon such trusts as he and Desmond should by deed jointly appoint, and in default of appointment (either under that power or certain other joint powers arising only if Desmond should die in the lifetime of Captain Estcourt) upon trust that Desmond should receive a rentcharge of £500 during his life (with provision in case he should die in the lifetime of Captain Estcourt for the payment of the other agreed rentcharges for the benefit of his widow and children), and subject thereto in trust for Captain Estcourt during his life by way of restoration of his original life estate, and after his death in trust for Desmond during his life, with remainder in trust for Desmond's sons successively in tail male, with numerous remainders over. The resettlement gave the successive life-tenants the usual power to appoint rentcharges to their surviving wives and husbands and to charge the lands with portions for their younger children. Clause 28, which resettled the balance of the investments and capital moneys, and under which the two policies of assurance were brought into settlement, was in the following terms:

"28.—(1) Captain Estcourt and the said Desmond Estcourt "in exercise of the power for this purpose given to them by the "deed of disentail and of all other powers enabling them and as "settlors hereby jointly and irrevocably appoint that all and "singular the investments and moneys mentioned in the first "schedule hereto shall henceforth so remain and be held upon "the trusts and with and subject to the powers hereinafter "declared concerning the same.

"(2) Captain Estcourt as settlor hereby assigns unto the "trustee all those policies of assurance effected in his own "name and on his own life mentioned in the fifth schedule hereto "and all moneys assured by or to become payable thereunder "to hold unto the trustee upon trust that the trustee shall "as soon as may be after the maturity of the said policies "respectively get in and receive the money to become payable "thereunder respectively and shall stand possessed of the net "residue thereof after discharging all costs and expenses of "recovering and receiving the same (hereinafter called 'the "'policy moneys') upon the trusts and with and subject to the powers hereinafter declared concerning the same.

"(3) The investments and moneys appointed by sub-clause (1) "of this clause and the policy moneys shall go and be held upon "such trusts and in such manner generally as Captain Estcourt "and the said Desmond Estcourt shall from time to time or at "any time by deed revocable or irrevocable jointly appoint and in "default of and subject to any such appointment and if the said "Desmond Estcourt shall die in the lifetime of Captain Estcourt

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"upon such trusts and in such manner generally as Captain "Estcourt and the person for the time being entitled to the first "interest for life in remainder under the limitations of the settled "land hereinbefore contained expectant on the death of Captain "Estcourt and the failure or determination of all intermediate "limitations in tail male or in tail or if such tenant for life in "remainder shall be under the age of twenty-one years Captain "Estcourt and the trustees shall from time to time or at any "time by deed revocable or irrevocable jointly appoint but so that "no appointment under the last mentioned power shall operate to "overreach the beneficial interests in the premises appointed of "the widow and children of the said Desmond Estcourt by "reference to the provisions of clauses 5, 6, 8, 18 and 19 hereof. "And in default of and until and subject to any appointment "under the powers aforesaid or either of them upon the trusts "and subject to the powers and provisions upon and subject to "which capital money or investments representing the same "would be held."

Captain Estcourt died on January 25, 1958, leaving Desmond him surviving, and on his death the Commissioners of Inland Revenue claimed estate duty on the policy moneys totalling £8,100 which then became payable on the footing that they passed on Captain Estcourt's death under section 1 or section 2 (1) (*b*) of the Finance Act, 1894, or alternatively, estate duty under section 2 (1) (*d*) on the value of Desmond's life interest therein at Captain Estcourt's death. This summons has been taken out by Child's Trustee Co. as trustees of the resettlement against the Commissioners of Inland Revenue to determine whether either of these claims is justified. The plaintiffs have argued first that the policy moneys would not have been liable to duty under either head of charge even if the settlement of them had been a voluntary settlement by Captain Estcourt, and, alternatively, that if the policy moneys are, prima facie, within either head of charge, the fact that the settlement of them was the outcome of a bargain between Captain Estcourt and Desmond for which Captain Escourt received full consideration frees them from any charge to duty.

E. I. Goulding for the plaintiffs.

C. L. Bathurst Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Richardson* v. *Inland Revenue Commissioners* [2]; *Attorney-General* v. *Robinson* [3]; *Attorney-General* v. *Sandwich (Earl)* [4]; *In re Bateman* [5]; *Adamson* v.

[2] [1909] 2 Ir.R. 597.
[3] [1901] 2 Ir.R. 67.
[4] [1922] 2 K.B. 500; 38 T.L.R. 703, C.A.
[5] [1925] 2 K.B. 429.

Attorney-General [6]; *Tennant* v. *Lord Advocate* [7]; *Coutts & Co.* v. *Inland Revenue Commissioners* [8]; *In re Barbour.* [9]

Cur. adv. vult.

April 6. CROSS J. read the following judgment, in which he stated the facts set out above, and continued: The first question which I have to consider is whether on the true construction of the resettlement Captain Estcourt had an interest in the policies which ceased on his death. Counsel for the commissioners submitted that he had, either because clause 28 (2) and (3) of the resettlement gave him such an interest, or, alternatively, because those clauses make no disposition of the beneficial interest in the policies during the rest of his lifetime and that, therefore, he took a life interest in them by way of resulting trust. I cannot accept either of these contentions. By clause 28 (2) the trustees are directed to hold the policies until Captain Estcourt's death and then to collect the policy moneys from the company, and in clause 28 (3) they are directed to hold the policy moneys subject to any appointment to the contrary under any of the joint powers therein mentioned "upon the trusts and subject to the powers "and provisions upon and subject to which capital money or "investments representing the same would be held." That means, I think, so far as the policy moneys are concerned, on the trusts of the settlement subsisting at Captain Estcourt's death, i.e., in the events which happened, on trust for Desmond for life with remainders over. Captain Estcourt was not given a life interest in the policies, nor did he take any interest in them by way of resulting trust, since they were held from the first on trust for those beneficially interested after his death. The case is, in my judgment, distinguishable from the cases of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners* [1] and *Wrightson* v. *Inland Revenue Commissioners.* [2] In both those cases the fully-paid policies in question were on the life of the settlor. He was given no interest in them; but it was held that the settlements on their true construction gave vested life interests in possession in them before the settlor's death to the same persons as would become entitled to life interests in the policy moneys on the death of the settlor if the policies remained in force until that date. It was, that is to say, the view of the majority of the House of Lords that if the policies had been surrendered in the lifetime of the settlor, or the insurance companies had been liquidated and the trustees had received a dividend in the liquidation, the life-tenants would have been entitled to be paid the income of the investments

[6] [1933] A.C. 257; 49 T.L.R. 169, H.L.

[7] [1939] A.C. 207; 55 T.L.R. 472; [1939] 1 All E.R. 672, H.L.

[8] [1953] A.C. 267; [1953] 3 W.L.R. 364; [1953] 1 All E.R. 418, H.L.

[9] [1956] Ch. 452; [1956] 2 W.L.R. 735; [1956] 1 All E.R. 627, C.A.

[1] [1958] A.C. 210.

[2] Ibid.

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representing the surrender moneys or the dividend in the liquidation. Here, on the other hand, if the policies had been surrendered in Captain Estcourt's lifetime, or the trustees had received a dividend in the liquidation of the insurance company, I do not think that either Captain Estcourt or Desmond, acting independently, could have required the trustees to invest the surrender moneys or dividend and pay him the income of the investments during the rest of Captain Estcourt's lifetime. Captain Estcourt was given no life interest whatever in the policies, and Desmond's life interest in the policy moneys was only to begin on Captain Estcourt's death. What the position would have been had Captain Estcourt and Desmond in such circumstances purported to exercise the joint power of appointment I do not say. But in the absence of such exercise the court would, I think, have directed either that the surrender moneys or dividend be applied in the purchase of another fully-paid policy payable on Captain Estcourt's death, or, if it had directed the money to be invested, would have ordered the income to be accumulated for the rest of Captain Estcourt's lifetime.

Counsel for the commissioners then submitted that even if the true view was that Captain Estcourt had no interest in the policies they nevertheless passed under section 1 or section 2 (1) (*b*) on his death by reason of the change in the respective interests of Desmond and the remaindermen in them which then took place. If the policies had been surrendered, their proceeds invested, and the income accumulated for the rest of Captain Estcourt's lifetime, there is no doubt that the investments and accumulations would have been liable to estate duty on his death. The income, which up to the date of his death would have been applied primarily for the benefit of capital, would, on his death, have begun to be paid to Desmond. By reason of this change in the enjoyment of the income the investments and accumulations would have "passed" on Captain Estcourt's death: see *In re Hodson's Settlement*.[3] Counsel argued that if the respective rights of Desmond and the remaindermen in the policies during Captain Estcourt's lifetime were such that had the policies been surrendered and the proceeds invested, the income of the proceeds would have been accumulated, it followed that the unsurrendered policies ought to be held themselves to pass on Captain Estcourt's death when the policy moneys became payable, and Desmond began to enjoy a life interest in possession in them. This is a novel contention on the part of the Revenue. In *Westminster Bank Ltd.* v. *Attorney-General*,[4] the Attorney-General accepted the position that in circumstances such as these duty was not payable under section 1 of the Finance Act, 1894, on the capital value of the policy moneys, but only under section 2 (1) (*d*) on the value of the life interest in them which came into possession on the death of the life assured. Again, in the two cases in the

[3] [1939] Ch. 343.

[4] [1939] Ch. 610.

House of Lords in 1958, duty was only claimed under section 2 (1) (*d*) on the value of the life interests arising on the death of the settlors. But counsel for the commissioners submitted that the *D'Avigdor-Goldsmid* case [5] had shown that the old view that estate duty on life policies was payable under section 2 (1) (*d*) on the arising of a beneficial interest in the policy moneys on the death of the life assured was wrong in principle, and that if one concentrated one's attention, as it now appeared that one should, on the rights of the beneficiaries in the policy itself, it followed that the policy itself passed under section 1 or section 2 (1) (*b*) in such a case as this. I cannot accept this argument. It is true enough that if the policies had been surrendered and the income of the invested proceeds had been accumulated, the investments and accumulations would have passed under section 1 on the death of Captain Estcourt, but I do not think that it follows in the least from this that the unsurrendered policies passed under section 1 on his death. If the policies had been surrendered and the proceeds invested, the remaindermen would have had an interest in the income which accrued and was invested during Captain Estcourt's lifetime. The longer he lived the larger the accumulation would be. There would, therefore, have been a real change in the respective interests of Desmond and the other beneficiaries on Captain Estcourt's death. But, in fact, the policies were retained and never yielded any income during Captain Estcourt's lifetime. In such circumstances nothing passed from the other beneficiaries to Desmond on the death of Captain Estcourt. All that happened was that Desmond's life interest in the policy moneys which had previously been a reversionary life interest became a life interest in possession, and that the interests of the other beneficiaries in the policy moneys which had previously been doubly reversionary in that they were expectant on the death both of Captain Estcourt and of Desmond, became expectant only on the death of Desmond. In my judgment, therefore, the claim of the commissioners to duty on the capital of the policy moneys under section 1 or section 2 (1) (*b*) fails quite apart from the fact that this settlement was not a voluntary settlement. On the other hand, if it had been a voluntary settlement, I cannot see how the claim for duty under section 2 (1) (*d*) on the value of Desmond's life interest could have been resisted. I understood counsel for the plaintiffs to submit that Desmond had a life interest in possession in the policies before Captain Estcourt's death but, as I have said, I think that his life interest was reversionary until Captain Estcourt's death.

I turn, therefore, now to consider whether the prima facie claim for duty on the value of Desmond's life interest under section 2 (1) (*d*) is affected by the fact that the resettlement was the outcome of a bargain between Captain Estcourt and Desmond. Section 3 (1) of the Finance Act, 1894, provides that estate duty shall not

[5] [1953] A.C. 347.

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be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit, and subsection (2) provides that where any such purchase was made for partial consideration in money or money's worth paid to the vendor for his own use and benefit, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty. Counsel for the plaintiffs contends that in this case, if the policy moneys passed at all they passed by reason only of a purchase of them by Desmond from his father for full consideration in money or money's worth. Captain Estcourt received under the family arrangement (a) the reversion on his death to a sum of £26,750, and (b) the extinction of the terminable rentcharges. What he gave in exchange for this was (a) the two fully-paid policies on his life, and (b) the rentcharges payable to Desmond or his family during his life. Counsel submitted that as Captain Estcourt was 72 years old at the time, it was clear that what he received was worth more than what he gave, and that, therefore, the conditions of exemption contained in section 3 were satisfied.

In *Attorney-General* v. *Hawkins* [6] the court had to consider the application of section 3 to a family arrangement of this sort. There, as here, the family property had been settled on the father for life with remainder to the son in tail male. The father had borrowed a large sum on the security of his life interest coupled with policies of assurance on his life. In addition, he owed considerable unsecured debts. His son, too, was in financial difficulties. By arrangement between them the property was disentailed and resettled, subject to a joint power of appointment, on the father for life with remainder to the son absolutely. The son then joined with the father (1) in converting the mortgages on the father's life interest into mortgages on the fee simple of the property, and (2) in raising substantial sums out of capital to discharge his father's unsecured debts. In return the son had paid to him a smaller sum out of capital and was given an annuity during his father's lifetime. Further, the father assigned the policies to trustees and charged his life interest with payment of the premiums on them and the interest under the mortgages. It was provided that if any of the policies, some of which were terminable policies, became payable in the father's lifetime, the trustees should apply the moneys received in reduction of the mortgages. Subject to that provision the policies and the moneys payable under them were held in trust for the son absolutely. No moneys became payable under any of the policies during the father's lifetime, and on his death the Crown claimed estate duty under section 2 (1) (*d*) on the moneys which then became payable to the son. It was argued

[6] [1901] 1 K.B. 285.

for the son that the arrangement was a transaction under which he had acquired the absolute interest in the policies for full consideration and that, therefore, the exemption under section 3 (1) applied. Kennedy and Phillimore JJ. rejected that contention. They were prepared to assume that the father received full consideration for anything that he gave up under the arrangement, but they held that, nevertheless, he had not sold the policies to his son. The policies were brought into settlement to replace as far as possible the capital that was taken out, and the son had no title to them in possession until his father's death. Counsel for the plaintiffs sought to distinguish that case from this on the ground that in *Attorney-General* v. *Hawkins* [7] it was possible that the father himself might derive some benefit from the policies before he died, because a terminable policy might have become payable in his lifetime and the proceeds used in reduction of the mortgage, the interest on which the father had to pay. But what prevented the court from holding that the son had purchased the policies from his father was the fact that the son did not obtain complete dominion over them, not the fact that the other person who had an interest in them was the father. In this case, although Captain Estcourt retained no interest in the policies, Desmond did not obtain an absolute interest in them. It was part of the arrangement that they were to be brought into settlement to benefit the remaindermen as well as Desmond. *Attorney-General* v. *Hawkins* [8] is, therefore, to my mind, indistinguishable in principle from this case, and if it is still good law it is decisive against the second contention of the plaintiffs.

It was argued, however, that the later case of *Lethbridge* v. *Attorney-General* [9] shows that *Attorney-General* v. *Hawkins* [10] was wrongly decided. There again, a father who was tenant for life of a family estate, had raised money by charges on his life interest supported by policies of assurance on his life. By a family arrangement between him and his son, who was tenant in tail, the estates were disentailed and the son concurred with his father in mortgaging them for a sum sufficient to pay the father's debts. In return, the father assigned the policies to the son and created a trust of the rents during his life for payment of the interest on the mortgages, the premiums on the policies, and an annuity to the son. Subject to these trusts, the estates were resettled on the father for life with remainder to the son. It will be seen that in the *Lethbridge* case,[11] unlike the *Hawkins* case,[12] the policies were assigned out and out to the son. He could have surrendered them at any time, and, as the House of Lords held, if he had done so he would have remained entitled to be paid out of the rents during his father's lifetime a sum equal to the premiums. On these facts the House of Lords, reversing the Court of Appeal, held that no estate duty was payable on the

[7] [1901] 1 K.B. 285.
[8] Ibid.
[9] [1907] A.C. 19.
[10] [1901] 1 K.B. 285.
[11] [1907] A.C. 19.
[12] [1901] 1 K.B. 285.

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policy moneys under section 2 (1) (*d*) on the father's death. The only member of the House who referred to *Attorney-General* v. *Hawkins* [12] was Lord Atkinson. He regarded the point in issue as being whether or not section 3 of the Act of 1894 applied to the case. He held that it did, and distinguished *Attorney-General* v. *Hawkins* [12] on the ground that there the policies had not been assigned absolutely to the son. Lord Loreburn and Lord Macnaghten, on the other hand, with whom the other members of the House concurred, decided the case independently of section 3 on the ground that the father could not be said on the facts to have "provided" the policies within the meaning of section 2 (1) (*d*) at all. Counsel for the plaintiffs submitted that the reason why Lord Loreburn and Lord Macnaghten held that the father did not provide the policies was simply the fact that he had received full consideration for anything that he gave up under the arrangement with his son, and he argued that as in this case Captain Estcourt received full consideration for everything which he gave up under the arrangement, he did not provide the two policies in question, even if he cannot be said to have sold them to Desmond. Now, undoubtedly, there are passages in the speeches of Lord Loreburn and Lord Macnaghten which lend colour to this submission. Thus Lord Loreburn, after pointing out that the general purpose of section 2 (1) (*d*) was to prevent a man escaping estate duty by subtracting from his means during his life money or money's worth which was to reappear when he died in the form of a beneficial interest arising on his death, said [13] that the father in the case before him had subtracted nothing from his means since he had received full consideration from his son for his assignment of the policies and the charge of the premiums on his income. Again, Lord Macnaghten [14] pointed out that it was not by the father's gift, or at his cost, or by means of any expenditure on his part that the policies were vested in the son, since the father received full consideration from the son for everything which he gave up. Further, it is to be observed that these very passages in the speeches of Lord Loreburn and Lord Macnaghten were referred to by the Privy Council in *Ward* v. *Inland Revenue Commissioners* [15] as showing that the House of Lords in the *Lethbridge* case [16] construed the word "provided" in section 2 (1) (*d*) as carrying with it the idea of bounty on the part of the deceased. "Where," asked counsel for the plaintiffs, "is the "element of bounty in this case?" On the other hand, I find it difficult to believe that Lord Loreburn and Lord Macnaghten were really intending to say that, even in a case where it was part of the arrangement between father and son that the policies should be brought into settlement by the father for the benefit of other persons as well as the son, the fact that the father received full

[12] [1901] 1 K.B. 285.
[13] [1907] A.C. 19.
[14] Ibid.
[15] [1956] A.C. 391, 401, 402; [1956] 2 W.L.R. 578; [1956] 1 All E.R. 571, P.C.
[16] [1907] A.C. 19.

consideration from the son for everything which he gave up, including the policies, must itself necessarily involve the consequence that the father did not " provide " the policies within the meaning of section 2 (1) (*d*). In the first place, if their Lordships meant that, it would appear to follow that *Attorney-General* v. *Hawkins* [17] was wrongly decided. That case was argued purely on section 3. It appears never to have occurred to anyone to suggest that the father did not provide the policies. Yet he received full consideration for bringing them into settlement and, therefore, on the view which I am considering, the case was not within section 2 (1) (*d*) at all. Again, if Lord Loreburn and Lord Macnaghten meant what counsel for the plaintiffs submits that they meant, it would have been unnecessary for them to stress, as each of them did, that the son in the *Lethbridge* case [18] became the absolute owner of the policies. Of course, if the creation of interests in the policies in other persons is simply the act of the son—if the father is prepared to agree to the son taking the policies absolutely, and the son decides on his own account to allow them to be brought into settlement—one can see that it is the son and not the father who really provides the policies for the beneficiaries. But where, as here, it is part of the arrangement between father and son that the policies shall be brought into settlement by the father for the benefit of others as well as the son, I should have thought that the policies could fairly be said to have been provided for the beneficiaries by the father, by arrangement with the son, even though the father received under the arrangement full consideration for everything which he gave up, including the policies. From the point of view of the remaindermen, the father here was one of the providers of the policies, even though he may have driven a hard bargain with the son in insisting that they should be brought into settlement and not given to the son absolutely. If I were satisfied that the House of Lords in the *Lethbridge* case [19] intended to hold that there should be read into section 2 (1) (*d*) some such words as " to the " extent that such purchase or provision is an act of bounty on the " part of the deceased," I should, of course, give effect to that view without hesitation; but as I am by no means clear that they meant so to decide, I feel at liberty to give effect to my own view of the question, and to leave it to a higher court to say that *Attorney-General* v. *Hawkins* [20] was wrongly decided. On the second point, therefore, I hold that the plaintiffs fail.

There remains one other matter to be mentioned. If the plaintiffs in a case of this sort claim that the property in question is wholly or partially exempt from duty on the ground that full or partial consideration has been given to the deceased, they ought, I think, to file evidence with regard to the value of the consideration unless it is agreed by the commissioners. In this case there was no evidence before me as to the value of what

[17] [1901] 1 K.B. 285.
[18] [1907] A.C. 19.
[19] Ibid.
[20] [1901] 1 K.B. 285.

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Captain Estcourt received under the arrangement as compared with what he gave up, and counsel for the commissioners, while admitting, as is indeed obvious, that Captain Estcourt received some consideration for the settlement of the policies, did not admit that it was full consideration. In the view which I have formed, the point does not arise, for I have held that even on the assumption that he received full consideration duty is payable; but if a higher court holds that I am wrong on this point then, unless the parties can agree the figures, the question of the value of the consideration will have to be decided on proper evidence.

The result is that I declare that estate duty is payable on the value of Desmond's life interest. With regard to costs, as the commissioners have not wholly succeeded, and it is a drawn battle, I will not make an order.

Declaration accordingly.
No order as to costs.

Solicitors: *Lawrence Graham & Co.; Solicitor of Inland Revenue.*

K. R. A. H.

[CHANCERY DIVISION.]

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March 24, 25, 28, 29; *April* 13.

Russell J.

BANKES *v.* SALISBURY DIOCESAN COUNCIL OF EDUCATION INCORPORATED AND ANOTHER.

[1958 B. No. 428.]

Education—School—Endowed school—Closure—Grant of land by lord of manor—Avoidance clause if intention of grantor could not be "carried into effect"—Limitation to steward of manor and rector of the parish "and their successors . . . rectors of the . . . parish" with lord of the manor as trustees—Statutory scheme vesting school in Educational Council—Closure of school—Whether avoidance clause continuing condition—Whether possessory title in favour of charity—Whether resulting trust for successor of lord of manor—School Sites Act, 1836 (6 *&* 7 *Will.* 4, *c.* 70), *ss.* 1, 2, 3 (*repealed and replaced by School Sites Act,* 1841 (4 *&* 5 *Vict. c.* 38), *ss.* 1, 2)—*Endowed Schools Act,* 1869 (32 *&* 33 *Vict. c.* 56), *ss.* 9, 46.

Charity—Education—School site—Closure of school—Whether resulting trust for successor of grantor.

Contract—Termination—Gift of land for school—Clause avoiding gift on failure of school—Use of school ceasing 116 *years later—Whether avoidance clause effective.*

Corporation—Sole—Powers—To hold land on trust—Endowed school—Gift to rector on trust.

Statute—Construction—Confiscation—Property rights not to be taken away without compensation unless by clear words.

By an indenture dated September 25, 1840, made pursuant,

but without reference, to the School Sites Act, 1836,[1] reciting: "Whereas it is expedient for the benefit of the said parish of "Studland that a school should be established in the parish for "educating the poor children there in the principles of the Christian "religion according to the doctrines and discipline of the United "Church of England and Ireland and in useful knowledge and for "that purpose to erect a convenient school-house . . . ," William John Bankes, the lord of the manor of Studland, a tenant for life, granted, by way of free gift, a parcel of land to Thomas George Robson, the steward of the manor and the Reverend Charles Michael Turner, the rector of the parish "and their successors stewards of the "manor and rectors of the said parish of Studland" with the lord of the manor to be held by them to the use of themselves and "their "successors lords and stewards of the said manor and rectors of the "said parish" on trust to permit the land to be used as a site for the erection of the school-house. The deed continued: "in case the said "school-house shall not be erected or being erected it shall be found "impracticable by the said trustees for the time being by reason of "a failure in the contribution or funds for the erection or support "thereof or by any other means whatsoever to carry the intention "of the said William John Bankes into effect then and in such "case the bargain and sale hereby made shall be void." A school was shortly thereafter erected and opened, and was carried on under the name of the Studland Church of England School. Under a scheme framed by the Minister of Education under the Endowed Schools Acts, 1869 to 1874,[2] and approved by Order in Council on

[1] School Sites Act, 1836, Preamble: "Whereas it is expedient to promote "the education of poor children in the "principles of true religion and useful "knowledge, and to afford additional "facilities for the erection of school "rooms to be used for that purpose ". . ."

S. 1: ". . . it shall be lawful for "the lord . . . of any manor . . . to "convey to the incumbent and church-"wardens of any parish in which "a school for the education of poor "children is intended to be erected, "or to the trustees of any such school ". . . so much of the common or "waste grounds in any such parish . . . "as may be required for the site of "such school, . . . and the conveyance "of such part of the common or waste "grounds by the lord . . . of the "manor wherein the same shall be "situate shall be a good and sufficient "conveyance for the purpose of vest-"ing the fee simple and inheritance "thereof in the parties to whom the "same shall be conveyed, for the pur-"pose hereinbefore specified, as fully "and effectually as if every person "having right of common . . . had "joined in and executed such con-"veyance."

S. 2: ". . . it shall be lawful for all "persons being seised in fee simple, "fee tail, or for life . . . to convey "any portion of land of which they "may respectively be seised, includ-"ing copyhold land . . . in the same "manner, to the same persons, and for "the same purposes as hereinbefore "authorised with respect to common "or waste ground."

S. 3: ". . . and all conveyances "made by virtue and according to the "provisions of this Act shall be valid "and effectual in law to all intents "and purposes for vesting the fee "simple and inheritance of the land "conveyed thereby in the parties to "whom the same shall be conveyed for "the purpose hereinbefore specified."

[2] Endowed Schools Act, 1869, s. 9: "The Commissioners . . . by schemes ". . . shall have power, in such "manner as may render any educa-"tional endowment most conducive to "the advancement of the education of "boys and girls, or either of them, to "alter and add to any existing, and "to make new trusts, directions and "provisions in lieu of any existing, "trusts, directions and provisions "which affect such endowment, and "the education promoted thereby, in-"cluding the consolidation of two or "more such endowments. . . ."

S. 46: "Upon a scheme coming "into operation, every Act of Par-"liament, letters patent, statute, "deed, instrument, trust, or direction "relating to the subject-matter of "the scheme, and expressed by such "scheme to be repealed and abrogated, "shall, by virtue of the scheme and

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December 21, 1949, the legal estate in the school became vested in the first defendant, the Salisbury Diocesan Council of Education Incorporated. Paragraph 2 of the scheme provided: "Repeal and Substitution. Every Act of Parliament, letters patent, "statute, deed, instrument or trust affecting the foundation is "hereby repealed and the provisions of this scheme are substituted "therefor." The scheme gave the first defendant power of letting and selling "the premises of the foundation" and to deal with the proceeds in a specified manner. Neither the Act of 1869 nor the scheme provided for compensation on the scheme taking effect. W. J. Bankes died in 1855, T. G. Robson in 1857 and the Rev. C. M. Turner in 1910. On January 9, 1956, the use of the premises as a school ceased.

In an action by the present lord of the manor of Studland for a declaration that the first defendant held the property on trust for him:—

Held, (1) that, on the true construction of the deed of 1840, the avoidance clause, since it referred to the support of the school, was not limited in time but imposed a continuing condition, and, therefore, operated whenever the property ceased to be used as a school (post, p. 923).

(2) That the School Sites Act, 1836, was an Act to cure defects in the person conveying, and did not dispense with the need for appropriate words of limitation, so that the references to the successors of the lord of the manor and of the steward of the manor had no more effect than an indication of the grantor's wishes; but that the limitation to the rector and his successors was appropriate to confer upon the rector as corporation sole a fee simple interest in one-third as tenant in common as trustee; that there was nothing in the character of a corporation sole which prevented a conveyance in 1840 from taking effect when a trust was imposed, or a court of equity from enforcing that trust; and, it being admitted that, in those circumstances, no possessory title in favour of charity had been acquired in destruction of the interests of the plaintiff, the legal estate, immediately prior to its vesting in the first defendant, was, accordingly, subject to a trust to permit its user for a school until for any reason it ceased to be used as such, and for the plaintiff beneficially under a resulting trust upon such cesser (post, pp. 924, 926, 927, 928).

(3) That, applying the principle of construction that property rights should not be regarded as taken away by statute without compensation unless the language used plainly so provided, the wording of section 9 of the Act of 1869 and of paragraph 2 of the scheme was not apt to repeal or abrogate a trust in favour of a private individual to take effect upon a contingency, only those parts of any deed and those trusts which directly concerned the educational "foundation" as such being repealed or abrogated; that when the school was closed in 1956 it ceased, by virtue of the resulting trust, to be "premises of the foundation," so that the power of letting and sale ceased to exist from that date; and that, therefore, the first defendant held the property upon trust for the plaintiff (post, pp. 929, 931, 933).

"of this Act, be repealed and abro-
"gated from the date in that behalf
"specified, . . . and all property pur-
"porting to be transferred by such
"scheme shall, without any other con-
"veyance or act in the law (so far as
"may be), vest in the transferees, and
"so far as it cannot be so vested shall
"be held in trust for the transferees."

ACTION.

An indenture dated September 25, 1840, expressed to be made between "William John Bankes . . . lord of the manor of Studland . . . of the one part and the said William John Bankes, Thomas George Robson . . . steward of the said manor of Studland and the Reverend Charles Michael Turner of Studland, clerk, rector of the . . . [parish of Studland] of the other part . . . " was in the following terms: "Whereas it is expedient for the benefit of the said parish of Studland that a school should be established in the parish for educating the poor children there in the principles of the Christian religion according to the doctrines and discipline of the United Church of England and Ireland and in useful knowledge and for that purpose to erect a convenient school-house and other necessary buildings, and whereas the said William John Bankes had consented to convey the piece of land hereinafter particularly described for the site of the said school-house and other necessary buildings in manner hereinafter mentioned, now this indenture witnesseth that in execution and performance of the said desire and by way of free gift of the said William John Bankes for the purposes aforesaid he the said William John Bankes by these presents to be enrolled as required by the statutes in such case made and provided doth bargain sell and confirm unto the said Thomas George Robson and Charles Michael Turner and their successors stewards of the said manor and rectors of the said parish of Studland with the lord of the said manor" [the parcel therein described], "and also all the estate right title interest claim and demand whatsoever both at law and in equity of him the said William John Bankes into out of or upon the said piece or parcel thereof with the appurtenances to have and to hold the said piece or parcel of land hereditaments and premises hereby bargained and sold or intended so to be with their appurtenances unto the said Thomas George Robson and Charles Michael Turner to the use of the said William John Bankes, Thomas George Robson and Charles Michael Turner and their successors lords and stewards of the said manor and rectors of the said parish upon trust to permit the same to be used as a site for the erection thereon of a school-house for instructing the poor children of the said parish in useful knowledge and in the principles of the Christian religion according to the doctrines and discipline of the United Church of England and Ireland and it is hereby declared and agreed by and between the said parties hereto that in case the said school-house shall not be erected or being erected it shall be found impracticable by the said trustees for the time being by reason of a failure in the contribution or funds for the erection or support thereof or by any other means whatsoever to carry the intention of the said William John Bankes into effect then and in such case the bargain and sale hereby made shall be void."

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A school was shortly thereafter erected and opened, and was carried on under the name of the Studland Church of England School.

By a scheme framed by the Minister of Education under the Endowed Schools Acts, 1869 to 1874, and not by the commissioners by reason of intermediate legislation, and approved by Order in Council on December 21, 1949, the legal estate in the school became vested in the first defendant, the Salisbury Diocesan Council of Education Incorporated.

The scheme, headed: "Counties—Dorset, Wiltshire and "Devon. Diocese—Salisbury. Foundations—Certain Church of "England Educational Foundations," was stated to be a "Scheme framed by the Minister of Education under the "Endowed Schools Acts, 1869 to 1874, as applied by an order of "the Minister dated April 7, 1949, made under section 86 (1) of "the Education Act, 1944, as amended by the Education Act, "1946." Paragraph 1, under the cross-heading "Foundations to "which scheme relates" was in the following terms: "This "scheme relates to the Church of England educational founda-"tions specified in the schedule to this scheme, hereinafter "referred to as 'the foundations,' in the diocese of Salisbury, in "the counties of Dorset, Wiltshire and Devon." In the schedule a large number of schools were set out, the names of the schools being in the left-hand column, and in the right-hand column, opposite the names were the words "comprised in a deed of . . ." Opposite the name of the school in question, which appeared as "Studland Church of England School," were the words "com-"prised in a deed of September 25, 1840."

Paragraph 2 of the scheme, headed: "Repeal and substitu-"tion," read: "Every Act of Parliament, letters patent, statute, "deed, instrument or trust affecting the foundations is hereby "repealed and the provisions of this scheme are substituted there-"for: Provided that until the premises of a foundation regulated "by this scheme are sold or let, as hereinafter provided, that "foundation shall be administered by the governing body herein-"after appointed in accordance with the trust subsisting imme-"diately before the coming into operation of this scheme."

Paragraph 3 headed: "Appointment of governing body," read: "The Salisbury Diocesan Council of Education Incorporated, is "hereby appointed to be the governing body of the foundations, "and all land held in trust for the foundations, except such land as "is at the date of this scheme vested in the Official Trustee of "Charity Lands or is already vested in the governing body, is here-"by vested in the governing body, and the former trustees of the "foundations and all other persons capable of being bound by this "scheme shall do all such acts as may be necessary to transfer "to the governing body any stocks, shares, funds and securities "belonging to the foundations which are not at the date of this "scheme invested in the name of the Official Trustees of Charit-"able Funds."

Paragraph 4, headed: "Sale or letting of premises," read: "The governing body is hereby authorised to sell any of the "premises of the foundations, subject in each case to the "approval of the purchase price by the Minister of Education, or "to let the same according to the general law applicable to the "letting of property by trustees of charitable foundations." Paragraph 5 read: "Application of capital assets and income. "(1) After payment of any expenses of administration the govern- "ing body may apply the net rents and profits of any of the "premises of the foundations, or of any part thereof for the time "being unsold, and any other income of the foundations in or "towards the maintenance of any school maintained as a volun- "tary aided school in the diocese of Salisbury in which religious "instruction is given in accordance with the doctrines of the "Church of England. (2) After payment of any expenses of "administration the governing body may, subject to the further "order of the Minister of Education in each case, apply the net "proceeds of the aforesaid sales and any other capital moneys "of the foundations in or towards the improvement, enlargement "or erection of any such school which is, or is to be maintained "as a voluntary aided school."

William John Bankes died in 1855, Thomas George Robson died in 1857, and the Reverend Charles Michael Turner died in 1910.

On January 9, 1956, the use of the premises as a school ceased.

The plaintiff, Henry John Ralph Bankes, the present lord of the manor of Studland, brought an action against the Salisbury Diocesan Council of Education Incorporated and the Attorney-General, claiming a declaration that the council held the property upon trust for him.

G. A. Rink Q.C. and *A. L. Stott* for the plaintiff.

N. S. S. Warren Q.C. for the first defendant, the Salisbury Diocesan Council of Education Incorporated.

B. J. H. Clauson for the Attorney-General.

The following cases, in addition to those referred to in the judgment, were cited in argument: *In re Blunt's Trusts* [3]; *In re Cooper's Conveyance Trusts* [4]; *In re Peel's Release* [5]; *Bull* v. *Bull* [6]; *In re Ingleton Charity* [7]; *Moses* v. *Lovegrove* [8]; *Churcher* v. *Martin* [9]; *Soar* v. *Ashwell* [10]; *Law Guarantee and Trust Society*

[3] [1904] 2 Ch. 767; 20 T.L.R. 754.

[4] [1956] 1 W.L.R. 1096; [1956] 3 All E.R. 28.

[5] [1921] 2 Ch. 218.

[6] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253, C.A.

[7] [1956] Ch. 585; [1956] 3 W.L.R. 369; [1956] 2 All E.R. 881.

[8] [1952] 2 Q.B. 533; [1952] 1 T.L.R. 1324; [1952] 1 All E.R. 1279, C.A.

[9] (1889) 42 Ch.D. 312.

[10] [1893] 2 Q.B. 390, C.A.

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& Hunter v. *Bank of England* [11]; *Jacobs* v. *Seward* [12]; *Patrick* v. *Simpson.* [13]

Cur. adv. vult.

April 13. RUSSELL J. read the following judgment: This case raises several points of some difficulty. The point of the action is this: the plaintiff asserts that, by reason of the closing of a school in Studland, Dorset, in 1956, the first defendant—in which the legal estate in fee simple is admittedly vested by reason of a scheme under the Endowed Schools Act, 1869, is trustee of the premises for him. By that defendant (supported by the Attorney-General) it is contended that the plaintiff has no beneficial interest in the property, which is held upon exclusively educational and charitable trusts. The plaintiff's claim is based on a resulting trust under a conveyance by his predecessor in title in 1840, which it is said took effect when the use of the premises as a school ceased in 1956. The defendants admit that if any such claim can be supported the plaintiff is the person entitled.

The first question is whether, on the construction of the deed of 1840, once the school premises were built and the school opened, there could any longer be a possibility of a resulting trust. If not, then the plaintiff must fail. [His Lordship read the deed and continued:]

For the defendants the following points were made: The object of the deed was the establishment of the school. There is no evidence that W. J. Bankes supplied all the moneys to build the school, and some evidence to suggest he did not. It is unlikely, therefore, it is said, that subscriptions for the building would be forthcoming on terms that within possibly a short time the donor of the plot would become entitled to the plot and any building thereon. There were many stages, it is said, before "establishment," when a reverter would sensibly operate: and that makes it unnecessary and unlikely that reverter at some remote future moment was intended. The phrase used was, it is pointed out, not that there should be reverter but that the deed should be void, and, moreover, void if the intention of the grantor could not be "carried into effect"; and it is said that there is nothing to show that his intention was other than simply that the school should be erected, established and launched. It was further argued that the reference to the trustees "for the time "being" does not necessarily involve any indefinite extension in time of the avoidance clause: there might be a change in the trustees before the school was "established."

Those are arguments of considerable weight but they do not persuade me that the avoidance clause was other than indefinite in time. That the conception of a reverter unlimited in time is in such cases consistent with the collection of money for the building

[11] (1890) 24 Q.B.D. 406; 6 T.L.R. 205.

[12] (1872) L.R. 5 H.L. 464, H.L.

[13] (1889) 24 Q.B.D. 128; 6 T.L.R. 23, D.C.

of a school is made plain by the School Sites Act, 1841. The reference to support of the school or school-house cannot be explained unless the reverter or resulting trust is unlimited in time.

In my judgment, on the true construction of the deed of 1840 the avoidance clause is not limited in time and operates whenever the property ceases to be used as a school. I cannot think that the reference to the failure to carry into effect the intention of the grantor for lack of funds for the support of the school-house, or for any other reason, is limited to the provision at the outset of a fund sufficient to keep the building in order or a teaching staff on duty. In my view, it is intended and to be construed as imposing a continuing condition of the suspension of the avoidance (and, therefore, of the reverter by resulting trust) that the property should continue to be used as a school, and the dedication to educational charity is, in my view, so limited.

If, as I have held, the avoidance or reverter clause or resulting trust has no time limit in its operation—which it is not denied is a legal possibility—the next question is related to the possibility that a possessory title for educational charity to the property was acquired so as to extinguish the rights of those entitled under the resulting trust.

Hereunder the first question is: What title was conferred, and on whom, by the deed of 1840? The relevant parts of the deed of 1840 for this purpose are as follows: "Now this indenture "witnesseth that in execution and performance of the said desire "and by way of free gift of the said William John Bankes for "the purposes aforesaid he, the said William John Bankes, by "these presents to be enrolled as required by the statutes in such "case made and provided doth bargain sell and confirm unto "the said Thomas George Robson and Charles Michael Turner "and their successors stewards of the said manor and rectors "of the said parish of Studland with the lord of the said manor" the parcel "to have and to hold the said piece or parcel of land "hereditaments and premises hereby bargained and sold or "intended so to be with their appurtenances unto the said "Thomas George Robson and Charles Michael Turner to the use "of the said William John Bankes Thomas George Robson and "Charles Michael Turner and their successors lords and stewards "of the said manor and rectors of the said parish upon trust."

By the ordinary law it is plain that this language was not sufficient to confer a fee simple in the entirety, lacking, as it did, the appropriate words of limitation. It is accepted by the plaintiff that ordinarily a conveyance in 1840 to individuals A, B and C. upon trusts would in law confer an estate which would not outlast the death of the survivor. To convey the fee simple would require a reference to their heirs as words of limitation. In this connection the plaintiff relies, among other things, upon the provisions of the School Sites Act, 1836, as dispensing with the need for words of limitation.

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Before coming to that Act it will be convenient to tabulate certain propositions which were accepted against themselves on behalf of the defendants and the plaintiff in the course of the argument. These admissions have made it unnecessary for me to consider much of the ground which was covered in argument. First, for the defendants it was accepted that W. J. Bankes was in 1840 tenant for life of the property in question by virtue of a settlement dated June 2, 1821; and, further, that the conveyance of 1840 was made by virtue of and pursuant to the School Sites Act, 1836, though not expressly referring to it. Secondly, for the defendants it was accepted that if the Act of 1836 operated to dispense with the need for words of limitation to convey the fee simple no possessory title adverse to the plaintiff would have been acquired. Thirdly, for the defendants it was accepted that if the effect of the conveyance of 1840 was to confer upon the rector as corporation sole a fee simple interest in one-third as a tenant in common as trustee, and no more than life interests on W. J. Bankes and T. G. Robson as trustees, no possessory title would have been acquired in destruction of the interests of the plaintiff under the resulting trust. Fourthly, for the plaintiff, it was accepted that if the effect of the deed of 1840 was to confer no legal interest extending beyond the death of the survivor of the three persons named therein, a possessory title in favour of charity must have been acquired such as to destroy the claim of the plaintiff under the resulting trust.

It is to be observed that the deed of 1840 referred in the habendum to Charles Turner and his successors, rectors of the parish of Studland. These are, in any event, words of limitation appropriate to a corporation sole. As will later appear, I consider (contrary to the defendants' submissions) that there is nothing impossible in law in the conception of a conveyance of land to an ecclesiastical corporation sole upon trust; consequently, the point I have mentioned thirdly as being accepted by the defendants makes it strictly unnecessary for me to consider whether the Act of 1836 dispenses with the need for words of limitation. But I will consider and deal with that question.

I should perhaps have said that, of course, the reference in the deed of 1840 to the successors of the lord of the manor and the steward of the manor cannot be words of limitation, nor can they be more than an indication of the grantor's wishes as to the identity of future trustees.

Before referring to the School Sites Act, 1836, it is pertinent to observe that if it dispenses with the need for a reference to heirs as words of limitation it was a significant breach in the walls of real property tradition, going even further than the Conveyancing Act, 1881, albeit in a limited sphere. So far as I am aware such a breach, if it was made, has not been noticed in the textbooks. It is true that this particular statute did not hesitate to authorise the gratuitous conveyance by bargain and sale; but,

nevertheless, I think that clear language must be found if it is also to abandon the requirement of words of limitation.

The leading purpose of the School Sites Act, 1836—and I quote from the preamble—was "to promote the education of poor "children in the principles of true religion and useful knowledge, "and to afford additional facilities for the erection of school rooms "to be used for that purpose."

Section 1 made it lawful for any lord of the manor "to "convey to the incumbent and churchwardens of any parish in "which a school for the education of poor children is intended "to be erected, or to the trustees of any such school" enough common or waste land in the parish to provide a site for such a school. The section further provided that "the conveyance of "such part of the common or waste grounds by the lord . . . "of the manor wherein the same shall be situate shall be a good "and sufficient conveyance for the purpose of vesting the fee "simple and inheritance thereof in the parties to whom the "same shall be conveyed, for the purpose hereinbefore specified, "as fully and effectually as if every person having right of "common . . . had joined in and executed such conveyance."

The section so enables the lords of the manor, whether they are seized in fee simple, fee tail or for life, whether they are corporations aggregate or sole, and whether feme covert, minor or lunatic (with appropriate consents).

The conveyance of 1840 was not made under this section, but under section 2, which enacted that it should be lawful "for all "persons being seised in fee simple, fee tail, or for life . . . to "convey any portion of land of which they may respectively be "seised, including copyhold land . . . in the same manner, to the "same persons, and for the same purpose as hereinbefore "authorised with respect to common or waste ground." This section also included femes covert, minors and lunatics, and as to copyhold land the lord's consent was required.

Section 3 ends with the following sentence: "and all convey-"ances made by virtue and according to the provisions of this "Act will be valid and effectual in law to all intents and "purposes for vesting the fee simple and inheritance of the land "conveyed thereby in the parties to whom the same shall be con-"veyed for the purpose hereinbefore specified." Section 5 required all conveyances authorised by the Act to be by bargaining and sale enrolled, and provided that they might be so made for valuable consideration or as a free gift. Section 6 limited the area of land to half an acre.

The greater part of section 3 is directed to giving similar powers to ecclesiastical bodies, and it was submitted by the defendants that the final sentence, which I have quoted above, is limited in its operation to that section; but the language is, I think, too general for that submission to be correct. I see no reason why validating words should be attached to conveyances under sections 1 and 3 but not to those under section 2; nor do

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I see any justification for reading the final sentence of section 3 as though it were worded "made by virtue *of this section* and "according to the provisions of this Act."

It is plain that the purpose of the Act was to enable conveyances in fee simple to be made by persons who, however much they designed to do so, were not in a position to do it. It is obviously an Act to cure defects under the ordinary law in the person conveying, and not defects under the ordinary law in the conveyance. This is additionally reflected in section 4, which dealt with the cases where schools had already been built on land whose owners (in the broad sense) were not able to make a valid and effectual conveyance thereof. The validating words are, in my judgment, sufficiently thus explained without going further. There is no reason why a new and special meaning should be attached to the words "to convey" or "the conveyance" in sections, 1, 2, 3 or 5, namely, that the conveyance, however worded and however lacking in the appropriate words of limitation, should confer a fee simple. The reference to a fee simple in section 2 does not, in my judgment, invalidate that approach to the construction.

In the course of argument on this point reference was made to the School Sites Act, 1841, which replaced and repealed the Act of 1836. It was pointed out that the statutory form of conveyance, albeit permissive, provided for the appropriate words of limitation. Section 15 of the Act of 1841 was also considered. It is not altogether easy to follow, but it does nothing to persuade me that the Act of 1836 must be construed as abolishing the need for the appropriate words of limitation in a conveyance thereunder—certainly not where the conveyance was not to the incumbent and churchwardens.

As previously indicated, the defendants next contended that although in the case of the rector's one-third the words of limitation appropriate to the conveyance of a fee simple to a corporation sole were used in the deed of 1840—that is to say, "and his successors"—yet there was something in the character of such a corporation sole which made it incapable in law of receiving a fee simple interest in land upon trusts such as this, or indeed, otherwise than as part of the endowment of the benefice; and, it was said, more especially if the interest was a tenancy in common.

In support of this submission reference was made to Blackstone's Commentaries, 8th ed. (1778), vol. 1, chap. 18, at p. 469. There it is said: "Before we proceed to treat of the several "incidents of corporations, as regarded by the laws of England, "let us first take a view of the several sorts of them; and then we "shall be better enabled to apprehend their respective qualities.

"The first division of corporations is into aggregate and sole. "Corporations aggregate consist of many persons united together "into one society, and are kept up by a perpetual succession of "members, so as to continue for ever: of which kind are the

"mayor and commonalty of a city, the head and fellows of a "college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in "some particular station, who are incorporated by law, in order "to give them some legal capacities and advantages, particularly "that of perpetuity, which in their natural persons they could "not have had. In this sense the king is a sole corporation: "so is a bishop: so are some deans, and prebendaries, distinct "from their several chapters: and so is every parson and vicar. "And the necessity, or at least use, of this institution will be "very apparent, if we consider the case of a parson of a church. "At the original endowment of parish churches, the freehold of "the church, the churchyard, the parsonage house, the glebe, "and the tithes of the parish, were vested in the then parson by "the bounty of the donor, as a temporal recompense to him for "his spiritual care of the inhabitants, and with intent that the "same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The "freehold was vested in the parson; and, if we suppose it vested "in his natural capacity, on his death it might descend to his "heir, and would be liable to his debts and incumbrances; or, at "best, the heir might be compellable, at some trouble and "expense, to convey these rights to the succeeding incumbent. "The law therefore has wisely ordained, that the parson, quatenus "parson, shall never die, any more than the king; by making him "and his successors a corporation. By which means all the "original rights of the parsonage are preserved entire to the "successor: for the present incumbent, and his predecessor who "lived seven centuries ago, are in law one and the same person; "and what was given to the one was given to the other also."

It does not seem to me that this quotation really supports the submission at all. It merely states generally the purposes for which such a corporation is incorporated in the eye of the law. It does nothing to suggest that a conveyance of land to such a corporation sole is in law a nullity if a trust is imposed on the estate or interest conveyed. Still less does it suggest that although the conveyance is not a nullity equity will decline to enforce the trust of the property and will leave the land as mere augmentation of the endowments of the benefice.

For the defendants reference was made also to a passage in Coke on Littleton, vol. 1, p. 9a; but, as was pointed out for the plaintiff, that passage was no more than a reference to the particular problems affecting personalty in relation to successive ownership by the successive constituents of a corporation sole.

I accept the submission for the plaintiff that no authority or principle has been advanced to show that a conveyance of land in 1840 to a corporation sole—whether of this or any other character—cannot take effect in law when a trust is imposed by the grant; nor to show that, although it takes effect in law, equity will not recognise or enforce the trust.

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To the contrary, indeed, are general statements. I refer to Halsbury's Laws of England, 3rd ed. (1954), vol. 9, at p. 72, where it is plainly stated: "As a general rule a corporation, "aggregate or sole, may hold property upon trust, either alone "or jointly with one or more individuals"; and to the same effect in the same work, 2nd ed. (1939), vol. 33, at p. 161: "A "corporation, whether aggregate or sole, may be a trustee, but "cannot without a licence in mortmain hold real property in trust "which it could not without such licence hold for its own benefit."

The suggestion that a corporation could, in the eye of equity, retain property which in law was conveyed to it while ignoring a trust thereof was once abruptly dismissed by Lord Hardwicke, as was recorded in *In re Thompson's Settlement Trusts.*[1]

In *Tufnell* v. *Constable* [2] a deceased had covenanted with the vicar and his successors that his estate would cause a certain sum to be invested in Government annuities in the corporate name of the vicar and in the corporate names of the churchwardens and in the corporate name of the Archdeacon of Colchester, to be held and applied by such vicar, churchwardens and archdeacon for the time being upon trusts for the support of parish schools—such as the present one—and for charitable purposes involving relief of poverty in the parish. Among the many points taken by the executors it was argued that corporations sole cannot take personalty in their corporate character or by perpetual succession; but it was never suggested additionally that they could not be trustees at all for such charitable purposes.

Grant, in his work on Corporations (1850), makes the general statement at p. 109 that a corporation, with exceptions in the cases of colleges at universities, may hold lands in trust for anyone, and even for purposes quite private; and at p. 648 he expressly refers to a case of land held by a parson as corporation sole in trust for charitable purposes.

The last lap of this case is therefore to be approached with this in mind, that regardless of where the whole legal estate in the land might from time to time rest, that legal estate was, immediately prior to its vesting in the first defendant by virtue of a scheme in 1949 next to be mentioned, undoubtedly subject to trusts (a) to permit its user for a school until it ceased to be used as such for any reason; and (b) for the plaintiff beneficially under a resulting trust upon such cesser. The final question is whether the scheme of 1949 operated to extinguish that resulting trust and to deprive the plaintiff of the beneficial entitlement to the land and, of course, the buildings thereon, which was otherwise undoubtedly his when in 1956 they ceased to be used as a school.

The statutory origin of the scheme of 1949 was the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56). That Act followed a commission of inquiry into the education given in schools such as this.

[1] [1905] 1 Ch. 229; 21 T.L.R. 86. [2] (1838) 7 Ad. & E. 798.

which (as the Act recited) recommended various changes in management and education, and in the application of educational endowments, with reorganisation where necessary. By section 9 of that Act commissioners were empowered as follows: They "by "schemes . . . shall have power, in such manner as may render "any educational endowment most conducive to the advancement "of the education of boys and girls, or either of them, to alter, "and add to any existing, and to make new trusts directions and "provisions in lieu of any existing, trusts directions and provisions "which affect such endowment, and the education promoted "thereby, including the consolidation of two or more such "endowments . . ."

By section 4 "endowment" was defined: "In this Act, unless "the context otherwise requires, the term 'endowment' means "every description of property, real, personal, and mixed, which "is dedicated to such charitable uses as are referred to in this Act, "in whomsoever such property may be vested, and in whosesoever "name it may be standing, and whether such property is in "possession or in reversion, or a thing in action."

Mr. Rink, for the plaintiff, submitted in the present case the endowment was not the fee simple in the land in perpetuity but only for a period which would determine when it was no longer used as a school; the land could not be regarded as an endowment, and therefore could not be dealt with under the scheme as such, in respect of any subsequent period. There is nothing, he pointed out, in principle to prevent an endowment being for a period less than perpetuity.

Under the Act of 1869 the procedure leading to a scheme was this. A draft scheme was to be prepared, published and circulated; objections could be made, and ultimately it required approval by Her Majesty in Council. It is to be noted that by section 39 any person directly affected by a scheme who felt aggrieved by the scheme on specific grounds might appeal to the Privy Council to reject the scheme; the second of those specific grounds was on the ground "Of the scheme not saving or making "due compensation for his or their vested interest as required "by this Act." This, which is the only reference to vested interest and compensation, obviously refers back to section 13 of the Act which, without reading, I can state certainly did not include a case such as that of the plaintiff.

When considering whether the statute authorised the extinction of the plaintiff's beneficial interest without compensation this seems to me significant. To this must be added the general principle of construction that property rights should not be regarded as taken away by statute without compensation unless the language used plainly so provides. It is, moreover, pertinent to observe that when, under the Education Act, 1944, it was decided to override by these schemes the legal right of reverter under the School Sites Act, 1841—which was a right similar in substance to the plaintiff's in the present case, although, of course,

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different in law—provision for express overriding normally with compensation was made: see section 86 of the Act of 1944.

Thus far, in my judgment, the statutory power to make schemes did not authorise the overriding or extinction of the resulting trust under the deed of 1840.

However, sections 45 to 47 of the Act of 1869 were in the following terms. Section 45: "A scheme shall not of itself have "any operation, but the same, when and as approved by Her "Majesty in Council, shall from the date specified in the scheme, "or, if no date is specified, from the date of the Order in Council, "have full operation and effect in the same manner as if it had "been enacted in this Act."

Section 46: "Upon a scheme coming into operation, every "Act of Parliament, letters patent, statute, deed, instrument, "trust, or direction relating to the subject-matter of the scheme, "and expressed by such scheme to be repealed and abrogated, "shall, by virtue of the scheme and of this Act, be repealed and "abrogated from the date in that behalf specified, or if no date "is specified, from the date of the scheme coming into operation, "and all property purporting to be transferred by such scheme "shall, without any other conveyance or act in the law (so far as "may be), vest in the transferees, and so far as it cannot be so "vested shall be held in trust for the transferees."

Then section 47: "The Order in Council approving a scheme "shall be conclusive evidence that such scheme was within the "scope of and made in conformity with this Act, and the validity "of such scheme and order shall not be questioned in any legal "proceedings whatever."

It must, therefore, be accepted that the answer to the final question in this case depends upon the true construction of the scheme, although that construction may and must be approached in the light of the general principles to which reference has already been made, and I think also with an unwillingness to find, except from clear language, that the scheme has exceeded the bounds of its statutory authority.

The scheme in question was approved by the King in Council on December 21, 1949, having been framed by the Minister of Education, and not by commissioners, by reason of intermediate legislation to which I need not refer. The scheme is headed: "Counties—Dorset, Wiltshire and Devon. Diocese—Salisbury. "Foundations—Certain Church of England Educational Founda- "tions." It is said to be a "Scheme framed by the Minister of "Education under the Endowed Schools Acts, 1869 to 1874, as "applied by an order of the Minister dated April 7, 1949, made "under section 86 (1) of the Education Act, 1944, as amended by "the Education Act, 1946."

Paragraph 1 is in these terms. It has the cross-heading "Foundations to which scheme relates: (1) This scheme relates "to the Church of England educational foundations specified in "the schedule to this scheme, hereinafter referred to as 'the

" ' foundations,' in the diocese of Salisbury, in the counties of " Dorset, Wiltshire and Devon." The schedule contains a very great number of schools of this type, and in the left-hand column of the schedule will be found the name of the school or the foundation or charity in question, and in the case of this school it appears on p. 6 as " Studland Church of England School "; then, in the right-hand column, " Comprised in a deed of September 25, " 1840." Throughout this schedule one will commonly find that phrase used, " comprised in a deed of " the particular date. In some instances other phrases are used and you find, for example, lands such as Archbishop Wake's charity, " Founded by the " will of William Wake . . . and now represented by the following " sums of stock."

I should add that one of these schools in this list at least, namely, the Milton Abbas Church of England school, was in fact a school which was built upon a site given under the School Sites Act, 1841, and in respect of that school at least a specific order was made under a section of the Education Act, 1944, to which I have made reference, extinguishing the reverter rights under the statute of 1841.

Paragraph 2 of the scheme is headed: " Repeal and substitu- " tion," and starts thus: " Every Act of Parliament, letters " patent, statute, deed, instrument or trust affecting the founda- " tions is hereby repealed and the provisions of this scheme are " substituted therefor." There is a proviso to which I will refer in a moment. This passage in the scheme of course relates back to section 46 of the Act of 1869. It is quite true that in one sense the deed of 1840, which is described in the schedule as " comprising " the foundation, is a " deed or instrument . . . " affecting the foundation," but " affecting " must be construed in some limited sense—a fact which is obvious when one considers the alternative of repealing every Act of Parliament affecting in any way the foundations or any of them. What is the criterion of such limitation? It seems to me that in the light of the whole legislation it must be, in relation to property and property rights, that only those parts of any deed and only those trusts which directly concern the educational foundation as such are repealed or abrogated.

I see no justification for saying that this provision (or the parallel provision in the statute of 1869 itself) is aptly worded to repeal or abrogate a trust in favour of a private individual to take effect upon a contingency or an event; such a trust affects him and not the foundation in the sense in which that word " foundation " is here used.

It was suggested that a resulting trust " affects " the foundation in that it deprives it in the event of endowment. I prefer the view that the only trusts " affecting " the foundation are those which confer upon it an endowment for a period lasting as long as the school continues in operation as a school.

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The substance of the matter is that just before the scheme the land was vested in trustees upon two trusts: (a) to permit the school to be carried on thereat for an indefinite period; (b) for the plaintiff absolutely and beneficially when and as soon as the school closed down.

Had the document been expressed in that form it is, in my judgment, reasonably plain that neither section 46 of the Act of 1869 nor paragraph 2 of the scheme would have repealed or abrogated trust (b).

The proviso to paragraph 2 of the scheme is in the following terms: "Provided that until the premises of a foundation regu- "lated by this scheme are sold or let, as hereinafter provided, that "foundation shall be administered by the governing body herein- "after appointed in accordance with the trusts subsisting imme- "diately before the coming into operation of this scheme." In the present case this simply means that the first defendant is directed, pending sale or letting of the land, to permit the land to be used for a school.

It is to be noted that by paragraph 2 the provisions of the scheme are to be "substituted" for that which is repealed, and it is not to be expected that the substitute should embrace a wider property interest than that which is repealed.

Paragraph 3, headed "Appointment of governing body," is in these terms: "The Salisbury Diocesan Council of Education In- "corporated, is hereby appointed to be the governing body of the "foundations, and all land held in trust for the foundations, "except such land as is at the date of this scheme vested in the "Official Trustee of Charity Lands or is already vested in the "governing body, is hereby vested in the governing body; and "the former trustees of the foundations and all other persons "capable of being bound by this scheme shall do all such acts as "may be necessary to transfer to the governing body any stocks, "shares, funds and securities belonging to the foundations which "are not at the date of this scheme invested in the name of the "official trustees of charitable funds."

It is accepted that the land now in question was, in 1949, "land held in trust for" the Studland school foundation, and that the legal estate in fee simple was, by this paragraph, vested in the first defendant. But, it is claimed, this paragraph does nothing to affect the beneficial trusts which remained (a) to permit the land to be used for the school; (b) for the plaintiff absolutely and beneficially when and as soon as it was no longer so used.

Paragraph 4 of the scheme, headed "Sale or letting of "premises," is in these terms: "The governing body is hereby "authorised to sell any of the premises of the foundations, subject "in each case to the approval of the purchase price by the "Minister of Education, or to let the same according to the "general law applicable to the letting of property by trustees of "charitable foundations."

Paragraph 5 (1) deals with the application of the net income of

any lettings. The cross-heading is "Application of capital assets and income": "(1) After payment of any expenses of administration the governing body may apply the net rents and profits of any of the premises of the foundations, or of any part thereof for the time being unsold, and any other income of the foundations in or towards the maintenance of any school maintained as a voluntary aided school in the diocese of Salisbury in which religious instruction is given in accordance with the doctrines of the Church of England.

"(2) After payment of any expenses of administration the governing body may, subject to the further order of the Minister of Education in each case, apply the net proceeds of the aforesaid sales and any other capital moneys of the foundations in or towards the improvement, enlargement or erection of any such school which is, or is to be, maintained as a voluntary aided school."

It is argued for the defendants that this power of letting and sale, coupled with the directions for dealing with the resultant money, necessarily overrides the beneficial interest of the plaintiff. The land, it is said, is the premises of the foundation; the power of sale is not limited by time or circumstances; there is no scope for dealing with the proceeds of sale by paying it to the plaintiff—all is earmarked by statute for administration expenses and educational charity. I do not consider that to be correct. In the present case, as soon as the school closed down in 1956 it ceased, by force of the resulting trust or reverter, to be "premises of the foundation," those resulting trusts having been those upon which the land, since 1949, had, inter alia, been held by the first defendant. The power of sale under the scheme consequently, in my judgment, no longer existed, nor did the provisions, of course, for the disposal of the proceeds of sale.

The matter is not an easy one, but the statute and scheme, which make no provision for compensation, do not, I consider, in clear terms override and extinguish the resulting trust in favour of the plaintiff.

I ought to add that paragraph 9 of the scheme is in the following terms, under the cross-heading "Questions under scheme." "Any question as to the construction of this scheme, or as to the regularity or validity of any acts done or about to be done under this scheme, shall be determined conclusively by the Minister of Education upon such application made to him for the purpose as he thinks sufficient."

Inasmuch as any scheme made by the executive with the approval of Her Majesty in Council is, by the statute, not open to challenge as ultra vires, and has itself the force of statute, the inclusion of such a paragraph as this might not be universally acclaimed. However, it is common ground among the parties that since the Minister has not made, and has not been asked to make, any determination in this matter, the jurisdiction of the court to determine the rights of the plaintiff is not ousted.

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I therefore conclude that the plaintiff has successfully surmounted the various hurdles set in his path, and will declare that since the closure of the school on January 9, 1956, the first defendant has held the land the subject of the grant of 1840 in trust for the plaintiff absolutely and beneficially.

Declaration accordingly.
Attorney-General to pay three-fourths of the plaintiff's costs; no order as to the first defendant's costs.

Solicitors: *Gregory Rowcliffe & Co.; Darley, Cumberland & Co. for Jonas & Parker, Salisbury; Treasury Solicitor.*

M. G. T.

[PRIVY COUNCIL.]

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DUDLEY ERNEST LYNCOLN WAGES FELIX . . . . . APPELLANT;

AND

GENERAL DENTAL COUNCIL . . . RESPONDENTS.

ON APPEAL FROM THE GENERAL DENTAL COUNCIL.

Dentist — Discipline — "Infamous or disgraceful conduct" — Meaning —National Health Service—Allegations of overcharging and wrongful certification — Elements essential to establish "infamous or "disgraceful conduct in a professional respect"—Dentists Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 28), *ss.* 25, 29.

Privy Council—Fact, question of—Appeal from disciplinary tribunal—Principles applicable—Dentists Act, 1957, *s.* 29.

Privy Council—Jurisdiction—Professional discipline—Whether appeal rehearing—Dentists Act, 1957, *s.* 29.

The appellant, a dentist registered under the Dentists Act, 1957, appealed against a determination of the Disciplinary Committee of the General Dental Council that he had been guilty of infamous or disgraceful conduct in a professional respect in overcharging for and wrongful certification of treatment of certain National Health Service patients. While admitting the overcharging, the appellant denied that it was done with any fraudulent or dishonest intent or with a view to obtaining remuneration to which he was not entitled, and attributed the mistakes admittedly made to carelessness on his own part and on that of his receptionist, to whom he entrusted the keeping of his records of treatment without adequate supervision or checking. With respect to the treatment alleged to have been wrongfully certified as necessary, the appellant's evidence was that he honestly believed it to be necessary, and the evidence of dentists called for the respondent council did not claim that that opinion was one which no dentist could honestly hold:—

† *Present*: LORD KEITH OF AVONHOLM, LORD JENKINS and LORD MORRIS OF BORTH-Y-GEST.

Held, (1) that the appeal was by way of a rehearing, to which the same principles applied as were applicable to an appeal to the Court of Appeal against the decision of a judge of first instance (post, p. 941).

Benmax v. *Austin Motor Co. Ltd.* [1955] A.C. 370, H.L.; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326 considered.

(2) Whether in relation to a given matter a dentist had been guilty of infamous or disgraceful conduct was a question of mixed fact and law, the question of law being whether on the facts proved or admitted he had been guilty of infamous or disgraceful conduct within the meaning of section 25 of the Act of 1957.

(3) The words "infamous or disgraceful conduct" should be construed in conjunction with the words "in a professional respect," and to make good such a charge in relation to the keeping of the prescribed dental records it was not enough to show that some mistake had been made through carelessness or inadvertence in (as here) two or three cases out of several hundred patients treated. To make such a charge good there must (generally speaking) be some moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty in regard to records as could be said to amount to dishonesty for that purpose. The question was to some extent one of degree, but the cases of overcharging in the present case clearly fell short of the degree of culpability required (post, p. 945).

Nor could the wrongful certification be regarded as amounting to infamous or disgraceful conduct. In the state of the evidence it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold the opinion that the treatment certified was necessary, and an honestly held opinion, even if wrong, plainly could not amount to infamous or disgraceful conduct.

Allinson v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750; 10 T.L.R. 304, C.A. considered.

Determination of the Disciplinary Committee discharged.

This was an appeal (No. 52 of 1959) under section 29 of the Dentists Act, 1957, from a determination of the Disciplinary Committee of the General Dental Council, made on November 12, 1959, under sections 25 and 26 of the same Act, that the appellant had been guilty of infamous or disgraceful conduct in a professional respect and that his name be erased from the register.

The appellant was a native of Sierra Leone and received his early education there. He was and had been at all material times a dentist registered under the Dentists Act, 1957, and his name was and had been at all material times included in the Bristol National Health Service list. He was 29 years of age, and having qualified as a licentiate in dental surgery at Glasgow in 1955 began practising on his own account in August, 1957.

The determination under appeal was the outcome of an inquiry held by the Disciplinary Committee on November 11 and 12, 1959, with respect to the following charge against the appellant:

"That being a registered dentist:

"(1) Having accepted Miss Ann Mathews of 623, Portway, "Shirehampton, Bristol, in or about February, 1958, as a patient "under the National Health Service (General Dental Services)

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"Regulations, you wrongfully claimed fees for three fillings "which had not been done.

"(2) Having accepted Mrs. Alkmina Moger of 2, Hallards "Close, Lawrence Weston Bristol, in or about April, 1958, as "a patient under the terms of the said Regulations, you "wrongfully claimed fees for two fillings when only one filling "had been done.

"(3) Having accepted Mrs. Beryl Dennis of 'Appletreewick,' "Barracks Lane, Shirehampton, Bristol, in or about April, 1958, "as a patient under the terms of the said Regulations: (i) you "wrongfully certified on Form E.C.17 that sixteen fillings were "required to render the patient dentally fit, when in fact thirteen "of these fillings were unnecessary: (ii) you wrongfully claimed "fees for four fillings when only three fillings had been done.

"And that in relation to the facts alleged you have been "guilty of infamous or disgraceful conduct in a professional "respect."

In the course of the inquiry paragraph (2) of the charge was amended by the insertion of the words "in one tooth" between the words "two fillings" and "when only. . . ."

At the conclusion of the inquiry the Disciplinary Committee determined (*a*) that the facts alleged against the appellant in each paragraph of the charge had been proved; (*b*) that as regards paragraph (1) (Miss Mathews) and paragraph (3) (i) and (ii) (Mrs. Dennis) the appellant had, in relation to the facts proved, been guilty of infamous or disgraceful conduct in a professional respect; but (*c*) that as regards paragraph (2) of the charge (Mrs. Moger) the appellant had not, in relation to the facts proved, been guilty of such conduct; and on those findings the Disciplinary Committee directed that the name of the appellant should be erased from the Register.

1960. April 4, 5. *Norman Richards Q.C.* and *Norman Brodrick* for the appellant.

J. P. Widgery Q.C. and *Peter Boydell* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Stock* v. *Central Midwives Board* [1]; *Allender* v. *Council of the Royal College of Veterinary Surgeons* [2]; *Bhandari* v. *Advocates Committee* [3]; *University of Ceylon* v. *Fernando* [4]; *Rex* v. *Cohen*.[5]

May 11. The judgment of their Lordships was delivered by LORD JENKINS, who stated the facts set out above and continued: To make the details of the charge intelligible, it is necessary

[1] [1915] 3 K.B. 756; 31 T.L.R. 436.
[2] [1951] 2 T.L.R. 892; [1951] 2 All E.R. 859, D.C.
[3] [1956] 1 W.L.R. 1442; [1956] 3 All E.R. 742, P.C.
[4] [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631, P.C.
[5] [1951] 1 K.B. 505; [1951] 1 T.L.R. 251; [1951] 1 All E.R. 203, C.C.A.

to refer briefly to two forms on which a dentist on the National Health Service list is required to record with respect to each patient the treatment needed in order to make the patient dentally fit, and the work actually done. These forms are prescribed by the National Health Service (General Dental Services) Regulations, 1954 (S.I. 1954, No. 472). Under paragraph 5 in Part I of the First Schedule to these Regulations a dentist is required to keep a dental record in respect of each patient, in which he records the treatment given and the date or dates on which it is given. He is also required to keep in respect of each patient the dental estimate form (E.C.17) as to which instructions are given in paragraph 7 of the same part of the same Schedule. This form is somewhat complicated. For the present purpose it is enough to say that a new patient should be required to sign part 10 signifying his or her willingness to undergo treatment, the dentist being then required to examine the patient and record the condition of the teeth on a chart (Part 1 of the form) and also to set out in column 1 of Part 2 the whole of the treatment in his opinion required to make the patient dentally fit, and if the patient is not willing to undergo the whole of such treatment to set out in column 2 of Part 2 particulars of such part of that treatment as the patient is willing to undergo. The dentist should also insert in column 1 of Part 2 his charges for the treatment proposed in accordance with a prescribed scale. Then (subject to approval of the estimate by higher authority when required by the Regulations, which did not require it in the cases now under review) the dentist proceeds to do (as the case may be) the whole of the work specified in column 1 of Part 2, or so much of that work as is specified in column 2. On completion of the work the dentist certifies such completion in Part 7 of the form, specifying the amount claimed for it, and the patient certifies in Part 11 that to the best of his or her belief the work has been done. Finally the completed form is submitted by the dentist for payment, and its accuracy is obviously of great importance.

The appellant admits that he accepted the three ladies named in the charge as his patients under the terms of the National Health Service (General Dental Services) Regulations, 1954, as alleged in the charge, and that in the case of Miss Mathews, whose treatment began on February 28, 1958) he submitted form E.C.17 claiming fees for 16 fillings when only 13 had been done; and that in the case of Mrs. Dennis (whose treatment began on April 15, 1958) he submitted form E.C.17 claiming fees for four fillings when only three had been done; and that in the case of Mrs. Moger (whose treatment began on or about April 21, 1958) he submitted form E.C.17 claiming fees for two fillings when apparently only one had been done. But in the case of Mrs. Moger (as appears from the amendment to paragraph (2) of the charge) the claim was made in respect of two fillings in one tooth, and the appellant explained in his evidence at the inquiry

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that the treatment in this instance began with two cavities, which merged into one in the course of the appellant's operations, and that the need for a corresponding alteration in form E.C.17 was overlooked. It would seem that the Disciplinary Committee accepted this explanation as affording sufficient ground for acquitting the appellant of infamous or disgraceful conduct in the case of Mrs. Moger. Be that as it may, they did in fact so acquit him, and accordingly this part of the charge must not be held against him in the present appeal.

The three cases with which their Lordships have so far dealt, now reduced to two by the Disciplinary Committee's decision in the case of Mrs. Moger, may conveniently be referred to as the cases of "overcharging." The appellant's defence in regard to them is to the effect that while he admits the fact of overcharging he denies that it was done with any fraudulent or dishonest intent or with a view to obtaining remuneration to which he was not entitled; and attributes the mistakes admittedly made to carelessness on his own part and on that of his receptionist, to whom he entrusted the keeping of his records of the treatment carried out for the patients concerned without adequate supervision or checking.

There remains the more serious matter raised in paragraph 3 (i) of the charge to the effect that the appellant wrongfully certified on form E.C.17 with respect to Mrs. Dennis that 16 fillings were required to make the patient dentally fit when in fact 13 of such fillings were unnecessary. As regards this head of charge (which may conveniently be referred to as the case of wrongful certification) the appellant admitted that on June 10 he submitted form E.C.17 in respect of Mrs. Dennis certifying that 16 fillings were required to render the patient dentally fit; but it was not in dispute that he had in fact filled three of them, and as to the remaining 13 he has throughout maintained the opinion that old fillings in 10 of them which had been previously filled were defective and needed replacement, and the other three were charted as suspect and requiring (or likely to require) attention.

Prior to the present inquiry, the matters complained of in the charge had been investigated by an entirely different body, namely, the local Dental Service Committee constituted under the National Health Service (Service Committees & Tribunal) Regulations, 1956 (S.I. 1956, No. 1077). There were in fact two such investigations, the first of which, held on July 23, 1958, dealt with the matters concerning Mrs. Dennis now alleged in paragraph 3 (i) and (ii) of the charge. The recommendations of the Dental Service Committee on that occasion were to the following effect: (i) That the Minister of Health be asked to authorise the Executive Council to withhold the sum of £500 from the appellant's remuneration. (ii) That until further notice the appellant should, before commencing any treatment, other than an examination or emergency treatment, be required to

submit for prior approval to the Dental Estimates Board estimates in respect thereof. (iii) That the appellant be paid fees only in respect of the work found to have been satisfactorily completed.

The second investigation by the Dental Service Committee was held on October 13, 1958, and dealt with the matters alleged in paragraphs (1) and (2) of the present charge. The recommendations made by the Dental Service Committee on that occasion were to the following effect: (i) That the Minister be asked to authorise the Executive Council to withhold the sum of £500 from the appellant's remuneration. (ii) That the appellant be severely censured and warned that, in the event of a further breach of the terms of service, the Council might consider making representations to the Tribunal (namely, the Tribunal constituted under section 42 of the National Health Service Act, 1946) that his continued inclusion in the Bristol Dental List would be prejudicial to the efficiency of the service.

The Minister of Health subsequently approved the recommendation of July 23, 1958, but in respect of the recommendation of October 13, 1958, reduced the amount to be withheld from £500 to £200.

In the course of the present inquiry reference was made to the investigations held by the Dental Service Committee, and to the outcome of those investigations in the shape of the recommendations to which their Lordships have alluded, and documents relating to these investigations have been included in the record prepared for the purposes of the present appeal. It is not in dispute that these investigations were held by the Dental Service Committee and that these recommendations resulted; but this, in their Lordships' view, carries the matter no further. The appellant's conduct was admittedly careless, and it is perhaps not surprising that the Dental Service Committee should have regarded it as involving breaches of the appellant's terms of service as a dentist on the National Health Service list, and as calling for severe measures. But the question which the Disciplinary Committee had to decide in the present inquiry was whether in relation to the matters complained of in the charge as proved or admitted before them the appellant had been guilty of infamous or disgraceful conduct in a professional respect.

The outcome of the Dental Service Committee's investigations having been communicated to the General Dental Council the Registrar to that body by letter dated July 30, 1959, informed the plaintiff that he was liable to be summoned before the Disciplinary Committee on a charge of infamous or disgraceful conduct in a professional respect within the meaning of section 25 of the Dentists Act, 1957, on grounds set out in the letter which raised the cases of Mrs. Dennis, Mrs. Moger and Miss Mathews and of another patient whose case has not been pursued in the present proceedings, and asked the appellant for any explanation

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or observations he might wish to make. That letter elicited a reply from the appellant dated August 1, 1959, which contained the following passages on which Mr. Widgery (appearing as solicitor to the Council) placed some reliance:

"I am filled with much humiliation and mortification by "this, as I have never in my life been so bluntly accused of "stealing. Indeed, I am very deserving of the fine which has "been imposed upon me, as a result of gross carelessness of "failing to check all National Health forms and keeping accurate "records.

"I must explain that, as a young practitioner, I had at the "time of these cases, very little experience, in fact under a "year's experience of the Health Service. I made the rather "serious mistake of leaving all forms and records to the entire "care of my receptionist. Although she cannot be held "responsible for mistakes made in my surgery, her marked "irresponsibility was discovered when these cases were brought "to light, and she was in consequence instantly dismissed. "These mistakes did not only result in very bad charting, but "it also resulted in the claiming of fees for work not done, and "also in the not claiming of fees for work done.

. . . . . .

"I am sincerely ashamed of myself that my recklessness has "occasioned such suspicion. I am very sorry indeed that this "is so, and can assure you, that since this happened, everything "possible is being done to ensure that it does not happen again."

The only witness before the Disciplinary Committee on the appellant's side was the appellant himself. [His Lordship referred to evidence given by the appellant in the cases of Miss Mathews and Mrs. Moger and continued:] As to the overcharging in the case of Mrs. Dennis, the appellant (record page 29) explained that she came to him the day before he was due to go on holiday and that he did three fillings in teeth 4, 6, and 7 upper left and told the receptionist which teeth he had done, implying that he left it to her to make the appropriate entries in the patient's record card. On his return from holiday he received an official letter asking him to forward the E.C.17. He then took the patient's record card and found that it showed that he had done fillings in teeth 4, 5, 6 and 7 upper right, and proceeded to fill in the E.C.17 as the record card showed.

[His Lordship referred to the cross-examination of the appellant on the cases of overcharging (record page 35) and continued:] As to the case of wrongful certification, also concerning Mrs. Dennis, it appears that Mrs. Dennis was not satisfied that all the treatment prescribed for her by the appellant was necessary, and consulted her doctor, who referred her to another dentist, Mr. J. G. James; and that, the case having come to the notice of the Dental Estimates Board, they asked the appellant for Mrs. Dennis's E.C.17. The appellant, according

to his evidence, entered on the E.C.17 the four fillings erroneously entered on Mrs. Dennis's record card as having been done and sent off the card as requested, making no claim for payment except for the four fillings which should have been only three, the fourth being the subject of the case of overcharging alleged with respect to Mrs. Dennis. Actually, it would seem that the E.C.17 as sent to the Board showed 16 fillings in column 1 of part 2 of the form (which, as above explained, is designed for showing the treatment which in the opinion of the dentist is necessary) of which three had actually been done by the appellant, leaving 13 remaining to be done, of which 10 had been filled before Mrs. Dennis came to him and the remaining three had no fillings in them. The appellant maintained throughout his evidence on this part of the case that the old fillings in the 10 teeth which had been previously filled were defective and needed attention, while the three which had never been filled were suspect and likely to require attention. Consideration of this part of the case is complicated by the fact that it seems to have been the plaintiff's practice to enter in colum 1 of part 2 of the E.C.17 not merely work necessary to be done but work likely to be found necessary on further investigation, and in the latter case to delete the relevant entries from column 1 in the event of the work being found superfluous. In other words, he treated the entries in column 1 as provisional and finalised them when the treatment was completed by reference to the work actually done. Thus if Mrs. Dennis's treatment had gone to completion the appellant, before certifying for his remuneration, would have struck out of column 1 any work which in fact had been found unnecessary. But the treatment was never completed because the Dental Estimates Board called in the E.C.17, and the appellant sent it to them just as it was, including the suspect cases. This practice was not warranted by the Regulations, and in fact involved a misuse of column 1 which might well lead to confusion. The more important question, however, is whether, given this misapprehension on the appellant's part as to the use of column 1, he honestly believed that these 13 teeth either needed or were likely to be in need of treatment. The appellant's evidence, if accepted, makes it clear that he did honestly so believe. Mr. James (who has already been mentioned) and Mr. Vernon Howarth, the two dentists who gave evidence for the Council on the case of wrongful certification, disagreed with the appellant but admitted that the matter was one of opinion and certainly did not say that no dentist could honestly be of the opinion expressed by the appellant.

As to the scope of the appellate jurisdiction conferred on their Lordships by section 29 of the Dentists Act, 1957, Mr. Widgery Q.C. (for the General Dental Council as respondents in the appeal) accepted a submission made by Mr. Norman Richards Q.C. (for the appellant) to the effect that such an appeal is an appeal by way of rehearing, to which the same principles apply as are applicable to an appeal to the Court of Appeal against the decision of a

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judge of the High Court sitting as a judge of fact at first instance, and accordingly their Lordships find it unnecessary to refer to the authorities cited by Mr. Norman Richards in support of this proposition. In this connection their Lordships were properly reminded of the principle that an appellate court should not lightly differ from the finding of a trial judge on a question of fact and that "it would be difficult for it to do so where the finding "turned solely on the credibility of a witness": see *Benmax* v. *Austin Motor Co. Ltd.*[1]; and note the distinction drawn by that case between the finding of a specific fact (which prima facie is a matter for the judge of first instance) and the drawing of inferences from the facts specifically found which, subject to the weight properly due to the opinion of the trial judge, is a matter on which the appellate court may properly regard itself as free to form its own view.

Thus in the present case a finding by the Disciplinary Committee that the appellant claimed fees for work which had not been done, and as to the circumstances in which he did so, would be a finding of specific facts which the appellate tribunal should prima facie accept: whereas a finding that on the specific facts so found the appellant was in relation to the matter in question guilty of infamous or disgraceful conduct in a professional respect would be in the nature of an inference from the specific facts found, and as such more readily open to review.

Their Lordships would add that the question whether in relation to a given matter a dentist has been guilty of infamous or disgraceful conduct is in their opinion a question of mixed fact and law, the question of law being whether on the facts proved or admitted the dentist has been guilty of infamous or disgraceful conduct within the meaning of section 25 of the Act of 1957.

In applying the above principles to the present case, their Lordships are put in some difficulty by the circumstance that beyond finding the facts alleged in each paragraph of the charge proved the Disciplinary Committee gave no reasons for its determination. Their Lordships are thus left without any express guidance as to the view of the facts upon which the Disciplinary Committee proceeded.

Their Lordships have also found some difficulty with regard to the precise meaning and effect of the adverb "wrongfully" which appears in each paragraph of the charge and in questions put to the appellant. Each paragraph of the charge states the act complained of and states that it was "wrongfully" done. It may thus be argued that, in finding the facts alleged in each paragraph of the charge proved, the Disciplinary Committee have found that in each case the act complained of was not only done but was "wrongfully" done, and that this without more would suffice to convict the appellant of infamous or disgraceful conduct. The word "wrongfully" is, however, of wide and uncertain import.

[1] [1955] 370, 373, H.L.; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

It can be regarded as adding nothing to the acts complained of, which were plainly wrongful in the sense that the appellant ought not to have done them. On the other hand, it may be regarded as imputing an unspecified degree of culpability of an undefined character ranging from mere carelessness to fraud or dishonesty; it clearly cannot be held that every act which can be characterised as " wrongful " in one sense or another is infamous or disgraceful. The Disciplinary Committee clearly recognised this in the case of Mrs. Moger, where they found the facts alleged to have been proved, including the allegation that the overcharge was made wrongfully, but nevertheless acquitted the appellant of infamous or disgraceful conduct in Mrs. Moger's case. Their Lordships think that the solution is to be found in sub-paragraph 10 (2) of the General Dental Council Disciplinary Committee (Procedure) Rules, 1957 (S.I. 1957, No. 1265). That sub-paragraph provides: " (2) Where in a case relating to conduct the Committee have " found that the facts or any of them alleged in any charge have " been proved to their satisfaction (and have not on those facts " recorded a finding of not guilty) "—as they did in Mrs. Moger's case—" the Committee shall forthwith consider and determine " whether in relation to the facts found proved as aforesaid the " respondent is guilty of infamous or disgraceful conduct in a " professional respect. . . ."

This shows that the inquiry is to be carried out in two stages, the first directed to finding whether the primary or specific matters of fact alleged, including any facts bearing upon the question of culpability or " wrongfulness," have been proved, and the second to determining whether on the facts so found the respondent has been guilty of infamous or disgraceful conduct.

Mr. Widgery argued that the proved or admitted fact that the overcharging took place (no matter how it came about) sufficed to raise a prima facie case with respect to the overcharging in the cases of Miss Mathews and Mrs. Dennis, on which the Disciplinary Committee were warranted in finding the appellant guilty of infamous or disgraceful conduct unless he tendered an explanation which the Disciplinary Committee found acceptable; and Mr. Widgery invited us to infer that the Disciplinary Committee did not accept the appellant's story to the effect that he relied on the receptionist to make the proper entries or corrections in the documents.

Their Lordships cannot accept this submission. It appears to them that the matter fell to be judged by reference to the evidence as a whole, including the appellant's explanation of the way in which the cases of overcharging arose. It further appears to their Lordships that inasmuch as the findings of the Disciplinary Committee on the cases of overcharging contained nothing to indicate that it did not accept the appellant's evidence as true, and inasmuch as the solicitor in conducting the Council's case did not challenge the truth of the appellant's explanation in cross-examination or otherwise, but on the contrary relied upon it as

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involving gross carelessness on the appellant's part, and inasmuch as the cases of overcharging were never put as cases involving fraud or dishonesty on the part of the appellant as distinct from carelessness or negligence, the Disciplinary Committee must be taken to have accepted the appellant's explanation as true, and to have held that the appellant's conduct in relation to the cases of overcharging with respect to Miss Mathews and Mrs. Dennis amounted, on his own explanation of it, to infamous or disgraceful conduct.

The question, then, is whether on this view of the facts the Disciplinary Committee was justified in finding the appellant guilty of infamous or disgraceful conduct. Their Lordships find this meaning assigned to the word "infamous" in the O.E.D.: "2. Deserving of infamy: of shameful badness, vileness, or "abominableness; of a character or quality deserving utter "reprobation." (One of the strongest adjectives of detestation.)

The meaning assigned to the word "disgraceful" is hardly less extreme: "2. Full of or fraught with disgrace; that brings dis- "grace upon the agent; shameful, dishonourable, disreputable."

It must, of course, be remembered that in the present case the words "infamous or disgraceful conduct" should be construed in conjunction with the words "in a professional respect"; and we were referred in this connection to the well-known case of *Allinson* v. *General Council of Medical Education and Registration* [2] where an injunction was sought by a medical practitioner against the defendant council from allowing his name to remain struck out from the medical register kept by the defendant council under the Medical Act, 21 and 22 Vict. c. 90. By section 29 of that Act the name of any medical practitioner judged after due inquiry by the council "to have been guilty of infamous conduct "in any professional respect" was liable to be erased from the register. The plaintiff's name having been so erased he brought his action for an injunction to the effect above mentioned, claiming that the proceedings leading to the erasure of his name were void on the ground (inter alia) that there was no evidence on which the council could reasonably find that the plaintiff had been guilty of "infamous conduct in any professional respect." This contention was rejected by Collins J. and the Court of Appeal, and Lord Esher said this [3]: "I adopt the definition "which my brother Lopes has drawn up of at any rate one "kind of conduct amounting to 'infamous conduct in a profes- "'sional respect,' viz.: 'If it is shown that a medical man, "'in the pursuit of his profession, has done something with "'regard to it which would be reasonably regarded as disgraceful "'or dishonourable by his professional brethren of good repute "'and competency,' then it is open to the General Medical Council "to say that he has been guilty of 'infamous conduct in a profes- "'sional respect.' The question is, not merely whether what a

[2] [1894] 1 Q.B. 750; 10 T.L.R. 304, C.A.

[3] [1894] 1 Q.B. 750, 760, 761.

" medical man has done would be an infamous thing for anyone " else to do, but whether it is infamous for a medical man to do. " An act done by a medical man may be ' infamous,' though the " same act done by anyone else would not be infamous; but, on " the other hand, an act which is not done ' in a professional " ' respect ' does not come within this section. There may be " some acts which, although they would not be infamous in any " other person, yet if they are done by a medical man in rela- " tion to his profession, that is, with regard either to his " patients or to his professional brethren, may be fairly considered " ' infamous conduct in a professional respect,' and such acts " would, I think, come within section 29."

It should be noted that the conduct there in question was very different from the conduct with which the present case is concerned, and was on the face of it quite plainly of an infamous, or for that matter disgraceful, character; and the jurisdiction which the court was asked to exercise was the limited jurisdiction exercisable by way of control of the proceedings of a domestic tribunal, as distinct from the full appellate jurisdiction invoked in this case.

Granted that in accordance with Lord Esher's definition of " infamous " conduct in a professional respect the full derogatory force of the adjectives " infamous " and " disgraceful " in section 25 of the Act of 1957 must be qualified by the consideration that what is being judged is the conduct of a dentist in a professional respect, which falls to be judged in relation to the accepted ethical standards of his profession, it appears to their Lordships that these two adjectives nevertheless remain as terms denoting conduct deserving of the strongest reprobation, and indeed so heinous as to merit, when proved, the extreme professional penalty of striking-off.

To make good a charge of " infamous or disgraceful conduct " in a professional respect " in relation to such a matter as the keeping of the prescribed dental records it is not, in their Lordships' view, enough to show that some mistake has been made through carelessness or inadvertence in two or even three cases out of (to quote the figures in the present case) 424 patients treated during the period in which the mistakes occurred, whether the carelessness or inadvertence consisted in some act or omission by the dentist himself or in his ill-advised delegation of the making of the relevant entries to a nurse or receptionist and omitting to check the forms to see that she had done as she was told. To make such a charge good there must, in their Lordships' opinion, (generally speaking) be some element of moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent and reckless disregard of the dentist's duty in regard to records as can be said to amount to dishonesty for this purpose. The question is to some extent one of degree, but in their Lordships' view the cases of overcharging with which this appeal is concerned clearly fall short of the degree of culpability required.

As to the case of wrongful certification, their Lordships cannot

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regard the appellant's misuse of column 1 of part 2 of the form E.C.17 as amounting to infamous or disgraceful conduct. With respect to the treatment alleged to have been unnecessary, the evidence (as their Lordships have already observed) showed that, according to the appellant, he honestly believed it to be necessary (or likely to be found necessary), while the dentists who disagreed with him did not claim that the opinion expressed by the appellant was one which no dentist could honestly hold. In this state of the evidence their Lordships think it would be wrong to impute to the Disciplinary Committee an implied finding to the effect that the appellant did not honestly hold that opinion. An honestly held opinion, even if wrong, in their Lordships' view plainly cannot amount to infamous or disgraceful conduct.

Mr. Widgery very fairly admitted that so far as the cases of overcharging alone were concerned the Disciplinary Committee would hardly go the length of erasing a dentist's name merely on account of three such cases (involving in the present proceedings a total, including Mrs. Moger, of £5 7s. 7d. out of total payments of some £1,915).

The record before their Lordships contains passages suggesting that there may have been other cases of overcharging besides those included in the charge—see in particular the appellant's letter of August 1, 1959, referred to above; but it was the duty of the Disciplinary Committee to judge the matter simply by reference to the cases alleged in the charge, or in other words "secundum allegata et probata." This plainly appears from the language of rule 10 (2) of the General Dental Council Disciplinary Committee (Procedure) Rules, 1957, to which reference has already been made. It was therefore right for the Disciplinary Committee to confine their consideration of the charge to the matters specifically alleged in the charge; and their Lordships, taking the same course, find themselves unable to hold that the appellant was rightly found guilty of infamous or disgraceful conduct in relation to the facts alleged.

For these reasons their Lordships are of opinion that this appeal should be allowed, and that the determination of the Disciplinary Committee should be discharged, and will humbly advise Her Majesty accordingly. The General Dental Council must pay the costs of the appeal.

Solicitors: *Le Brasseur & Oakley; Waterhouse & Co.*

C. C.

[COURT OF APPEAL.]

A. MARTIN FRENCH *v.* KINGSWOOD HILL LTD.

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March 23, 24, 25; *April* 4.

Hodson, Willmer and Devlin L.JJ.

[1958 F. No. 782.]

Practice—Payment into court—Counterclaim—Plea of equitable set-off by defendants—Payment into court by defendants accepted by plaintiffs—Whether balance of counterclaim extinguished by such payments—R.S.C., Ord. 22, *r.* 1 (1).

The plaintiffs, a firm of surveyors, claimed £1,320 against the defendants as the balance of an account for professional services. The defendants counterclaimed £2,960 as damages for negligence and breach of duty, relied on their counterclaim as an equitable set-off and paid £927 into court under R.S.C., Ord. 22, r. 1 (1).[1] The plaintiffs took this sum out of court and amended their defence to counterclaim by alleging that by reason of the payment into court the cause of action relied on by the defendants by way of set-off and counterclaim had been satisfied and extinguished. On a trial of this issue an official referee gave judgment for the defendants. On appeal:—

Held, dismissing the appeal, that the conclusion of an action by a payment into court was quite different from its conclusion by a judgment, and created no estoppel; that, under the language of Ord. 22, r. 1 (1), a payment in by a defendant represented the sum calculated to satisfy the plaintiffs' claim as it then stood, and did not permit the defendant to pay in a balance between the plaintiffs' claim and the defendants' set-off and counterclaim. Consequently, the cause of action in the counterclaim had not been extinguished or satisfied.

Coote v. *Ford* [1899] 2 Ch. 93; 15 T.L.R. 378, C.A. and *Hanak* v. *Green* [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A. applied.

APPEAL from His Honour W. K. Carter Q.C., Official Referee.

The following statement of facts is taken from the judgment of the court, delivered by Devlin L.J.: On June 17, 1958, the plaintiffs issued a writ against the defendants claiming £1,320 12s. 8d., the balance of an account rendered to them for work done as surveyors and valuers. On July 30 the defendants filed a defence and counterclaim. By their defence they alleged that the fees claimed were unfair and unreasonable and that some of the disbursements had not been made; and by their counterclaim they sought to obtain damages, which they estimated at £2,960, for breach of duty by the plaintiffs. In their defence they relied

[1] R.S.C., Ord. 22, r. 1: "(1) In "any action . . . the defendant may "at any time after appearance upon "notice to the plaintiff pay into court "a sum of money in satisfaction of "the claim or (where several causes "of action are joined in one action) "in satisfaction of one or more of the "causes of action; provided that with "a defence setting up tender before "action the sum of money alleged to "have been tendered must be brought "into court. . . . (3) The notice "shall be in Form 3 in Part II of "Appendix B. . . ."

R.S.C., Appendix B, Pt. II, 3: "Take notice that the defendant . . . "has paid into court . . . and says "that that sum is enough to satisfy "the plaintiff's claim. . . ."

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upon their counterclaim as an equitable set-off, as under the authority of *Hanak* v. *Green* [2] (in his Lordship's view) they were entitled to do. On August 8, 1958, and March 10, 1959, the defendants made payments into court which together totalled £927. On March 23, 1959, the plaintiffs took these sums out of court and so undoubtedly disposed of their claim; their contention was that this disposed of the counterclaim also. So as to raise this point, they applied for leave to amend their defence to the counterclaim. By the amendment they alleged that, since they had accepted the sums paid into court in satisfaction of their claim subject to and reduced by the set-off, the cause of action relied on by way of set-off and counterclaim had been satisfied and extinguished. They were given leave to amend in these terms and it was ordered that the plea raised by the amendment should be tried as a preliminary issue. It was so tried, and the official referee gave judgment against the plaintiffs, holding that the cause of action in the counterclaim had not been extinguished or satisfied. The plaintiffs appealed.

Roy Wilson Q.C. and *Adrian Hamilton* for the plaintiffs.
Frederick Hallis for the defendants.

The following cases, which are not referred to in the judgment, were cited in argument: *Stumore* v. *Campbell & Co.*[3]; *Davis* v. *Hedges*[4]; *Rowntree* v. *Allen*[5]; *Chell Engineering* v. *Unit Tool and Engineering Co. Ltd.*[6]; *Morgan & Son Ltd.* v. *Martin Johnson & Co. Ltd.*[7]; *Childs* v. *Blacker*[8]; *Sharpe* v. *Haggith*[9]; *McGowan* v. *Middleton*[10]; *Stephens & Co.* v. *Allen*[11]; *Mondel* v. *Steel*[12]; *Amon* v. *Bobbett.*[13]

Cur. adv. vult.

May 5. The following judgment was read.

Hodson L.J. The judgment of the court will be given in the judgment which Devlin L.J. is about to read.

Devlin L.J. read the following judgment of the court, in which he stated the facts and continued: It is, of course, clear that, if judgment is delivered upon a claim that is subject to a set-off, both the claim and the set-off are disposed of. The cause of action in the set-off cannot thereafter be raised in any new

[2] [1958] 2 Q.B. 9; [1958] 2 W.L.R. 755; [1958] 2 All E.R. 141, C.A.
[3] [1892] 1 Q.B. 314; 8 T.L.R. 99, C.A.
[4] (1871) L.R. 6 Q.B. 687.
[5] (1935) 41 Com.Cas. 90.
[6] [1950] W.N. 146; [1950] 1 All E.R. 378, C.A.
[7] [1949] 1 K.B. 107; 64 T.L.R. 381; [1948] 2 All E.R. 196, C.A.
[8] [1954] 1 W.L.R. 809; [1954] 2 All E.R. 243, C.A.
[9] (1912) 28 T.L.R. 196; 106 L.T. 13.
[10] (1883) 11 Q.B.D. 464.
[11] (1922) 91 L.J.P.C. 32.
[12] (1841) 8 M. & W. 858.
[13] (1889) 22 Q.B.D. 543.

action; neither can it be raised by counterclaim, which is in substance a separate action. The matter is res judicata.

But the conclusion of an action by payment into court is something quite different from its conclusion by a judgment. In *Coote* v. *Ford* [1] Stirling J. clearly explained the effect upon a cause of action of the taking out of money which has been paid in in respect of it. The payment in implies no admission about the merits of the cause of action; there has been no adjudication upon it and therefore no estoppel is created. What has happened is simply that the claim arising out of the cause of action has been settled, just as it would have been settled by a payment under a compromise.

The plaintiffs accept this distinction and have proceeded accordingly. Contending as they do that an abandonment of the set-off was an essential part of the compromise effected by the payment in, they claim to treat the matter just as if the defendants' claim had been satisfied by a money payment; and so they rely upon the compromise as an additional defence made available to them after action brought.

Are the plaintiffs right in their contention that the payment in necessarily involves the extinction of the set-off? When a defendant who has pleaded a set-off pays money into court, does he pay in to satisfy the plaintiff's claim, ignoring the set-off? Or does he pay in to satisfy the claim less the set-off? If the latter, then, if the offer is accepted and the money taken out, the set-off must be extinguished, for it has been used as an alternative to money to pay off the plaintiff, and a counterclaim based on the same cause of action must perish with it. If the former, the set-off is unaffected and the claim embodied in it can be pursued by counterclaim or otherwise.

Mr. Wilson contends that a payment in in these circumstances must inevitably have the effect of satisfying the claim less the set-off. A defendant, he says, is not obliged to use a cross-claim as a set-off; but if he elects to do so, it is impossible for him thereafter to deal with the claim otherwise than as a claim subject to a set-off.

We do not think that the answer is to be found by the application of a rigid principle of this sort. A payment into court is simply an offer to dispose of the claim on terms. If the defendant were free to formulate the terms himself, he could make his offer in whatever form he liked. He could offer either to settle the claim less the set-off, or he could offer to settle the claim by itself, leaving the set-off alive to form the subject of a counterclaim or another action. But if he seeks to effect his compromise under the rules which permit a payment into court, he must make his offer according to the rules. So the answer to the question must be sought by ascertaining and construing the terms of the rule under which the payment into court is made.

[1] [1899] 2 Ch. 93, 99; 15 T.L.R. 378, C.A.

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That means construing R.S.C., Ord. 22 r. 1 (1), for that rule not only provides for payment in but also prescribes the form of words that must be used in the notice of payment in. The form of words used, and which had to be used, in this case is: The defendants "say that that sum . . . is enough to satisfy the plaintiff's "claim." The plaintiff's *claim* cannot be affected by the amount of the set-off. What he *recovers* may be, but not, unless he admits the set-off, what he claims. The defendant, when he pays into court in these terms, is not therefore paying in such sum as he thinks the plaintiff may be likely to recover at the end of the day, but a sum to satisfy the plaintiff's claim as it then stands. Ord. 22, r. 5, makes provision for the plaintiff paying in against the counterclaim, if he wants to, but there is no provision for balancing one against the other.

The natural meaning of the words used in the rule and in the notice served under it is therefore against Mr. Wilson's contention. If he is to succeed, he must show that the words in the rule "the plaintiff's claim" do not mean what they appear to mean, but ought to be construed as "the plaintiff's claim less "the defendant's claim." Alternatively, he must show that when the defendants say that "that sum is enough to satisfy "the plaintiff's claim," they mean "that sum together with the "value of the set-off." Mr. Wilson submits that if one looks at the purpose of the rule, one ought to give it an interpretation of that sort. An offer of settlement can be made and accepted or refused without the assistance of any rule. The purpose of the rule is to enable the offer to be recorded in such a way that it can be used to affect the order for costs. So that he can save himself costs, the rules give a defendant the right to pay in, and a defendant has also under the rules a right of set-off. If he is not allowed to pay in a sum to satisfy a claim less set-off, he is, Mr. Wilson argued, being deprived of the exercise of one or other of these rights. Suppose a plaintiff has a claim for £75,000 and the defendant a set-off for £70,000. The defendant believes that he will be able to knock £2,000 off the plaintiff's claim so that the plaintiff will on balance recover £3,000. The defendant ought, Mr. Wilson says, to be able to pay into court £3,000. If, in order to get the benefit of payment in, he has to find £73,000, he is losing the benefit of his set-off.

This sort of situation can be made to sound more inconvenient than it really is. Payment into court is not the only method which a defendant may have to save himself costs, though it certainly is the most satisfactory. It is not a method that is always available; it cannot be used, for example, in arbitrations or appeals. A written offer which the court can take into consideration after the hearing has then to be made to serve the same purpose as nearly as may be. It is not a conclusive argument against a particular construction of a rule that under it the utility of the rule is less than it might be.

If matters of this sort are to be considered, arguments can be advanced on the other side which show that in certain circumstances Mr. Wilson's construction is an inconvenient, if not an impossible, one. Suppose that a plaintiff has four separate causes of action, each leading to a separate money claim, and the defendant has, as here, a counterclaim, unconnected with any of the plaintiff's claims, which he uses as an equitable set-off. The defendant pays in, as he must do if he wishes to pay in at all, separate sums in respect of each cause of action. To which sum is the value of the set-off to be taken as a notional addition? Which of the four claims is it to be taken as diminishing? Or is it notionally divided among them all? If the plaintiff takes out one sum and not others, what is the effect on the set-off? Mr. Wilson's solution of this difficulty is to say that the whole value of the set-off must be deemed to be allocated to the cause of action in respect of which a sum is first taken out. We can see no warranty for this solution in preference to any other; but if it be correct, it makes the calculation of the sum to be paid in so difficult for the defendant as to make the procedure useless to him. He cannot tell in advance which sum the plaintiff will take out and which he will leave in. If the defendant underpays on claim A, hoping that the value of the set-off may be used to supplement it, and pays adequately on claim B, the plaintiff may take out the adequate sum on claim B and the set-off will be automatically extinguished with nothing to show for it; the plaintiff can then proceed on claim A and the defendant will then have to make good the underpayment or risk losing the costs.

It seems to us that in the end we must come back to the plain meaning of the language used, and on that Mr. Wilson fails. The rules as drafted do not permit a defendant to strike a balance between the plaintiff's claim on the one side and a set-off and counterclaim on the other, and to pay in to satisfy the balance. It might be a great convenience and advantage to litigants if they did, and we think that the rules committee might be invited to consider whether an amendment could not be made, giving the defendant an option under which he could, so to speak, offer up his cross-claim as well as a sum of money in settlement. But we have to apply the rules as they stand. Unfortunately, one or other of the parties has misconstrued them and must suffer accordingly. In our judgment it is the appellants who have misunderstood the position and the effect of the payment in, and this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Parker, Garrett & Co.; Stanley & Co. for C. W. Nelson & Co., Leeds.*

F. R. D.

[PROBATE, ETC., DIVISION.]

1960
April 13.

LE MARE *v.* LE MARE.

Collingwood J.

Husband and Wife—Maintenance—Divorce—Children—Whether court has power to order maintenance for child beyond the age of 21—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26.

The court has power under section 26 of the Matrimonial Causes Act, 1950,[1] to order the payment of maintenance for a child beyond the age of 21 years.

APPLICATION for maintenance of child.

A wife petitioner was granted a decree nisi of divorce on December 14, 1959, on the ground of her husband's adultery. She issued a summons seeking an order for secured provision, for maintenance for herself, maintenance for the child of the family, Robert, who was 20 years old at the date of the hearing, from the date of decree absolute until April 1, 1963, and for payment to the child of such additional sum as was necessary to pay for the child's tuition and examination fees. The summons was referred by the registrar to a judge.

Joseph Jackson for the wife.
Victor Williams for the husband.

The following statutes and authorities were referred to in argument, in addition to those set out in the judgment: *Galloway* v. *Galloway*[2]; Legitimacy Acts, 1926 and 1959; Matrimonial Causes Rules, 1957, r. 4.

COLLINGWOOD J. referred to the facts and continued: The question raised is whether the court has power to provide maintenance for a child beyond the age of 21 years. [His Lordship referred to the Matrimonial Causes Act, 1950, s. 26 (1) and (3), and continued:]

[1] Matrimonial Causes Act, 1950, s. 26: "(1) In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court. . . . "(3) On any decree of divorce or nullity of marriage, the court shall "have power to order the husband, "and on a decree of divorce made on "the ground of the husband's insanity, shall also have power to "order the wife, to secure for the "benefit of the children such gross "sum of money or annual sum of "money as the court may deem "reasonable, and the court may for "that purpose order that it shall be "referred to one of the conveyancing "counsel of the court to settle and "approve a proper deed or instrument "to be executed by all necessary "parties.

"Provided that the term for which "any sum of money is secured for the "benefit of a child shall not extend "beyond the date when the child will "attain twenty-one years of age."

[2] [1956] A.C. 299; [1955] 3 W.L.R. 723; [1955] 3 All E.R. 429. H.L.

It is to be observed that section 26 (1) speaks of "children "of the marriage" without any restriction as to age. Furthermore, the proviso says that where the money is secured for the benefit of the child, then it shall not extend beyond the date when the child attains 21 years. This specific restriction in respect of secured maintenance would seem to indicate that unsecured payments were the subject of no such restriction, otherwise there would be no necessity for this proviso. Again, if one looks at section 23 of the same Act, it is provided: "Where a "husband has been guilty of wilful neglect to provide reasonable "maintenance for his wife or the infant children of the marriage, "the court, if it would have jurisdiction to entertain proceedings "by the wife for judicial separation, may, on the application of "the wife, order the husband to make to her such periodical "payments as may be just; . . ." In that section it is to be observed that the power is restricted to "infant children" specifically. Section 24 gives the court power to order settlement of the wife's property for the benefit of "the children of the "marriage" without the use of the word "infant"; and in section 25, which relates to the power of the court to make orders as to application of settled property, again there is no restriction as to age.

Furthermore, the Matrimonial Proceedings (Children) Act of 1958, under section 1 (1), which extends the jurisdiction of the court to further classes of children, refers specifically to section 26 of the Act, whilst section 1 (4), which deals with cases of wilful neglect to provide reasonable maintenance, refers to section 23 of the Act—apparently indicating that the legislature had in mind the distinction between "child" and "infant child."

The case cited in support of the proposition that the power of the court is limited to the age of 21 years was *Thomasset* v. *Thomasset*.[1] The headnote of that case reads: "The court has "power to make orders respecting the custody, maintenance and "education of children during the whole period of their infancy "—that is, till they attain the age of 21 years"; and *Blandford* v. *Blandford*[2] was overruled by the Court of Appeal.

The facts in *Thomasset* v. *Thomasset*[3] were shortly these. It was an appeal from Sir Francis Jeune P. On March 15, 1892, the petitioner, Mrs. Thomasset, obtained a decree of divorce from her husband, the respondent. On August 8, 1893, an order was made for the payment by the husband to the wife of permanent alimony at the rate of £266 a year and £23 6s. 8d. for the maintenance and education of each of the four younger children of the marriage. On March 27, 1894, the eldest of these four children attained the age of 16 years, and on June 1, 1894, an order was made by the registrar, on the application of the husband, that the allowance of £23 6s. 8d. in regard to that child should cease.

[1] [1894] P. 295; 10 T.L.R. 591.
[2] [1892] P. 148; 8 T.L.R. 391.
[3] [1894] P. 295.

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That order was confirmed by Sir Francis Jeune P., who considered that he was bound by the authority of *Blandford* v. *Blandford*,[4] and from that decision the wife appealed, and the Court of Appeal allowed the appeal.

I need refer only to a portion of the judgment of Lindley L.J.[5] He says: "In my judgment, the wide discretion conferred on the "Divorce Court by the Divorce Acts has been unduly restricted "by judicial decisions. Such discretion ought to be exercised "in each particular case as the circumstances of that case may "require; and in exercising such discretion the Divorce Court, "which has all the old powers of the Court of Chancery, is not "and ought not to consider itself fettered by any supposed rule "to the effect that it has no power to make orders under the "Acts respecting the custody, maintenance and education of "infants who, being males, are over 14, or who, being females, "are over 16. I am clearly of opinion that, whether the children "are males or females, the jurisdiction conferred by the sections "of the Divorce Acts on which this case turns can, since the "Judicature Acts, at all events, be exercised during the whole "period of infancy—that is, until the children, whether males "or females, attain 21; although I do not say that a child who "has attained years of discretion can, except under very special "circumstances, be properly ordered into the custody of either "parent against such child's own wishes. The appeal must "therefore be allowed, . . ."

That decision was under section 35 of the Matrimonial Causes Act, 1857, and in that section there was no proviso such as there is to section 26 of the Act of 1950, and in my opinion the wording of section 26 and the proviso thereto shows that there is no such restriction under that section. The order will, therefore, be made in accordance with the wife's summons.

Solicitors: *Oswald Hickson, Collier & Co.; Withers & Co.*

E. J.

[4] [1892] P. 148. [5] [1894] P. 302.

[PRIVY COUNCIL.]

J. C.*

1960

April 26.

MAPITIGAMA BUDDHARAKKITA THERO . APPELLANT;

AND

DON EDMUND WIJEWARDENA AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Buddhist law—Buddhist temple—Gift of land to, by will—Conveyance to high priest—"Management" entrusted to will trustees—High priest's claim to income—Meaning of "management"—

* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD DENNING.

Buddhist Temporalities Ordinance (*c.* 222, *Legislative Enactments of Ceylon*, 1938 *Rev.*), *s.* 20.
Corporation—Corporation sole—Buddhist temple—Whether capable of owning property.

By section 4 of the Buddhist Temporalities Ordinance (c. 222 of the Legislative Enactments of Ceylon, 1938): "(1) The manage- "ment of the property belonging to every temple . . . shall be vested "in a person . . . duly appointed trustee under the provisions of "this Ordinance." By section 20: "All property, movable and "immovable, belonging or in anywise appertaining to or appro- "priated to the use of any temple . . . shall vest in the trustee . . . "for the time being of such temple."

A testatrix, who died in 1940, by clause 5 of her will gave 250 acres of land "to the Raja Maha Vihare [Great Royal Temple], "Kelaniya. The selection of the 250 acres I leave to my executors "and the management of the same for the benefit of the said Vihare "I entrust to my trustees . . ." The trustees in 1942 executed a deed by which they conveyed the selected 250 acres to the then Viharadipathi (high priest or chief incumbent) of the temple and his successors in office, "subject always to the conditions in the said "will . . . that the management of the said property for the benefit "of the said Vihare shall be in the trustees in the said will." Thereafter, the trustees of the will managed the land, collecting the rents and profits from it, which they used for the purposes of the temple. On a claim made in 1954 by the appellant, the present high priest of the temple, that he was entitled to have the income from the land paid over to him, and that it was for him, and not for the will trustees, the respondents, to apply it as he, and not as they, thought fit for the purposes of the temple:—

Held, (1) that a Vihare (Buddhist temple) was not a juristic person—it was not a corporation and had no legal personality—and could not accept and own property, and, accordingly, the gift in the will of the 250 acres did not operate as an outright gift to the temple.

(2) The 250 acres did not vest in the appellant—who was himself the duly appointed trustee of the temple under the provisions of the Buddhist Temporalities Ordinance—by virtue of section 20 of that Ordinance. A Buddhist temple, not being a juristic person, could not have property belonging to it, and section 20 of the Ordinance must be read as dealing only with sanghika property, that is, it dealt only with property which had been dedicated to the sangha (priesthood) as a whole, with all the ceremonies and forms necessary to effect a dedication. The Ordinance did not apply to property which was vested in private trustees for the benefit of the temple as a charitable trust.

The word "management" in clause 5 of the will was not confined to management of the property strictly so called, but extended also to the management of the income, and, accordingly, the trustees of the will were the persons to decide how the income should be applied for the purposes of the temple.

Judgment of the Supreme Court of Ceylon (1957) 59 N.L.R. 121 affirmed.

APPEAL (No. 10 of 1959), by special leave, from a judgment and decree of the Supreme Court of Ceylon (June 18, 1957) reversing a judgment of the District Court of Colombo (July 6, 1955) in favour of the present appellant in an action brought by him against the respondents.

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The following facts are taken from the judgment of the Judicial Committee: This case arose out of the will of Mrs. Helena Wijewardena, a widow who died on November 10, 1940. She took a great interest in a famous Buddhist temple at Kelaniya called the Raja Maha Vihare (Great Royal Temple) and by her will she gave 250 acres of land to it. The material gift was in clause 5: "I give 250 acres out of all that paddy field called "Kalawewa Farm situate in the North Central Province Ceylon "to the Raja Maha Vihare, Kelaniya. The selection of the "250 acres I leave to my executors and the management of "the same for the benefit of the said Vihare I entrust to my "trustees hereinafter named." Since her death the land had been managed by the trustees of her will. They had had possession of it and collected the rents and profits from it. They had used the income for the purposes of the temple, as for instance, in making improvements to it, paying the tom-tom beaters, and so forth. That went on for many years. But in 1954 the Viharadipathi (the high priest or chief incumbent) of the temple claimed that he was entitled to have from the trustees an account of the income they had received, and to have them pay to him the moneys in their hands, and furthermore, that he was entitled to possession of the land itself.

On July 6, 1955, the judge of the District Court (Sirimanne A.D.J.) held that the Viharadipathi was entitled to an account of the income and payment of it, but that he was not entitled to possession of the land. The trustees of the will appealed to the Supreme Court of Ceylon (Basnayake C.J. and Pulle J.), who on June 18, 1957, allowed the appeal and set aside the order of the District Court. The Viharadipathi now appealed to Her Majesty in Council. He accepted the decision that he was not entitled to possession of the land, but he claimed that he was entitled to have the income paid over to him.

1960. March 7, 8, 9. *John Pennycuick Q.C.* and *S. N. Bernstein* for the appellant.

Walter Jayawardena for the respondents.

In addition to the case referred to in the judgment the following cases were cited in argument: *Ranasinghe* v. *Dhammananda* [1]; *Charles* v. *Appu* [2]; *Van Reeth* v. *De Silva* [3]; *Sadhananda Terunanse* v. *Sumanatissa* [4]; *Karthigasu Ambalawanar* v. *Subramaniar Kathiravelu* [5]; *Maraliya* v. *Gunasekera* [6]; *Gunaratne* v. *Punchibanda* [7]; *Saranankara Unnanse* v. *Indajoti* [8]; *Fernando* v. *Jinalankara Tissa Thero* [9]; *Vajirawansa Thero* v. *Abraham Silva* [10];

[1] (1935) 37 N.L.R. 19.
[2] (1914) 19 N.L.R. 242.
[3] (1903) 8 N.L.R. 97.
[4] (1934) 36 N.L.R. 422.
[5] (1924) 27 N.L.R. 15.
[6] (1921) 23 N.L.R. 261.
[7] (1927) 29 N.L.R. 249.
[8] (1918) 20 N.L.R. 385.
[9] (1945) 46 N.L.R. 519.
[10] (1958) 60 N.L.R. 276.

Dharmawansa Thero v. *Ukku Banda* [11]; *Wijewardene Nilame* v. *Naina Pulle*.[12]

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April 26. The judgment of their Lordships was delivered by LORD DENNING, who stated the facts set out above and continued: Their Lordships must point out that there is no suggestion that the trustees of the will have mismanaged the property or misappropriated the funds. They have applied the income for the purposes of the temple: and in so far as this has been done with his consent or concurrence, the Viharadipathi does not seek to disturb it. But he seeks to obtain payment of any sums which were not paid out with his concurrence: and he does seek to have the income paid over to him for the future. He claims that it is for him to apply it as he thinks fit for the purposes of the temple: and not for the trustees of the will to do it. The District Court decided in favour of the Viharadipathi on this point, but the Supreme Court decided it in favour of the trustees of the will.

This issue depends largely on the true interpretation of the will. Mrs. Helena Wijewardena died on November 10, 1940. By her will she appointed her three sons to be her executors. The material gift was in clause 5: [His Lordship stated the terms of that clause and continued:] She afterwards, in clause 7, gave considerable property to her same three sons as trustees for certain charitable purposes which she specified, including restoration work at the Kelaniya Temple, aiding her poor relations and supporting Buddhist charitable institutions.

The executors seem to have assumed that, under the provisions contained in clause 5, it was their duty to convey the land to the Viharadipathi. Accordingly, they selected 250 acres out of the 1,000 acres of paddy fields: and on November 27, 1942, they executed a deed by which they conveyed it to the then Viharadipathi, the Reverend Mapitigama Dharmmarakkitha High Priest, and his successors in office, "subject always to the conditions in the said will expressly contained, namely, that the management of the said property for the benefit of the said Vihare shall be in the trustees in the said will."

A serious question has now arisen as to the meaning of the word "management" in the will and in the deed: but their Lordships observe that for many years after the execution of that deed the trustees managed the 250 acres in this sense, that they not only collected the income from the 250 acres, but they also applied it as they thought fit for the purposes of the Vihare. The then Viharadipathi, the Reverend Mapitigama Dharmmarakkitha, died on July 19, 1947, and was succeeded by the Reverend Mapitigama Buddharakkita Thero, the plaintiff in this action. The trustees of the will continued to collect and apply the income as before. No complaint was made by the Viharadipathi until February, 1954, when his solicitor claimed the money in the hands of the trustees as income of the 250 acres.

[11] (1959) 60 N.L.R. 350. [12] 1 C.W.R. 167.

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Have the trustees of the will been doing wrong all these years in applying the income themselves for the purposes of the Vihare? That depends on the true interpretation of clause 5 of the will.

The Viharadipathi sought in his case before their Lordships to say that a Vihare (Buddhist temple) is a juristic person, and as such entitled to accept and own property: and that, accordingly, when the testatrix said: "I give 250 acres . . . to the Raja "Maha Vihare, Kelaniya," this operated as an outright gift to the temple. Their Lordships cannot accept this view. There is a long line of authority to show that a Buddhist temple is not a juristic person. It is not like the deity of a Hindu temple. It is not a corporation. It has no legal personality. The authorities to this effect are so numerous and so weighty that Mr. Pennycuick before their Lordships did not feel able to controvert them.

The Viharadipathi next sought to say that, even though a Vihare is not a juristic person, nevertheless the 250 acres were vested in him, the Viharadipathi, by virtue of the Buddhist Temporalities Ordinance (chapter 222 of the Legislative Enactments of Ceylon, 1938. The material provisions of this Ordinance are as follows:

"2. . . . 'temple' means vihare . . . or any place of Buddhist "worship . . .

"4. (1) The management of the property belonging to every "temple . . . shall be vested in a person . . . duly appointed "trustee under the provisions of this Ordinance. . . .

"20. All property, movable and immovable, belonging or in "anywise appertaining to or appropriated to the use of any "temple . . . shall vest in the trustee . . . for the time being of "such temple. . . .

"25. All issues rents moneys profits and offerings received by "any trustee for or on behalf of a temple shall with the sanction "of the public trustee be appropriated by such trustee for the "following purposes: [here are set out several purposes directly "connected with the temple, but also] (*d*) the promotion of educa-"tion. (*e*) . . . the customary hospitality to bhikkhus and "others. . . ."

The Viharadipathi is himself the trustee of the Raja Maha Vihare, duly appointed under the provisions of the Ordinance.

At first sight sections 4 and 20 do seem wide enough to cover property which is given by will to a temple, such as is contained in the first sentence of clause 5 of the will. Such property would seem to be "property belonging to" a temple. But their Lordships have come to the conclusion that this is not correct. If the definition of "temple" is written into section 20, we find that it says that all property belonging to a Vihare or any place of Buddhist worship shall vest in the trustee. But a vihare is not a juristic person. A place of Buddhist worship is not a juristic person. It cannot have property belonging to it. Some interpretation must be sought beyond the literal words. To what

then, does section 20 apply? The answer given by the Supreme Court of Ceylon was that it deals only with *sanghika* property which has been dedicated to the Sangha, that is, it deals only with property which has been dedicated to the priesthood as a whole, with all the ceremonies and forms necessary to effect a dedication, but with special attention to the priests of a particular temple. Viewing the object and intent of the Ordinance, their Lordships think this is correct. Vast temporalities were granted in olden days by the Sinhalese kings to the Sangha (priesthood) of the ancient temples. These priests had renounced all worldly possessions and were unable adequately to protect and manage their properties. The Buddhist Temporalities Ordinance was passed so that trustees could be appointed to manage such properties. It did not apply at all to property which was vested in private trustees for the benefit of the temple as a charitable trust.

Mr. Pennycuick seemed disposed to concede that, so far as dispositions inter vivos were concerned, the Ordinance only applied to property which had been dedicated to the sangha with all the ceremonies and formalities necessary to effect a dedication: see *Wickremesinghe* v. *Unnanse* [1]: but he submitted that, so far as dispositions by will were concerned, there was no need for any ceremonies or formalities. No gift by will could ever take effect, he said, if such ceremonies or formalities were needed: because of necessity the donor was not able to be present to comply with them. Their Lordships realise the force of this contention, but they do not feel able to give effect to it. It must be remembered that it is only in comparatively recent times that a person in Ceylon has been permitted to dispose of property by will: and the legislature may well be presumed to have intended that gifts by will should take effect only under the Ordinances regulating wills and trusts and not under the Buddhist Temporalities Ordinance.

Their Lordships think that this can be tested by taking this very case: Under clause 5 of the will the testatrix clearly intended that the 250 acres should be managed by the trustees of the will: and that it should be applied for the purposes of this particular temple only. But if section 20 of the Ordinance applies so as to vest the 250 acres in the Viharadipathi, it would mean that the management of the property would be vested in him: see section 4 of the Ordinance; and the income could be applied, not only for the purposes of this particular temple, but also for the various purposes of section 25 of the Ordinance. Thus the provisions of clause 5 of the will would be overriden by the terms of the Ordinance. Their Lordships cannot agree to an interpretation of the Ordinance which would lead to this result.

Their Lordships are of opinion, therefore, that the 250 acres of land did not vest in the Viharadipathi by virtue of section 20 of the Buddhist Temporalities Ordinance.

[1] (1921) 22 N.L.R. 236.

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There remains a further point which was taken on behalf of the Viharadipathi. Even if the 250 acres did not come within the Ordinance, nevertheless the trust in the will must be given effect. On its proper construction it was, said Mr. Pennycuick, a gift for the general purposes of the temple. The temple was not merely a building. It was a charitable institution. A gift to it must be construed as a gift for the purposes of the institution which can and should be carried out by paying the income to the governing body of the institution. It was a valid charitable trust. The income should therefore, he said, be paid over to the Viharadipathi as the trustee of the temple.

Their Lordships feel the force of this argument, but they do not think it should be given effect. The effect of the first sentence in clause 5 of the will is cut down by the second sentence: " . . . " the management of the same for the benefit of the said Vihare I " entrust to my trustees." Their Lordships think that the word " management " in this sentence is not to be confined to management of the property strictly so called, that is, to the cultivation and letting of the land and the collection of the income. It extends also to the management of the income. The words " for " the benefit of the said Vihare " connote that the trustees are to consider the ways in which the Vihare should benefit. In short, that they should decide on the particular purposes to which the income should be applied. And their Lordships are the more disposed to accept this interpretation when they remember that for 12 years or more the parties have acted on that footing.

True it is that this means that there is no great distinction between the position of the trustees of the will under clause 5 and their position under clause 7, except that the purposes are different. But their Lordships feel it unnecessary to search for any further distinction. The intention of the testatrix may well have been to effect a distinction as to the purposes and nothing more.

In the result, their Lordships are of opinion that the trustees of the will are the persons to decide how the income should be applied for the purposes of the temple. They find themselves in agreement with the judgment of the Supreme Court of Ceylon. They will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Gaster & Turner; Darley, Cumberland & Co.*

C. C.

[QUEEN'S BENCH DIVISION.]

REGINA *v.* JUDGE SIR DONALD HURST. *Ex parte* SMITH. REGINA *v.* OXFORD ELECTORAL REGISTRATION OFFICER. *Ex parte* SMITH.

1960
May 5.

Lord Parker C.J., Gorman and Ashworth JJ.

Crown Practice—Certiorari—Inferior tribunal—County court—Order of county court judge made without jurisdiction—Whether certiorari will lie to quash—County Courts Act, 1959 (7 & 8 *Eliz.* 2, *c.* 22), *ss.* 107, 115.

Parliament—Election—Registration—Appeal to county court—Selected appeal—Objection to registration of 96 *names—Appeal in respect of six names—No notice of appeal served on remaining* 90*—Whether jurisdiction to direct removal of the* 90 *names from register—Representation of the People Act*, 1949 (12 & 13 *Geo.* 6, *c.* 68), *s.* 45 (1)—*County Court Rules*, 1936 (*as amended*), *Ord.* 43, *rr.* 3 (2), 8.

Section 107 of the County Courts Act, 1959, provides: "... no "judgment or order of any judge of county courts, nor any proceedings brought before him or pending in his court, shall be removed "by appeal, motion, certiorari or otherwise into any other court "whatever, except in the manner and according to the provisions in "this Act mentioned."

By section 115 (1): "The High Court or a judge thereof may "order the removal into the High Court, by order of certiorari or "otherwise, of any procedings commenced in the county court, if "the High Court or judge thereof thinks it desirable that the "proceedings should be heard and determined in the High Court."

Notwithstanding the provisions of section 107 of the County Courts Act, 1959, and that the only remedy by way of certiorari provided by the Act is in relation to the removal of proceedings to be heard and determined in the High Court, certiorari will lie to bring up and quash an order of a county court where the judge has acted without jurisdiction.

Ex parte Bradlaugh (1878) 3 Q.B.D. 509 applied.

A registration officer, determining, pursuant to section 9 (1) of the Representation of the People Act, 1949,[1] an objection to the registration in the register of electors for the City of Oxford of the names of 96 members of Ruskin College, Oxford, decided that all 96

[1] Representation of the People Act, 1949, s. 9 (1): "With a view to "the preparation of the registers, the "registration officer shall ... (*c*) ... "determine all claims for registration "duly made by any person, and all "objections to any person's registration. ... "

S. 45 (1): "An appeal shall lie to "the county court—(*a*) from any "decision under this Act of the registration officer on any claim for "registration or objection to a person's registration made to and considered by him."

Representation of the People Regulations, 1950 (S.I. 1950, No. 1254), reg. 62: "(1) A person desiring to "appeal against the decision of a "registration officer must give notice "of appeal to the registration officer "and to the opposite party ... (3) "Where it appears to the registration "officer that any notices of appeal "given to him are based on similar "grounds, he shall inform the county "court ... for the purpose of enabling the court (if it thinks fit) to "consolidate the appeals or select a "case as a test case."

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should be included in the register. The objector appealed to the county court with regard to six of the names. No notices of appeal, or notice of selected appeal, under Order 43, rule 8 (1), of the County Court Rules, 1936 (as amended),[2] were served on any of the members, other than those six, and the remaining 90 members were not made parties to the appeal and did not appear and were not represented. On February 9, 1960, the county court judge allowed four and dismissed two of the appeals, and on the same day ordered that the names of the four persons in respect of whom the appeals had been allowed be deleted from the register. On February 12, 1960, the objector's solicitors and the registration officer appeared before the judge who, on the basis that the appeals had come before him as a test case, gave directions indicating that he had intended that "the effect of my decision is, that none of the names of persons "objected to . . . should appear on the register" with the exception of the two in respect of whom the appeals had been dismissed. The registration officer duly removed from the register not only the names of the four in respect of whom the appeals had been allowed, but also the other 90 names. On February 15, 1960, the register was published.

On an application by one of the 90 members of the college, who had not been a party to an appeal, for an order of certiorari to quash the directions of the judge given on February 12, and also for an order of mandamus requiring the registration officer to restore to the register his name and the names of the other members of the college affected by the directions:—

Held, (1) that under Order 43, rules 3 (2) and 8, of the County Court Rules, 1936, the first step in any case was that all the persons whose names were in dispute should be made parties to appeals, and that then it could be ruled that one should be treated as a selected appeal, and that, as no such step had been taken, and the remaining 90 persons whose names were in question had not been made parties to appeals, the directions given by the judge on February 12, 1960, were given without jurisdiction, so that the applicant was entitled to an order of certiorari to quash the directions.

(2) That since, but for the directions, the registration officer would not have removed his name from the register, the applicant was also entitled to an order of mandamus directing the registration officer to put his name on the register.

APPLICATIONS for orders of certiorari and mandamus.

The following statement of facts is taken from the affidavits filed in support of the applications: On December 31, 1959, the Electoral Registration Officer for the City of Oxford heard and determined claims and objections in respect of the Register of

[2] County Court Rules, 1936 (as amended), Ord. 43, r. 3 (2): "The "respondents to the appeal shall be "the registration officer and the party "(if any) in whose favour the decision "of the registration officer was "given. . . ."

R. 8: "(1) Where two or more "appeals involve the same point or "points of law, the judge may direct "that one appeal shall be heard in "the first instance as a test case, and "thereupon the registrar shall send "to the parties to the selected appeal "and to the parties to the other "appeals and to the registration "officer a notice . . . (2) If within "five days of the service of such a "notice on him any party to an appeal "other than the selected appeal gives "notice . . . that he desires the appeal "to which he is a party to be heard, "the registrar shall give notice . . . to "the other parties . . . (3) If the "registrar receives no such notice . . . "the parties to the appeal shall be "bound by the decision on the selected "appeal without prejudice to their "right to appeal to the Court of "Appeal . . ."

Electors for the City of Oxford under the Representation of the People Act, 1949, by one P. G. Gower, objecting, inter alia, to the inclusion in the register of the names of 96 members of Ruskin College, Oxford, of whom the applicant, Samuel Adolphus Smith, was one. It was agreed between the registration officer and the objector that objection would be made in respect of 10 names only, and that if his objection to those 10 names were to fail, he would not proceed against the remaining 86 names. The applicant's name was not among those 10 names, and he was not present at the hearing, but was represented by the secretary of the college. He was not a party to, and did not know of, the agreement. On the same day the registration officer gave his decision, which was that the 10 names should be included in the register, together with the remaining 86 names, against whom the objector no longer proceeded.

The objector appealed to the Oxford County Court with regard to six names. The name of the applicant was not included among those six names. No notices of appeal of any sort, and no notices of selected appeal under Order 43, rule 8 (1), of the County Court Rules, 1936, were served on any members of Ruskin College save for the six, and the applicant, therefore, was not a respondent to the appeal and he was not present and not represented. The appeals were heard on February 9, 1960, and the judge, reserving his reasons, decided that four of the appeals should be allowed and two dismissed: on the same day he ordered that the names of the four persons in respect of whom appeals had been allowed be deleted from the register.

On February 12, 1960, the registration officer and the solicitors for the objector came before the judge when he gave oral directions in explanation of his order of February 9 which, put into writing and signed by the judge on March 4, 1960, were as follows: "I give directions to remove any misunderstanding of "the effect of my judgment given 9th February, 1960, as follows: "From the statement of the registration officer it is clear to me "that the case was dealt with by him as a test case, covering "objections raised by Mr. Gower to 96 names of persons at "Ruskin College and The Rookery. That the appeals before me "were similarly a test case—my decision being sought on the point "of principle covering all 96 names. That I so dealt with it, and "indicate that I intend that the effect of my decision is, that none "of the names of persons objected to by Mr. Gower before the "registration officer should appear on the register to be published "on 15th February, 1960, with the exception of" the two persons in respect of whom the appeals had been dismissed.

The registration officer caused the name of the applicant and of the other 89 members of Ruskin College to be removed from the register, and the register was published on February 15, 1960, those names having been deleted. On February 25, 1960, the judge gave the reasons for his decision of February 9, 1960. On April 25, 1960, the applicant's solicitor wrote to the registration

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officer informing him of the proposed proceedings, and the registration officer replied, inter alia, that he could not ignore the specific direction given to him by the judge on February 12 to take the names off the register.

The applicant now applied for an order of certiorari to bring up and quash the directions in writing dated March 4, 1960, and given orally on February 12, 1960, and an order of mandamus requiring the registration officer to add to the electoral register published on February 15, 1960, the names of the applicant and the other members of Ruskin College affected by those directions. The grounds of the applications were: (1) that the appeal to the county court named as respondents only six persons and did not include the applicant or the other members of Ruskin College mentioned in the directions, who, accordingly, were not parties to the appeal; (2) that no notice of selected appeal had been served on the applicant or any of those members by the registrar of the county court in accordance with Order 43, r. 8 (1) of the County Court Rules, 1936 (as amended) or at all; (3) that in those circumstances the judge had no jurisdiction to order the exclusion of the names of the applicant and those members from the register, and that after the order of February 9, 1960, the judge was functus officio in the matter; (4) that in view of the finding of law by the judge that the test of residence was whether or not the respondents to the appeal had a home in the United Kingdom outside the City of Oxford, there was no evidence before the court that the applicant and the other members had such homes; (5) that the applicant and the other members were debarred from appealing to the Court of Appeal by the provisions of the County Courts Act, 1959, whereby no appeal lay to the Court of Appeal save by a party to the proceedings in the county court; (6) that the judge in ordering the name of the applicant and the other members to be excluded from the register was acting in a manner contrary to natural justice; and (in the case of the application for an order of mandamus) (7) that in removing and excluding the names of the applicant and the other 89 members from the register, and refusing to reinstate them, the registration officer was acting without lawful authority, in excess of his jurisdiction and in breach of the duties imposed on him under the Representation of the People Act, 1949.

Stephen Tumim for the applicant.
David Trustram Eve for the registration officer.
J. R. Cumming-Bruce as amicus curiae.

The following cases were cited in argument: *Ex parte Bradlaugh* [3]; *Reg.* v. *Worthington Evans, Ex parte Madan* [4]; and *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*.[5]

[3] (1878) L.R. 3 Q.B.D. 509.
[4] [1959] 2 Q.B. 145; [1959] 2 W.L.R. 908; [1959] 2 All E.R. 457, D.C.
[5] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796, C.A.

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LORD PARKER C.J. In these proceedings Mr. Tumim moves on behalf of Samuel Adolphus Smith for an order of certiorari to quash a decision of Judge Sir Donald Hurst in the Oxford County Court so far as it consists of certain directions given by him on February 12 of this year. He also applies for an order of mandamus to the Electoral Registration Officer for the City of Oxford directing him to add the name of the applicant, Samuel Adolphus Smith, to the register of electors.

It is a curious case, and it arises in this way: There are a number of students of Ruskin College, some 96 in all, who claim that they qualify to have their names put on the register. A claim was made by one P. G. Gower, against the registration of those 96 names and, I think, of others. That claim was made under section 9 (1) (*c*) of the Representation of the People Act, 1949, which provides: "With a view to the preparation of the "registers, the registration officer shall . . . (*c*) except in Northern "Ireland, determine all claims for registration duly made by any "person, and all objections to any person's registration duly made "by another person appearing from the electors lists to be him-"self entitled to be registered."

Having heard and considered the matter, the registration officer decided that the names of all those 96 persons, which included the applicant's, should be and remain on the register. The objector appealed, as he was entitled to do under section 45 (1) (*a*) of the Act of 1949, to the Oxford County Court. His appeal, however, only related to six names out of the 96, and those six names did not include the name of the applicant.

On February 9, 1960, the appeal was heard. The registration officer and the objector were both represented. There were, as I have said, six parties to the appeal but the applicant and the other 89 were not made parties to the appeal at all. The question at issue in the appeal was as to the meaning of "residence" for the purposes of qualifying to be on the register, and the county court judge decided that four out of those six were resident outside the City of Oxford and not entitled to be on the register, but that two of them, who were resident in Oxford, were entitled to be on the register. On that day an order was drawn up allowing the appeal of the objector in respect of the four and dismissing the appeal in so far as it related to the two. The register was due to be published shortly, on February 15, and it is clear that both the judge and the registration officer were anxious that the matter should be put in order and the register published. On February 12 the solicitors representing the objector and the registration officer appeared before the judge, no doubt to elucidate what was to be done as the result of the order drawn up on February 9. The registration officer was clearly very concerned about it because, under section 45 (4) of the Act, it was his duty to give effect to the decision. That subsection reads: "Notice shall be sent to the "registration officer in manner provided by rules of court of

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"the decision of the county court or of the Court of Appeal on "any appeal by virtue of this section, and the registration officer "shall make such alterations in the electors lists or register as "may be required to give effect to the decision."

On that day, February 12, the judge gave directions, although they were not signed until March 4, in these terms: "I give "directions to remove any misunderstanding of the effect of my "judgment given February 9, 1960, as follows: From the state- "ment of the registration officer it is clear to me that the case "was dealt with by him as a test case, covering objections raised "by Mr. Gower to 96 names of persons at Ruskin College and "The Rookery. That the appeals before me were similarly a test "case—my decision being sought on the point of principle cover- "ing all 96 names. That I so dealt with it, and indicate that I "intend that the effect of my decision is, that none of the names "of persons objected to by Mr. Gower before the registration "officer should appear on the register to be published on "February 15, 1960, with the exception of Brian George Ball "and Francis Richard Adams." Those were the two people in respect of whom the appeal had failed and whom the judge thought were rightly on the register. In the directions he was saying, in effect, to the registration officer: "My intention was that "you should not merely remove from the register the names of "the four in respect of whom the appeal has succeeded but all the "other 90," the other 90 names including the name of the appli- cant in these proceedings. As the result, the registration officer obeyed those directions and removed all the 90 names from the register which was published on February 15.

Mr. Tumim, for the applicant, points out that the 90 persons whose names were removed from the register were in no way parties to the appeal, and his submission is that in those circum- stances the directions of the county court judge in regard to them were made without jurisdiction. He says, secondly, that if they can be said to have been parties to the appeal in any form, then at any rate the procedure envisaged by the County Court Rules, 1936, was not complied with. Thirdly, he points out that the effect of what was done is that the names of all the 90 persons, including that of the applicant, have been removed from the register without the facts of each case ever being considered, in other words, without seeing whether the tests of qualification laid down by the judge apply or do not apply in their cases.

That the applicant was not a party to the appeal is clear. The judge apparently thought, and with some reason, that the whole procedure from the beginning had been in the nature of a test case, and in giving those directions he assumed that, although the applicant was not a party to the appeal, arrangements had been made whereby he was in some way bound by the result, and the same with regard to the other 89. But it is quite clear that that was not so, and not only that, but that the procedure envisaged by the rules was not complied with. Order 43 of the County Court

Rules, 1936, provides, by rule 3 (2) that "The respondents to "the appeal shall be the registration officer, and the party (if "any) in whose favour the decision of the registration officer was "given," and, accordingly, each one should be made the subject of an appeal. It is then provided by rule 8 (1): "Where two "or more appeals involve the same point or points of law, the "judge may direct that one appeal shall be heard in the first "instance as a test case." And by rule 8 (3): "If the registrar "receives no such notice within the time so limited, the parties "to the appeal shall be bound by the decision of the selected "appeal without prejudice to their right to appeal to the Court "of Appeal, and an order similar to the order made in the selected "appeal shall be made without further hearing." That is the machinery provided for test cases or representative actions, whatever they may be called. The first step in each case is that the parties whose names are in dispute are all to be made parties to appeals. Then it can be ruled, when there are a number of appeals, that one should be treated as a selected appeal, but no such machinery was employed in this case. It seems to me also to be clear that, in the result, the applicant and, indeed, the other 89, have had their names removed from the register without their individual cases in regard to residence being considered at all.

That being so, it seems to me that the judge's directions of February 12 were given without any jurisdiction, and prima facie the applicant is entitled to an order of certiorari to quash those directions. It has, however, been pointed out that section 107 of the County Courts Act, 1959, provides: "Subject to the pro- "visions of any other Act relating to county courts, no judgment "or order of any judge of county courts, nor any proceedings "brought before him or pending in his court, shall be removed by "appeal, motion, certiorari or otherwise into any other court "whatever, except in the manner and according to the provisions "in this Act mentioned." Section 115 provides: "(1) The High "Court or a judge thereof may order the removal into the High "Court, by order of certiorari or otherwise, of any proceedings "commenced in a county court, if the High Court or judge "thereof thinks it desirable that the proceedings should be heard "and determined in the High Court." Looking at those two sections, it is to be observed that the only remedy by way of certiorari dealt with is in regard to the removal of the proceedings from one court into another, and not for the purposes of quashing. Notwithstanding that, I am quite satisfied that certiorari will lie in this case. The leading case on the matter is *Ex parte Bradlaugh*,[1] where Mellor J. put the principle in these few words[2]: "It is well established that the provision taking away the "certiorari does not apply where there was an absence of jurisdic- "tion," and went on[2]: "The consequence of holding otherwise "would be that a metropolitan magistrate could make any order

[1] (1878) 3 Q.B.D. 509.

[2] Ibid. 513.

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"he pleased without question." To the same effect are a number of cases including, coming to quite recent times, *Reg.* v. *Worthington-Evans, Ex parte Madan*,[3] and *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*.[4] I am quite satisfied that certiorari will lie against a county court judge if he has acted without jurisdiction, notwithstanding the provisions of the County Courts Act, 1959, to which I have referred. Accordingly, it seems to me that in this case it would be right for the court to grant the order to quash the directions given by the judge on February 12.

So far as the registration officer is concerned, unfettered, if I may use that term, by those directions, he would in the ordinary way not have removed the applicant's name from the register, and I think that the applicant, accordingly, is entitled to the almost consequential relief of an order of mandamus to the registration officer to put his name on the register.

For these reasons I would order certiorari and mandamus to issue.

GORMAN J. I agree, and I desire to add nothing.

ASHWORTH J. I also agree.

Tumim, for the applicant, pointed out that the relief claimed in the application for the order of mandamus also referred to the names of the members of the college stated in the directions, which included the further 89 persons who were in the same position.

LORD PARKER C.J. Do not let us fall into the trap. This is a single application on behalf of Samuel Adolphus Smith, and all that we can do, therefore, in these proceedings, is to quash the directions generally, I did not say so far as they relate only to the applicant, as having been given without jurisdiction. When we come to mandamus, the specific order we make is that the applicant's name shall be inserted in the register. No doubt the registration officer without any order of mandamus will, as I have said, unfettered by the directions of February 12, insert all the names in the register, but it is not for us to order that.

Orders accordingly.

Solicitors: *Field, Roscoe & Co. for Reeves & Co., Oxford; Sharpe, Pritchard & Co. for Town Clerk, Oxford; Treasury Solicitor.*

J. F. L.

[3] [1959] 2 Q.B. 145; [1959] 2 W.L.R. 908; [1959] 2 All E.R. 457, D.C.

[4] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796, C.A.

[HOUSE OF LORDS.]

TOMKINSON AND ANOTHER . . . . . APPELLANTS;

AND

FIRST PENNSYLVANIA BANKING AND TRUST CO. . . . . RESPONDENT.

H. L. (E.)*

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March 14, 15, 16, 17, 21, 22, 23; *May* 5.

[APPEAL IN *In re* UNITED RAILWAYS OF HAVANA AND REGLA WAREHOUSES LTD.]

Conflict of Laws—Contract—Discharge—Debt payable under contract—Whether discharged.

Conflict of Laws—Chose in action or debt—Discharge.

Conflict of Laws—Contract—Proper law—Lease of movables—Lease entered into "in accordance with the provisions of the laws" of Cuba—Whether conclusive of proper law.

Currency—Contract—Foreign debt—Conversion into sterling—Date for conversion.

Estoppel—Per rem judicatam—Company—Winding up—Summons by liquidators for leave to make interim distribution—Decision that part of proof should be rejected—Subsequent decision that creditors entitled to claim from liquidators on other grounds—Effect of previous decision.

An English court cannot give judgment for the payment of an amount in foreign currency, and for the purpose of litigation in England a debt expressed in a foreign currency must be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable.

The U. Company, a company incorporated in England in 1898, conducted a railway undertaking in Cuba. In 1921 it bought rolling stock worth $14,000,000 and decided to raise part of that sum in the United States of America under a scheme whereby 15-year 7½ per cent. trust certificates should be issued to the public through a trust company, which was a corporation of the Commonwealth of Pennsylvania. In February, 1921, the U. Company caused to be incorporated in the United States a subsidiary company to which on March 25, 1921, it sold the rolling stock. By a lease dated April 18, 1921, and executed in New York, the subsidiary company as lessor leased to the U. Company as lessee the rolling stock for a period of 15 years for a rental payable twice yearly at the office of the trust company in Philadelphia. The rentals payable under the lease were to provide principal and interest reserved by the trust certificates, the lease forming security for those payments.

By an agreement executed in New York contemporaneously with the lease, the subsidiary company assigned all its rights under the lease and interest in the rolling stock to the trust company as trustee for the certificate holders. By a further agreement dated April 27, 1922, the subsidiary company resold the rolling stock to the U. Company "subject to and with the benefit of the lease and "the agreement." From February 14, 1931, the U. Company ceased to pay the instalments due under the lease.

In 1953 the Cuban Government, acting under certain decrees enacted for the purpose, acquired the management and control

* *Present*: VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD DENNING and LORD MORRIS OF BORTH-Y-GEST.

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of the U. Company's undertaking and assets by way of sale and purchase. By an agreement dated September 5, 1953, the Cuban Government released the U. Company from all responsibility in respect of liabilities arising under the trust certificates.

On March 4, 1954, the U. Company went into voluntary liquidation and the successors of the trust company as trustee for the certificate holders lodged a proof, claiming in respect of 333 (meaning 331) certificates "in the hands of members of the public" and 1867 (meaning 1869) certificates "purchased by the company." The liquidators rejected the proof.

The liquidators then applied for leave to make an interim distribution in the winding up, and Roxburgh J. on December 4, 1956, held that there was sufficient ground for rejecting the proof in respect of the 1867 certificates, and directed that the remainder of the summons should stand over. There was no appeal from that order.

On the remainder of the summons:—

Held, (1) that the proper law of the lease and the contemporaneous agreement was that of Pennsylvania, since it was with that law that the transaction had its closest and most real connection (post, pp. 980, 993, 1009, 1020).

Observations of Viscount Simonds delivering the judgment of the Judicial Committee of the Privy Council in *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201, 219 applied.

Per Lord Radcliffe. I do not think that the tests for determining the proper law of a contract can ever be comprehended under a single phrase, so various are the situations and considerations that have to be taken account of; but this is a case in which, in my opinion, the law of the place of performance ought to be regarded as of preponderating importance, and of those two possible places Pennsylvania which is both the home of the trustee and the place where the capital is to be repaid is clearly the natural choice (post, p. 1000).

(2) That, since according to the law of Pennsylvania, the obligations of the U. Company under the lease were still continuing, the trustee company was entitled to the outstanding sums due to it under the lease (post, p. 1013).

But (3) (Lord Morris of Borth-y-Gest dissenting), that by virtue of the order of Roxburgh J., the trustee was only entitled to claim 331/2,200ths parts of the debt properly due to it (post, pp. 985, 986, 998, 999, 1004, 1008).

Per Lord Morris of Borth-y-Gest. The order of Roxburgh J. never purported to relieve the U. Company of its contractual obligations or to assess them or to deal with them (post, pp. 1026, 1027).

(4) That the provable sum in dollars was to be converted into sterling at the rates of exchange prevailing at the respective dates when the several sums owing by the U. Company to the trustee fell due and were not paid (post, pp. 990, 995, 1001, 1011, 1024, 1025).

Ward v. *Kidswin* (1626) Lat. 77; *S.S. Celia* v. *S.S. Volturno* [1921] 2 A.C. 544; 37 T.L.R. 969, H.L., and *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [1943] A.C. 507; [1943] 2 All E.R. 406 applied.

Decision of the Court of Appeal, sub nom. *In re United Railways of Havana and Regla Warehouses Ltd.* [1960] Ch. 52; [1959] 2 W.L.R. 251; [1959] 1 All E.R. 214 reversed in part.

APPEAL from the Court of Appeal (Jenkins, Romer and Willmer L.JJ.).

This was an appeal from an order of the Court of Appeal, dated December 8, 1958, dismissing an appeal by the appellants

from an order made by Wynn-Parry J. in the Chancery Division of the High Court on November 19, 1957, whereby he ordered that the proof of debt dated June 18, 1954, and lodged on behalf of the respondent (then called " The Pennsylvanian Company for Bank- " ing and Trusts ") in the liquidation of the United Railways of Havana and Regla Warehouses Ltd., be admitted for a sum (in the said order referred to as " the provable sum ") to be computed in the manner described in the said order, and that certain inquiries and computations should be made for the purpose of computing the provable sum.

The basic issue in this appeal arose as follows: In 1921 the United Railways of the Havana and Regla Warehouses Ltd. (being the company whose liquidators the appellants were and hereinafter called " the company ") desired to borrow money in the United States of America for the purchase, in that country, of rolling stock and railway equipment (hereinafter referred to as " rolling stock "), and it did in fact raise $(U.S.) 6,000,000 on the New York market through the issue of 6,000 " equipment trust " certificates " of $1,000 each. The repayment of this sum, and the service of the loan, was secured by a financial method known as " the Philadelphia plan " under which the rolling stock was leased to the company at rentals (which the company covenanted to pay) calculated to repay the loan by 1936, and to provide interest at 7½ per cent. per annum, and thereupon vested in trustees for the certificate holders (in fact the predecessors of the respondent).

After payment of interest up to and including August 14, 1934, and of capital instalments up to and including February 14, 1931, the company defaulted, leaving 11 instalments of capital owing amounting to $2,256,000.

On December 1, 1953, the company, without the concurrence of the respondent as trustee, which still remained the owner of the rolling stock, sold its undertaking in Cuba, including the rolling stock, to the Cuban State for $(U.S.)13,000,000, which was paid to the company in United States Treasury Bills (which were later sold by the company and the proceeds converted into sterling at $2.80 to the £).

The company thereupon, on March 4, 1954, went into a members' voluntary liquidation, being solvent as to creditors, and the respondent as trustee claimed against the company a sum sufficient to pay off the outstanding certificate holders. There were 331 certificates outstanding, so that the amount claimed was $331,000 plus interest from 1934, plus a premium of 2½ per cent. as provided by the terms of issue, plus the respondent's expenses as trustee. The respondent's claim was in the first place based on the covenant in the lease, but alternative claims were made based upon allegations that the company had converted the rolling stock by selling and delivering it to the Cuban State, and had committed a breach of a covenant against assignment contained in the lease.

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The company set up a number of defences, the most substantial of which was that the lease of the rolling stock, which contained the company's covenant to pay the instalments, was governed by Cuban law, and that under Cuban law a "novation" took place whereby the company's liability to the trustee was discharged or transferred to the Cuban State.

The company also relied (again upon the basis that Cuban law applied) upon certain Cuban moratorium laws in order to reduce the respondent's claim.

On both of these matters of Cuban law (assuming that it was applicable) Wynn-Parry J. and the Court of Appeal (unanimously) decided against the company and in favour of the respondent.

The respondent, in addition to contesting the appellants' contentions as to Cuban law, also submitted, in both courts below, that in fact the lease was not governed by Cuban law but by the law of Pennsylvania. If this were the case it was not disputed that there was no novation of the company's debt, and that the moratorium laws did not apply. This contention (which involved consideration of the proper law of the lease) was upheld by Wynn-Parry J. and the Court of Appeal (Willmer L.J. dissenting).

There remained a final contention, raised by the appellants at the trial, which was in effect that, under English law, the respondent's claim should be reduced by converting it from United States dollars into sterling at the pre-devaluation (i.e., pre-1949) rate. This contention was also rejected by Wynn-Parry J. and by the majority of the Court of Appeal, Willmer L.J. dissenting on the point.

Prior to February, 1921, the company had purchased in the United States rolling stock and railway equipment at a total price of $(U.S.)14,000,000. In February, 1921, the company caused to be incorporated in the State of Delaware, a wholly-owned subsidiary called Cuban Rolling Stock Company (hereinafter called "the car company"). On March 25, 1921, as part of the arrangements for financing the purchase of this stock the company sold all the rolling stock equipment which it had purchased or agreed to purchase to the car company and transferred the title in it to the car company by bill of sale.

In the early part of 1921 arrangements were completed through a firm of New York brokers for the raising of $6,000,000 on the New York market by the issue of 6,000 equipment trust certificates of $1,000 each to be secured on the rolling stock and equipment, and in due course the net proceeds of the sale of the certificates were paid to the company. The security for the repayment of this loan was effected by two documents executed in New York on April 18, 1921, namely, the lease and a trust agreement.

The parties to the lease were the car company (the then owner of the rolling stock; later it became vested in the trustee) as lessor and the company as lessee. After a clause by which the lessor leased the stock to the company for 15 years from

February 15, 1921, the lease contained the following relevant provisions, which may be summarised as follows:

(1) An unconditional covenant to pay to the lessor or its assigns (a) Dividends (i.e., interest) at 7½ per cent. per annum payable half-yearly on February 14 and August 14 in each year. (b) Instalments of principal payable half-yearly on February 14 and August 14 in each year of $206,000 until February 14, 1931 (20 instalments), and thereafter of $205,000 (10 instalments) making together a total of $6,170,000 which represented the amount of the loan plus a premium. (c) A sum equal to the expenses of the lessor or its assigns in enforcing the covenants of the lease, and in the performance of the trust under which the certificates were issued (clause 1).

(2) An option to the lessee to satisfy any instalment of principal by delivering certificates to the trustee for cancellation and further, on any rental date subsequent to August 14, 1931, to pay to the trustee a sum sufficient to redeem all outstanding certificates at par plus a premium of 10 per cent. (clause 1).

(3) Covenants by the lessee to mark the rolling stock with the trustee's name as "owner and lessor," to keep it in repair and insured (clauses 2–4).

(4) A covenant by the lessee not to assign or transfer its rights or interest in the rolling stock without the consent of the lessor (clause 5).

(5) Power for the lessor to retake the rolling stock in default (clause 6).

(6) An agreement that the lessor might forthwith assign its interest to the trustee for the certificate holders, and that when the lessee should have fully paid the rents, the rolling stock should be reassigned to the lessor (sic) (clause 8).

Clauses 11 and 12 were important and were as follows:

"Eleventh. It is the intention of the parties to this lease "to enter into and execute this lease in accordance with the "provisions of the laws of the Republic of Cuba to the end that "this lease may be deposited or filed and/or registered there-"under, and the railway company agrees to so deposit and/or "register or file the same, and to record the same in such State "or territories of the United States as may be required by law, "and to perform any other act required by law that may be "necessary to protect the trustee's title. In case it becomes "necessary that this lease be translated into the Spanish "language in order that it may be filed and/or registered in the "proper offices in the Republic of Cuba, then and in that event "it is understood and agreed that the English text shall govern "in case of any conflict between the English and Spanish texts.

"Twelfth. The parties hereto submit themselves to the juris-"diction of the tribunals of the City of Havana, in the Republic "of Cuba, for all notifications, summonses and other judicial or "extra judicial formalities to which this lease shall give rise, with "express renunciation of their own jurisdiction if different."

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The parties to the trust agreement were the car company and the Commercial Trust Company of Philadelphia as trustee, whose successor in title was the present respondent. After reciting the lease and the agreement by the car company to assign its interest in the rolling stock and the lease to the trustee, the trust agreement contained the following relevant provisions, which may be summarised as follows:

(1) The car company assigned to the trustee as trustee for the certificate holders the lease and all the interest of the car company in the rolling stock, and all rentals reserved under the lease (clause 1).

(2) The trustee agreed to deliver certificates to the car company to a total value of $6,000,000 in the form set out (clause 2).

(3) Payment of interest and principal and premium on the certificates was to be made only out of the rentals when paid as provided by the lease (clause 2).

(4) The semi-annual instalments on account of principal were to be applied by the trustee in redeeming certificates at par (plus a premium of 2½ per cent.) by drawings (clause 2).

(5) A covenant by the trustee to apply any rentals under the lease, after payment of expenses and taxes, in payment of interest on the certificates, and then in payment of the certificates when and as retired or purchased for retirement (clause 5).

(6) Power for the trustee to retake possession of the rolling stock and to sell it, and to apply the proceeds in payment of interest and principal on the certificates, and to pay any surplus to the car company (clause 6).

(7) A provision that if the company made default, and if it were thought "necessary or convenient for the purpose of "enforcing and carrying out all the terms and stipulations of the "lease and of this agreement under the laws and statutes of the "Republic of Cuba"; then under certain stipulated circumstances the trustee was to assign and to hand over to a substituted trustee authorised to act or do business in Cuba (clause 7).

(8) A provision that, on payment of the last instalment and on retirement of the certificates, any surplus money and the rolling stock should be assigned to the car company (clause 10).

Clause 11 and the second sentence of clause 12 were in similar terms to clause 11 of the lease, but the trust agreement contained no submission to the jurisdiction such as that in clause 12 of the lease.

By an agreement dated April 27, 1922 (the resale agreement), and made between the company of the one part and the car company of the other part, the car company resold the rolling stock to the company subject to and with the benefit of the lease and the trust agreement.

The car company was dissolved in 1924.

The result of the transactions referred to above was that the

rolling stock became vested in the trustee (ultimately the respondent) as lessor. It was leased to the company which bound itself to pay the instalments of capital and the interest on the loan to the trustee. The trustee held the instalments and the interest upon trust for the certificate holders pari passu. The company (as assignee of the car company) had a right to have the rolling stock reassigned to it when it had fully complied with its obligations and (also as assignee of the car company) to have paid to it any surplus money in the hands of the trustee after the certificate holders had been paid. The certificate holders had no direct claim against the company and could only enforce their claim against the trustee to the extent of money actually received by the trustee from the company.

Prior to February 14, 1931, 3,800 certificates to the face value of $3,800,000 had been redeemed pursuant to the trust agreement, but the company failed to pay the instalment of $206,000 which fell due on that day under the terms of the lease, or any of the 10 subsequent instalments of $205,000 which fell due at half-yearly intervals thereafter. The total of the 11 unpaid instalments was $2,256,000. The company continued to pay interest until August 14, 1934, but since that date no interest had been paid. Before the sale of its undertaking in 1953 the company had acquired by purchase in 1937, under the terms of a compromise of proceedings instituted by the respondent against the company in the State of Maine, a further 1,869 certificates, which, however, were not delivered to the trustee for cancellation. That left a balance of 331 certificates in the hands of the public, which certificates were those in respect of which the trustee desired to prove.

On June 10, 1949, an interventor was appointed by the Cuban State to take over the management of the company's undertaking in Cuba. This did not affect the ownership of the undertaking or of the rolling stock.

By a preliminary agreement dated September 5, 1953, the company, whilst still in default, agreed to sell its railway undertaking (including the rolling stock which was still vested in the respondent) to the Cuban State for the sum of $(U.S.)13,000,000. The preliminary agreement contained the following clause:

"4 (B). The price agreed upon shall be received by 'The "'Uniteds' (the company) and 'The Terminal' (a wholly-owned "subsidiary of the company) free from all responsibility with "respect to liabilities outstanding in Cuba, represented by debts, "obligations and responsibilities arising out of the operations of "the properties which are to be acquired by the State, whether "involving operations prior to June 10, 1949, on which date said "properties passed to the management of the Interventors of the "Government of Cuba, or subsequent to that date."

On the same date a separate confidential agreement (hereinafter called "the Confidential Agreement") was executed by the

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Cuban State, the National Bank of Cuba and the company, which contained the following provisions:

"First: That among the liabilities in respect of which the "State liberates 'The Uniteds' from all responsibility, in accord- "ance with letter B of Clause Fourth of the Preliminary Agree- "ment signed on this same date between the same parties, it is "understood to be included the responsibilities that may derive "from the 7½ per cent. Equipment Trust Certificates which were "issued under agreement dated February 15, 1921, between the "Cuban Rolling Stock Company and Commercial Trust Company, "as Trustees.

"Second: That what is established by this agreement does "not signify that the State or 'The Uniteds' acknowledge or "admit that there can exist legal merit in any claim, demand or "proceedings that may be established as a result of the referred "to 7½ per cent. Equipment Trust Certificates, but that it is "exclusively established what is mentioned in this agreement in "respect thereof for the supposed case that a sentence may be "handed down as a result of any claim, demand or proceedings "derived from said 7½ per cent. Equipment Trust Certificates, "whether it be before courts of justice of the Republic or in "foreign courts."

The preliminary agreement was completed by a deed of sale dated December 1, 1953, and thereupon the Cuban State paid the $13,000,000 to the company in United States Treasury Bills. The Cuban State, on the same day, transferred the company's undertaking, but not all the assets transferred to the State by the company, to a newly-formed railway company in Cuba Ferrocariles Occidentales de Cuba S.A. Under a provision of the deed of sale the company delivered to the Cuban State the 1,869 certificates purchased by the company.

The company went into members' voluntary liquidation on March 4, 1954. Prior thereto a scheme of arrangement had been made by which its loan capital and share capital was reorganised, but this did not affect the claim of the trustee for the equipment trust certificates.

On June 18, 1954, the respondent lodged a proof of debt for the following sums set out in paragraph 2 of the proof under the following heads:

(a) £264,076 0s. 1d. (being the sterling equivalent on the winding-up date at $2.80 to the £) of $739,412.81 due and payable to the respondent in respect of $333,000 in face value of the certificates then outstanding in the hands of members of the public as follows, namely a sum equal to:

Face value	$333,000.00
Premium of 2½ per cent. on the said face value	8,325.00
Carried forward	$341,325.00

Brought forward	$341,325.00
Interest at the rate of 7½ per cent. per annum on the said face value from August 15, 1934, to February 14, 1936	37,462.50
Interest at the rate of 6 per cent. per annum on the said face value from February 15, 1936, to March 4, 1954	360,625.31
	$739,412.81

(b) £11,177 6s. 9d. (being the sterling equivalent at the rate of $2.80 to the £) for the amount of the reasonable expenses incurred by the respondent down to the winding-up date in the performance of the trust.

(c) £20,000 for the estimated value of its future or contingent claim in respect of expenses incurred or to be incurred by it subsequent to the winding-up date, in the performance of the said trust.

(d) Subject as hereinafter mentioned £1,480,570 5s. 7d. being the sterling equivalent on the winding-up date (at $2.80 to the £) of $4,145,596.78, due and payable to the respondent in respect of $1,867,000 in face value of the certificates which had been purchased by the company as follows, namely a sum equal to:

Face value	$1,867,000.00
Premium of 2½ per cent. on the said face value	46,675.00
Interest at the rate of 7½ per cent. per annum on the said face value from August 15, 1934, to February 14, 1936	210,037.50
Interest at the rate of 6 per cent. per annum on the said face value from February 15, 1936, to March 4, 1954	2,021,884.28
	$4,145,596.78

The appellants and the respondent were agreed that the inclusion under paragraph 13 (a) and (d) of $333,000 and $1,867,000 in face value of certificates was an error, due to the fact that the respondent was not aware that the company had purchased two more certificates, and agree that the said figures should be altered to $331,000 and $1,869,000 with consequential adjustments to the other figures. The respondent filed evidence which was not challenged that under the laws of the Commonwealth of Pennsylvania and the State of New York the appropriate rate of interest on unpaid debts would be 6 per cent. per annum.

(a) In the said proof of debt (paragraph 4) the respondent alleged (inter alia) that the liability of the company to it (which was the subject-matter of the proof) arose under or by virtue of a covenant by the company with the car company contained in the lease the benefit whereof, including the ownership of the rolling

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stock, had by the trust agreement been assigned by the car company to the respondent's predecessor as trustee.

(b) Alternatively, the respondent alleged that the said liability arose by way of damages for breach of the said covenant in the lease against assignment, or by way of damages for conversion of the rolling stock by the company.

(c) The said proof of debt also alleged two further grounds of liability, both of which were abandoned by the respondent at the hearing before Wynn-Parry J.

By a notice dated November 19, 1954, the appellants rejected the said proof of debt.

On April 25, 1955, the respondent issued a summons asking that the rejection of the proof of debt might be reversed, and that it might be ordered to be admitted in full.

On December 4, 1956, in connection with an application by the appellants for leave to make an interim distribution in the winding-up, the respondent's summons came before Roxburgh J., who made an order which recited that the court was satisfied that the holders in due course of the 1,867 certificates therein referred to (being an erroneous reference to the 1,869 certificates purchased by the company) had renounced any claim to participate in the assets available for distribution in the winding-up, and that such renunciation alone was a sufficient ground for rejection of that part of the respondent's proof of debt, namely, the claim in respect of the sum of £1,480,570 5s. 7d. mentioned in paragraph 2 (d) of the proof, which was based upon or measured by reference to the said 1,867 certificates. The order then proceeded to declare that the court did not think fit to reverse or vary the decision of the appellants as such liquidators rejecting the said proof of debt so far as the same related to the said sum of £1,480,570 5s. 7d. The order then stated that the court made no order on that part of the respondent's summons accordingly, and directed that the remainder of the said summons should stand over. The respondent did not appeal from such order.

On October 8, 1957, the remainder of the respondent's summons came on for hearing by Wynn-Parry J., who varied the appellants' rejection of the proof of debt except so far as the same related to the sum of £1,480,570 5s. 7d., and ordered that the proof of debt should be admitted for a sum to be computed in the manner described in the order.

The appellants appealed to the Court of Appeal. The decision of the Court of Appeal on the main issues, except for the issue stated hereafter, is summarised above.

In the Court of Appeal a further contention was advanced on behalf of the appellants, to the effect that the consequence of the order made in the proceedings by Roxburgh J. on December 4, 1956, was to reduce the maintainable claim of the respondent to a proportion of the gross fund corresponding to the proportion which the certificates held by the general public bore to the totality

of the unredeemed certificates. It was accordingly contended that, since the company had purchased 1,869 certificates prior to its liquidation, leaving 331 certificates in the hands of the public, the proof of the respondent's debt should be reduced to 331/2,200ths of the total of the instalments converted into sterling at the rate contended for by the appellants. The majority of the Court of Appeal, Willmer L.J. dissenting, rejected this contention.

On appeal to the House of Lords, the appellants abandoned at the outset their contention that in English Private International Law the system of law applicable for determining the question whether or not there has been a statutory novation of a debt is the lex situs of the debt in question.

The main questions which were the subject of debate before their Lordships were: (1) the proper law of the contract; (2) the quantum of the company's liability and the effect of the order of Roxburgh J. thereon; (3) whether the exchange rate applicable to the various sums due for rentals and interest was the exchange rate ruling on the date when the particular item became due (as the respondent conceded below), or whether it was the rate prevailing at some other date, namely, the date of judgment or the date of the writ or other initiating step of the proceedings.

John Megaw Q.C., *Kenneth Mackinnon Q.C.* and *Richard Hunt* for the appellants, the liquidators.

R. O. Wilberforce Q.C. and *R. B. S. Instone* for the respondent, the trustee for the certificate holders.

The following cases were cited in argument: *Owners of the "P. Caland" and Freight* v. *Glamorgan Steamship Co.*[1]; *Montgomerie & Co. Ltd.* v. *Wallace-James*[2]; *Mendip Range (Owners of S.S.)* v. *Radcliffe*[3]; *In re Wellsted's Will Trusts*[4]; *Bonython* v. *Commonwealth of Australia*[5]; *Hamlyn & Co.* v. *Talisker Distillery*[6]; *Vita Food Products Inc.* v. *Unus Shipping Co.*[7]; *N. V. Kwik Hoo Tong Handel Maatschappij* v. *J. Finlay & Co. Ltd.*[8]; *Maritime Insurance Co. Ltd.* v. *Assecuranz-Union Von 1865*[9]; *In re Claim by Helbert Wagg & Co. Ltd.*[10]; *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[11]; *Commercial Investment Trust Co.* v. *Minon*[12]; *Austrian Lloyd S.S. Co.* v. *Gresham Life Assurance Society Ltd.*[13]; *S.S. Celia* v. *S.S. Volturno*[14]; *In re*

[1] [1893] A.C. 207, 215, 216; 9 T.L.R. 309, H.L.
[2] [1904] A.C. 73, H.L.
[3] [1921] 1 A.C. 556; 37 T.L.R. 474, H.L.
[4] [1949] Ch. 296; [1949] 1 All E.R. 577, C.A.
[5] [1951] A.C. 201; 66 T.L.R. (Pt. 2) 969, P.C.
[6] [1894] A.C. 202; 10 T.L.R. 479, H.L.
[7] [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513, P.C.
[8] [1927] A.C. 604, H.L.
[9] (1935) 52 Ll.L.Rep. 16.
[10] [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.
[11] [1910] 2 Ch. 502; 26 T.L.R. 591, C.A.; reversed sub nom. *De Beers Consolidated Mines Ltd.* v. *British South Africa Co.* [1912] A.C. 52; 28 T.L.R. 114, H.L.
[12] (1939) 104 Fed.Rep. (2nd Series) 765 (U.S.A.).
[13] [1903] 1 K.B. 249; 19 T.L.R. 155, C.A.
[14] [1921] 2 A.C. 544; 37 T.L.R. 969, H.L.

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Chesterman's Trusts [15]; *Di Ferdinando* v. *Simon, Smits & Co. Ltd.* [16]; *Manners* v. *Pearson & Son* [17]; *Scott* v. *Bevan* [18]; *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* [19]; *Lloyd Royal Belge S.A.* v. *Louis Dreyfus & Co.* [20]; *Madeleine Vionnet et Cie* v. *Wills* [21]; *In re British American Continental Bank Ltd., Goldzieher and Penso's Claim* [22]; *In re British American Continental Bank Ltd., Credit General Liegeois' Claim* [23]; *In re British American Continental Bank Ltd., Lisser and Rosenkranz's Claim* [24]; *The Baarn (No. 1)* [25]; *Peyrae* v. *Wilkinson* [26]; *Deutsche Bank Filiale Nürnberg* v. *Humphreys* [27]; *Cummings* v. *London Bullion Co. Ltd.* [28]; *In re Russian Commercial and Industrial Bank* [29]; *Lebeaupin* v. *Crispin & Co.* [30]; *Cockerell* v. *Barber* [31]; *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [32]; *Ward* v. *Kidswin* [33]; *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property* [34]; *Belsize Motor Supply Co.* v. *Cox.* [35]

Their Lordships took time for consideration.

May 5, 1960. VISCOUNT SIMONDS. My Lords, I propose to state in summary form the facts of this long and complicated case. They are fully stated in the opinion of my noble and learned friend, Lord Morris of Borth-y-Gest, which I have had the privilege of reading. It was necessary to do so in order to determine the question what is the law determining the liability of the appellants to the respondent in respect of certain agreements to which I shall briefly refer. I could add nothing to his exposition of the facts and I am wholly in agreement with his conclusions of law upon this question. I proceed upon the footing that the relevant law is that of the Commonwealth of Pennsylvania and shall examine the questions, which then arise, what is the sum in dollars owed by the appellants to the respondent, and at what rate that sum must be converted into sterling.

The appellants are the liquidators in the voluntary winding up of an English company called the United Railways of the Havana and Regla Warehouses Ltd., which I will call "the company." The company for many years carried on a railway undertaking in

[15] [1923] 2 Ch. 466, C.A.
[16] [1920] 3 K.B. 409; 36 T.L.R. 797, C.A.
[17] [1898] 1 Ch. 581; 14 T.L.R. 312, C.A.
[18] (1831) 2 B. & Ad. 78.
[19] [1922] 1 K.B. 451; 38 T.L.R. 221.
[20] (1927) 27 Ll.L.Rep. 288.
[21] [1940] 1 K.B. 72; 56 T.L.R. 15; [1939] 4 All E.R. 136, C.A.
[22] [1922] 2 Ch. 575; 38 T.L.R. 465, 785, C.A.
[23] [1922] 2 Ch. 589; 38 T.L.R. 464.
[24] [1923] 1 Ch. 276.
[25] [1933] P. 251; 49 T.L.R. 554, C.A.
[26] [1924] 2 K.B. 166.
[27] (1926) 272 U.S.Rep. 517.
[28] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383.
[29] [1955] Ch. 148; [1955] 2 W.L.R. 62; [1955] 1 All E.R. 75.
[30] [1920] 2 K.B. 714; 36 T.L.R. 739.
[31] (1810) 16 Ves.J. 461.
[32] [1943] A.C. 507; [1943] 2 All E.R. 406.
[33] (1625–27) Lat. 77.
[34] [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.
[35] [1914] 1 K.B. 244.

the Island of Cuba. Before or during the year 1921 the company had purchased or contracted to purchase in the United States of America rolling stock and other railway equipment to an aggregate amount of over $14,000,000, and for the purpose of financing part of this amount decided to raise the sum of $6,000,000 in the United States of America.

The finance was arranged in what appears to be a somewhat elaborate way. It no doubt had its own purpose. In February, 1921, the company caused to be incorporated in the State of Delaware a subsidiary company, the Cuban Rolling Stock Company, which has generally been referred to as " the car company," and to this company sold all the rolling stock and equipment already delivered and assigned the contracts for future delivery of the balance. Notwithstanding this sale, the company continued to use the rolling stock as part of its railway undertaking as it had before the sale. In April, 1921, the car company leased to the company the rolling stock and equipment already delivered, and agreed to lease the remainder when delivered for a period of 15 years expiring on February 14, 1936. The company agreed to pay as rental for the rolling stock and equipment (all of which I will call " the rolling stock ") first, half-yearly on February 14 and August 14 in each year, the first payment to be made on August 14, 1921, (a) a sum equal to $3\frac{3}{4}$ per cent. of the par value of certain certificates therein mentioned outstanding and unpaid on the same dates in each year during the term of the lease together with certain other sums which need not be particularised, and (b) a sum equal to the expenses incurred by the car company or its assigns in enforcing the covenants and terms of the lease and performance of the trust under which the said certificates were issued, and (c) a sum equal to certain taxes, duties and other charges therein mentioned: secondly, half-yearly on the same dates in each year beginning with August 14, 1921, a sum of $206,000 for the first 20 payments and of $205,000 for the last 10 payments. There were provisos for payment of these semi-annual sums in trust certificates as therein mentioned, and also for the retirement of such certificates but they are not relevant to the question that I am considering. The lease also contained covenants by the company for maintenance, replacement and insurance of the rolling stock, and that there should be no assignment, transfer, or underletting of the rolling stock without the consent of the car company or its assigns. Further, there was provision in the event of default by the company in payment of rental or performance of its other obligations for the car company or its assigns to declare the lease terminated, and to enter upon the company's railroad and retake the rolling stock. Finally, the lease provided that the car company might forthwith assign to the Commercial Trust Company of Philadelphia as trustee all its right, title and interest in the rolling stock, and all its claims, demands and remedies accruing or to accrue under the lease.

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Your Lordships will have observed that the lease refers to trust certificates and to an intended assignment to a trustee. These references require a brief explanation, if only because much of the confusion that has arisen in this case is due to them.

The transfer contemplated by the last provision of the lease to which I have referred was in fact effected by a so-called trust agreement of the same date, the parties to which were the car company and the Commercial Trust Company of Philadelphia as trustee, whose successors in title are the respondents to this appeal. The car company thereby assigned to the trustee as trustee for the certificate holders thereinafter mentioned the lease and all its interest in the rolling stock and all rentals reserved under the lease. I venture to repeat and emphasise that the lease did not, nor did the trust agreement impose any contractual liability to the certificate holders upon the company. I therefore think it sufficient to say that the certificates were 6,000 "equip-" ment trust certificates" of $1,000 each, and that it was to secure the repayment of them by 1936 together with certain premiums, interest and other sums that the company entered into the lease containing the several covenants that I have already described.

The next step was that by an agreement dated April 27, 1922, the car company resold the rolling stock to the company subject to and with the benefit of the lease and of the trust agreement. Shortly afterwards the car company was dissolved.

In due course 3,800 certificates were retired in accordance with provisions in the trust agreement and were cancelled. The company did not pay the last instalment of $206,000 which became due under the lease on February 14, 1931, or any of the 10 instalments of $205,000 which subsequently became due. The total of these unpaid instalments is $2,256,000. The company kept up the other payments which were included in the "rentals" payable under the lease down to and including those due on February 14, 1935, but made no further payment. A large sum was due under these heads.

In 1937 proceedings were instituted by the respondents against the company in the State of Maine. They were compromised on the terms (inter alia) of an offer by the company to purchase outstanding certificates at a price of $147.50 per certificate. This offer was accepted by holders of 1,869 certificates which, accordingly, came into the possession of the company. The certificates have not been cancelled. Thus, there were only 331 certificates left in the hands of the public. The number is sometimes given as 333 but the difference is immaterial.

I need not refer to the subsequent Cuban legislation which would be relevant only if Cuban law governed the contract. It is sufficient to say that in consequence of it the company on December 1, 1953, sold the whole of its undertaking to the Cuban State

which, on the same day, resold it to a Cuban company formed for the purpose called the Ferrocariles Occidentales de Cuba S.A. As a term of such sale to the Cuban State the purchase price was to be received by the company free from all responsibility with respect to liabilities outstanding in Cuba represented by debts, obligations and responsibilities arising out of the operation of the properties acquired by the Cuban State. Under a further term the company delivered to the Cuban State the 1,869 certificates which, as already stated, it had purchased.

This was the state of affairs when on March 4, 1954, the company passed a special resolution for winding up and appointed the appellants as liquidators. I am conscious that, though I have been able to omit much that is relevant only to the question of the proper law of the contract, yet I have troubled your Lordships by a recital of many facts which can have no bearing upon the only question which is before the court in the winding up of the company, viz., what is the debt owed by the company to the respondents under the lease. I have done so only because not otherwise is the form of proof put in by the respondents explicable. That does not mean that it is in any way justifiable. Upon the question that now arises I come to a different conclusion from that reached by Wynn-Parry J., and the majority of the Court of Appeal.

On June 18, 1954, the respondents lodged their proof of debt in the winding up.

In order to simplify the issue I will in the first place deal solely with the claim which is based on the failure of the company to fulfill its contractual obligations under the lease and reserve for later consideration certain alternative claims. I will also ignore for the present two heads of claim relating to certain expenses incurred by the respondents which the company have contracted to pay, and will confine my attention to two claims which appear to relate to the failure of the company to pay to the respondents 11 instalments of principal, the first of $206,000 and the others of $205,000, and certain premiums and interest. I say " appear " to relate " for, though I never before saw so confused and confusing a document as this proof, it is clear from its fourth paragraph that the liability of the company in the sums claimed in paragraph 2 is assigned in the first place to its covenants under the lease. I can only do justice to these claims by setting them out verbatim. They are as follows:

" 2 (a) The sum of £264,076 0s. 1d. being the sterling " equivalent on the said date [viz., the commencement of the " winding up], calculated at the rate of $2.80 to the £, of " 739,412.81 United States dollars due and payable to the " claimant in respect of $333,000 in face value of United Rail- " ways of Havana 15-year 7½ per cent. equipment trust certifi- " cates then outstanding in the hands of members of the public " as follows, namely a sum equal to

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" Face value	$333,000.00
" Premium of 2½ per cent. on the said face " value	$8,325.00
" Interest at the rate of 7½ per cent. per " annum on the said face value from " August 15, 1934, to February 14, 1936	$37,462.50
" Interest at the rate of 6 per cent. per " annum on the said face value from " February 15, 1936, to March 4, 1954	$360,625.31
	$739,412,81

" (d) In addition thereto (subject as hereinafter mentioned) " £1,480,470 5s. 7d., being the sterling equivalent on March 4. " 1954 (calculated at the rate of $2.80 to the £) of United States " $4,145,506.78 due and payable to the claimant in respect of " $1,867,000 in face value of United Railways of Havana 15-year " 7½ per cent. equipment trust certificates which had been pur- " chased by the company as follows, namely a sum equal to

" Face value	$1,867,000.00
" Premium of 2½ per cent. on the said face " value	$46,675.00
" Interest at the rate of 7½ per cent. per " annum on the said face value from " August 15, 1934, to February 14, 1936	$210,037.50
" Interest at the rate of 6 per cent. per " annum on the said face value from " February 15, 1936, to March 4, 1954	$2,021,884.28
	$4,145,596.78 "

Your Lordships will observe that ex facie these claims are quantified not by the amount by which the company has fallen short of its obligations under the lease, but by the amount which the respondents allege to be necessary to satisfy the certificate holders whose certificates have not been cancelled. But, since the certificate holders do not stand in any contractual relation to the company, it is at once clear that the form of proof is wrong and misleading, and I think that the proper course would have been to reject it in toto with liberty to the respondents to recast it if they thought fit. It is too late to do that now. All that we can do is to take these two claims amounting together to $4,885,009.59, to assume that they are referable, as appears from paragraph 4 of the proof, to the company's failure to fulfil its obligations under the lease, and ask, first, at what rate of exchange the dollars are convertible into sterling, and, secondly, what is the result of the order made by Roxburgh J. on December 4, 1956, to which I will refer later. I emphasise that at this stage the two sums must be aggregated, for the liability of the company to the respondents though divided in the proof arises from a single source, namely, its breach of its obligations to them.

Upon this footing I entertain no doubt that the proper rate of exchange is that which prevailed at the date when the several sums owing by the company to the respondents fell due and were not paid. The sum of $739,412.81 being thus converted would (after a slight adjustment of the figures which has been agreed) represent £180,724 5s. 1d., and this is the sum which the appellants say is due to the respondents. It is, as they rightly contend, wholly irrelevant that the respondents might, if they had to satisfy the dollar claims of the certificate holders, have to convert into sterling at the rate of $2.80 to the £. That is not a question which arises in the liquidation and is no concern of the company. What is true of the sum claimed under 2 (a) is equally true of that claimed under 2 (d), but for the reason that I shall presently state this need not be further considered. Here, then, are two sums the result of an artificial division, for which the respondents alone are responsible, both of them stemming from the company's liability to the respondents, both of them convertible into sterling not at $2.80 to the £, but at the several rates prevailing when the several sums fell due and were not paid.

Two sums there were and, if there had continued to be two sums, a situation would have arisen of which I cannot guess the solution. It may be that if the respondents had persisted in their claim for the whole $4,885,009 the Cuban State or their successors as holders of the 1,867 or 1,869 certificates would have had something to say about the distribution of the fund in the hands of the respondents. I should by no means assume that they would assent to a course which would benefit the 331 (333) certificate holders. I will not make that or any other assumption. For the event did not happen. What did happen was, in my view, fatal to the respondents' contention.

The respondents' claim having been duly presented in the winding up was rejected by the liquidators on November 19, 1954. On April 25, 1955, they took out a summons asking that the liquidators' decision rejecting their proof for (inter alia) the several sums of £264,076 0s. 1d. and £1,480,570 5s. 7d. might be reversed, and that the proof might be ordered to be admitted in full. At an earlier date, namely, on November 14, 1955, the liquidators had themselves taken out a summons asking that they might be at liberty to apply certain sums in making a first interim return of capital to the holders of the Consolidated Stock of the company and towards redemption of its Second Income Loan Stock. These summonses appear to have come before Roxburgh J. on the same day, and that learned judge made two orders on December 4, 1956. By the first of them, which related to the rejection of proof, it was recited that it appeared that the holders in due course of 1,867 certificates whereof the denoting numbers were set forth in the schedules to the order had renounced any claim to participate in the assets available for distribution in the winding up, and that such renunciation alone was a sufficient ground for the rejection of that part of the respondents' proof of debt (namely

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the claim in respect of the sum £1,480,570 5s. 7d. claimed in subparagraph (d) of paragraph 2 of the proof, which was based upon or measured by reference to the said 1,867 certificates) and the court did not think fit to reverse or vary the decision of the liquidators rejecting the said proof so far as it related to the said sum of £1,480,570 5s. 7d. and made no order on that part of the summons. The remainder of the summons was ordered to stand over, the costs so far incurred being reserved. The respondents applied for leave to appeal from this order: it was refused and they carried the matter no further. The second order made on the same day has no immediate relevance to the matter now under appeal, but it may be noted that the learned judge in fact authorised the liquidators to distribute out of the assets of the company a sum of £496,066 and a sum not exceeding £1,371,889 for the purposes mentioned in their summons. The respondents asked for leave to appeal from this order also: it was refused and the respondents carried the matter no further.

I return to the first order. How is it possible, my Lords, to regard it as anything but a final and now irrevocable rejection of the proof to the extent of £1,480,570? It may be that the reason for rejection was wrong. I think it was. But it was due to nothing else than the manner in which the proof was framed. For that the respondents alone were responsible. It is possible that too late they saw the folly of it, but they did not appeal. In the result all that remains is the claim under 2 (a). That is a sum of dollars which is not now challenged except that the appellants contend that it has been converted into sterling at the wrong rate of exchange. When the respondents receive this sum, they must deal with it as the terms of their trust demand. With that the court has no concern in the winding up of the company. It may be the failure to realise this fact that led Wynn-Parry J. and the majority of the Court of Appeal to a conclusion for which I see no justification. All that remains of the proof is the sum originally claimed less that part which has been rejected.

So far I have dealt with the case upon the footing that the proof of debt is based upon the failure by the company to perform its obligations under the lease. That accords with paragraph 4 of the proof. But counsel for the respondents has urged that if this claim fails in the respect that I have mentioned, they have an alternative claim for damages for conversion by the company of the equipment, which cannot suffer the same fate, inasmuch as the conversion took place in 1953 and at that date the rate of exchange was already $2.80 to the £. I find it impossible to accept this contention. I will assume, though there are probably many difficulties in the way, that the claim in damages for conversion is valid, and further, that such damages can, as Wynn-Parry J. held, be quantified at such a sum in sterling as when converted into dollars at the rate of exchange obtaining on December 1, 1953, that is, $2.80 dollars to the £, would produce $2,000,000. It is to be remembered that this claim is strictly

alternative to the claim with which I have already dealt. But though the ground of claim, the cause of action, is different, no other particulars are given than those in paragraph 2 (a), (c) and (d). They are, of course, irreconcilable with the new claim. But the claims new and old are subject to the order of December 4, 1956. The proof of debt is rejected to the extent of £1,480,570. It is plain that nothing is left if a claim in damages for conversion is substituted for the original claim. It is not, in my opinion, possible to construe the order as a rejection pro tanto of the proof of debt if, and only if, it is founded on one of the causes of action indicated in paragraph 4, and that it is to be disregarded if another cause of action is substituted.

I have so far deliberately ignored the claims under paragraph 2 (b) and (c). These are claims which appear to be well funded subject to such inquiry as to quantum as may be necessary. Moreover, I do not think that the rate of exchange of $2.80 to the £ can be successfully challenged, for the rate must be determined not at the date when the respondents incurred the several expenses which constitute the claim, but at the date when demand was made upon the company for payment. There was no evidence that demand was made before the 2.80 rate obtained.

Once more, then, I return to the claim under paragraph 2 (a), and the single question that remains is whether the $739,412 therein mentioned should be converted, as the respondents contend at the 2.80 rate or, as the appellants contend, at the rates prevailing when the several sums payable by the company in respect of principal, premium and interest, fell due and were not paid. This was said to be an important question of principle upon which this House has not hitherto pronounced. The question, summarily stated, is what sum in sterling is recoverable by a plaintiff suing in the courts of this country, for a sum of money payable in foreign currency in a foreign country under an instrument of which the proper law is a foreign law. Admittedly, the claim must be for a sterling sum and the judgment must be in sterling. It is established by authority binding on this House that a claim for damages for breach of contract or for tort in terms of a foreign currency must be converted into sterling at the rate prevailing at the date of breach or tortious act: see, for example, *S.S. Celia* v. *S.S. Volturno*.[1] But, it was said, doubts had been expressed whether the same rule applied where the claim arose from a failure to pay a debt expressed in terms of foreign currency, and it was urged that on principle the plaintiff should recover sterling at the rate prevailing at the date of judgment or, alternatively, at the date of the writ or other initiating step of the proceedings. To this it was answered that without undue refinement the two cases, damages and foreign debt (as I will call a debt in foreign currency) could not be distinguished, that an action to recover a foreign debt was upon a sound analysis nothing else than an action

[1] [1921] 2 A.C. 544; 37 T.L.R. 969.

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for recovery of damages for breach of a contract to deliver foreign currency, that there was ample authority, ancient and modern, for this proposition, and that in any case convenience demanded that the same rule should obtain.

My Lords, I have no doubt what your Lordships' decision on this point should be. In the course of the argument it occurred to me to ask learned counsel what in old days was the form of action where the claim was for a foreign debt. The answer was found after some research. It was extremely enlightening if not decisive. In the case of *Ward* v. *Kidswin*,[2] decided as long ago as the second year of the reign of King Charles I, the exact point appears to have been decided. In that case (which is reported in Norman French) the plaintiff brought an action in detinet against the defendant declaring that on such and such a day the defendant in London bound himself to the plaintiff by bond that he would repay "such and such a sum of Hamburg money which "is such and such English money." Among other exceptions it was excepted that "the debt for Hamburg money was in detinet "alone whereas money ought to be in debet and detinet." Upon this point it was held: "There is express authority in 34 H.6.12 "where the action brought in detinet is held to be good," and the report goes on: "And it was agreed by all (the judges) "that in the case of foreign coin, such as Flemish, one must "declare the value in English. Note that one can be charged "for money as a receiver and bailee for goods or for Hamburg "money, provided it is not current here: and the action is quite "the same as for a box or a horse, etc. And in such case the "action will be in detinet only unless it is for money made "English coin . . . Justice Jones (held) that the action is properly "brought in detinet alone for Hamburg money which is of no "value and as if the action were brought for a piece of plate." The money was in this case apparently contracted to be paid in London, and the bond was an instrument governed by English law. The result could not have been different if it had been payable in Hamburg under a Hamburg bond.

I have spoken of authority ancient and modern, and have given your Lordships an example of ancient authority. Let me pass over more than 300 years and come at once to a case decided in 1943. In *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*[3] the material question was at what rate according to the law of Palestine, which was conceded for this purpose to be the same as English law, should a sum of 2,000 gold Turkish pounds, payable at Haifa be converted into local (that is, Palestine) currency. I venture to quote extensively from a judgment of the Judicial Committee of the Privy Council which was delivered by Lord Wright.[4] "At what dates," he asked, "must the rate of

[2] (1626) Lat. 77.
[3] [1943] A.C. 507; [1943] 2 All E.R. 406.
[4] [1943] A.C. 507, 512.

"exchange be calculated? There can, their Lordships appre-
"hend, be now no doubt as to the English law on this point. It
"is true that different views have been taken at different times
"and by different systems of law. Indeed, there are at least four
"different rules which might be adopted. The rate of exchange
"might be determined as at the date at which payment was due,
"or at the date of actual payment, or at the date of the com-
"mencement of proceedings to enforce payment, or at the date
"of judgment. English law has adopted the first rule, not only
"in regard to obligations to pay a sum certain at a particular
"date, but also in regard to obligations the breach of which
"sounds in damages, as for an ordinary breach of contract, and
"also in regard to the satisfaction of damages, for a wrongful act
"or tort." Then, after citing the following words of Lord Sumner from the *Celia*[5]: "The agreed numbers of lire are only part of
"the foreign language in which the court is informed of the
"damage sustained, and, like the rest of the foreign evidence,
"must be translated into English. Being a part of the description
"and definition of the damage, this evidence as to lire must be
"understood with reference to the time when the damage accrues,
"which it is used to describe," the judgment proceeds[6]: "This
"can be applied directly to a case where the damage claimed
"arises from failure to pay a sum in foreign currency, like the
"Turkish gold pounds here. It is true that Lord Sumner does not
"deal specifically with, and seems to reserve the question of what
"is the rule where there is a contractual obligation for the payment
"of fixed or calculable sums in a foreign place and [their Lord-
"ships would prefer ' or '] in a local currency. He does, however,
"observe that: ' waiting to convert the currency till the date of
"' judgment only adds the uncertainty of exchange to the uncer-
"' tainty of the law's delays.'[7] Lord Buckmaster rejects sum-
"marily the idea that the date of the writ or of the commence-
"ment of the action is the proper date.[8] His view, in their Lord-
"ships' opinion, is summed up by his statement that in regard
"to damages which have been ' assessed in a foreign currency
"' the judgment here, which must be expressed in sterling, must
"' be based on the amount required to convert this currency into
"' sterling at the date when the measure was properly made,
"' and the subsequent fluctuation of exchange, one way or the
"' other, ought not to be taken into account.' "[9] Then, after a felicitous reference to section 72 (4) of the Bills of Exchange Act, 1882, which enacts that in the case of bills of exchange the amount of the foreign currency is to be translated into the United Kingdom currency according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable, their Lordships adopted that date as the proper date for the exchange rate of the Turkish gold pounds. In this case, which, if not

[5] [1921] 2 A.C. 544, 555.
[6] [1943] A.C. 507, 513.
[7] [1921] 2 A.C. 544, 558.
[8] Ibid. 548.
[9] Ibid. 549.

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strictly binding on this House, is of the highest persuasive authority, two lines of thought which end in the same conclusion appear to be blended, the first that the breach of an obligation to pay a sum in foreign currency sounds in damages, and therefore the rule of the *Celia* [10] applies, the second that as an independent rule of law the proper rate of exchange for failure to pay a debt in foreign currency is that obtaining on the date when payment should have been made. Both propositions find ample support. I do not propose to detain your Lordships by the citation of a large number of authorities. I am content to accept as a correct statement of law, whichever way the conclusion is reached, the propositions in rule 177 at p. 914 of the seventh edition of Dicey's Conflict of Laws as follows: "(1) An English court cannot give "judgment for the payment of an amount in foreign currency . . . "(2) For the purpose of litigation in England (a) a debt expressed "in a foreign currency must be converted into sterling with "reference to the rate of exchange prevailing on the day when "the debt was payable."

There are, however, certain landmarks in the case law on this subject which I cannot ignore.

First, I must mention *Scott* v. *Bevan*,[11] and I do so largely because it has from time to time been suggested, and was strenuously urged by counsel that it does not decide a point which it obviously does. There an action was brought in the King's Bench to recover the value of a given sum of Jamaican currency upon a judgment obtained in that island. The facts are somewhat complicated. But it clearly emerges that it was argued on the one side that a conventional rate of exchange should be taken, on the other that the rate should be that actually prevailing at the date of the judgment in Jamaica, that at the trial Lord Tenterden directed the jury to find in favour of the former view, that a rule nisi for a new trial was obtained upon the ground that only that sum was recoverable in sterling which would equal the value of the sum payable under the Jamaican judgment in Jamaican currency at the rate of exchange prevailing at the date of that judgment, and that the rule was made absolute. It is true that Lord Tenterden himself continued to express some doubt, but this may be forgotten in the judgment of a court consisting besides himself of Littledale, Parke, Taunton and Patteson JJ.

Next I would refer to *Manners* v. *Pearson & Son*,[12] a case frequently cited for the judgment of Vaughan Williams L.J., though I doubt whether on the question now in issue a different view was taken by Lindley M.R. and Rigby L.J. The question was as to the proper mode of taking an account ordered in an action brought in this country by a creditor to have an account taken of moneys payable abroad by the defendant in a foreign currency, that is, whether it should be taken on the relative values of the English and foreign currencies as of the date of taking the account, or as

[10] [1921] 2 A.C. 544.
[11] (1831) 2 B. & Ad. 78.
[12] [1898] 1 Ch. 581; 14 T.L.R. 312. C.A.

of the dates when the debts became payable, or as of some other and what date or dates. Ignoring at first the particular form of action, that is, an action for an account, Vaughan Williams L.J. said [13]: "It seems clear that, in an action in whatever form in "the English courts for the recovery of a debt payable in foreign "currency, the amount of the English judgment or order must be "expressed in English currency, and that, unless the relative "values of the respective currencies are fixed by statute or some "authority binding the English courts or by the agreement of "the litigants, the amount of the English judgment or order must "be based on the quantity of English sterling which one would "have to pay here to obtain in the market the amount of the "debt payable in foreign currency delivered at the appointed place "of payment—i.e., the amount payable according to the rate of "exchange." The learned Lord Justice goes on to explain that the rule is based upon what I may call the commodity theory of a debt in foreign currency, echoing the judges in *Ward* v. *Kidswin* [14] 300 years ago. He then stated that he saw no reason why the rule should not apply in an action for an account—the only point, I think, upon which he differed from his brethren. His judgment, and in particular the passage that I have cited, has been frequently approved, particularly in *Di Ferdinando* v. *Simon, Smits & Co. Ltd.* [15] which was itself approved in *The Celia.* [16]

I should not pass over *Madeleine Vionnet et Cie* v. *Wills*, [17] for in that case Clauson L.J. states the law in words upon which I cannot improve [18]: "If this be the position," he says, "the "only question open in this court would seem to be whether any "distinction can in principle be drawn between the case of a "claim in respect of breach of contract which results in relief by "way of damages, and a like claim which results in relief by way "of a judgment for a fixed sum. We can find no logical "ground for such a distinction either in reason or in any principle "which can be deduced from the decided cases; indeed counsel "supporting the judgment below was not able to formulate any "such principle, still less to point to any decided cases from "which any such principle could be deduced." I may without disrespect say that learned counsel for the respondents on the present appeal, greatly though he assisted the House, suffered in this respect from the same infirmity.

I could refer to many other cases, particularly to a group which arose in the liquidation of the British American Continental Bank in 1922 and 1923, [19] in which it was held that a claim in debt is on the same footing for the purpose of determining the rate of exchange as a claim for damages for breach of contract. But I do

[13] [1898] 1 Ch. 581, 592.
[14] Lat. 77.
[15] [1920] 3 K.B. 409; 36 T.L.R. 797, C.A.
[16] [1921] 2 A.C. 544.
[17] [1940] 1 K.B. 72; 56 T.L.R. 15, C.A.
[18] [1940] 1 K.B. 72, 78, C.A.
[19] *Goldzieher and Penso's Claim* [1922] 2 Ch. 575; 38 T.L.R. 465, 785, C.A.; *Crédit Générale Liègeois' Claim* [1922] 2 Ch. 589; 38 T.L.R. 464; *Lisser and Rosenkranz's Claim* [1923] 1 Ch. 276.

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not think that any useful purpose would be served by doing so. I am satisfied that nothing is to be found in them which could lead one to a different judgment. Reliance was also placed on the judgment of the Supreme Court of the United States in *Deutsche Bank* v. *Humphreys*.[20] Any judgment of that court will be regarded with respect in this House, nor will anyone doubt that the conclusion to which the majority of the court, including Holmes J., came can be supported by weighty argument. It was that the date when the suit is brought, not the date when the debt is payable nor the date of judgment, is the date at which the rate of exchange must be fixed. But I do not find in the judgment persuasive authority which would justify your Lordships in adopting a rule which has so long been rejected in the courts of this country. This leads me to some final observations in this too long opinion.

We are engaged in settling the law upon a question in which any rule is artificial and to some extent arbitrary. In other systems of law different rules have been adopted, and there is no doubt that one system may benefit one creditor and another another. No rule can do perfect justice in every case. In this country the rule is settled so as to bind all courts that where the claim is in damages for breach of contract, or for a tortious act, the date of conversion is the date of that breach or that act. It would, in my opinion, introduce the sort of refinement into the law, against which I have striven and shall ever strive, if a different rule were adopted in the case of a foreign debt. In the one case a contract for delivery of goods, in another for delivery of foreign currency, in another for payment of a foreign debt, in all alike precisely the same damage suffered by a plaintiff who sues on the failure of the defendant to fulfil his obligation. It would be little credit to our law if a different measure of relief was meted out in these several cases.

I come to the conclusion that the claim in paragraph 2 (a) of the proof can be admitted for no more than £180,724 5s. 6d., being the sterling equivalent for the dollar sums therein mentioned at the rate of exchange prevailing when they severally fell due. I have already intimated that the claims in 2 (b) and (c) must subject to inquiry as to quantum be admitted, and the claim under 2 (d) must be rejected.

To sum up, the appeal, in my opinion, fails upon the major question what is the proper law of the contract, but succeeds in so far as it seeks to reduce the proof of debt under paragraph 2 (a) of the proof to £180,724 5s. 1d. It fails in the attempt which was not seriously pressed to reduce the claim under 2 (b). The claim under 2 (c) has not been challenged and the claim under 2 (d) is rejected.

The question of costs remains. The appellants have so far been ordered in the Winding-up Court and the Court of Appeal to

[20] (1926) 272 U.S.Rep. 517.

pay substantially all the costs of the respondents. Taking this into account, and the fact that they have succeeded in a considerable degree in this House and should have succeeded similarly in the courts below, their Lordships propose not to vary the orders already made in regard to costs, but to make no order as to the costs of the present appeal, except that the costs of the appellants be their costs in the winding-up.

LORD REID. My Lords, the United Railways of the Havana and Regla Warehouses is an English company which went into voluntary liquidation on March 4, 1954. The appellants are the liquidators and this case arises out of a proof of debt lodged on behalf of the respondents. The only debt owed by the company to the respondents is the unpaid part of the rentals due under a lease of rolling stock in Cuba to which I shall have to refer later. The appellants seek to avoid liability for that debt by maintaining first that the proper law of the contract of lease is the law of Cuba, and secondly, that the law of Cuba discharges them in whole or in part of that liability. In my opinion the proper law of the contract is not the law of Cuba: it is the law of the Commonwealth of Pennsylvania. I have had an opportunity of reading the speeches about to be delivered by my noble and learned friends, Lord Denning and Lord Morris of Borth-y-Gest, and I agree with the reasons which they give for this. Accordingly, the only remaining question is the amount for which the respondents are entitled to prove.

The company's debt is in United States dollars, and this must be converted into sterling. The question is, at what rate or rates of exchange must this conversion be made. The sums due by the company ought to have been paid half-yearly between 1931 and 1936. At that time the rate of exchange was over $4 to the £, at the date of liquidation it was only $2.80 to the £. The appellants say that the date for conversion should be the dates of the breaches, that is, the dates at which the debtor ought to have paid his debt. The respondents say that the date should be at the earliest the date of liquidation, and we were informed that if the earlier dates are taken the appellants would have to pay about £80,000 less than if the later date is taken.

For many years it has been generally accepted that conversion should be made at the rate of exchange current at the date when the debtor broke his contract by failing to make due payment. But I do not think that this House is bound by authority in this matter, although the weight of authority in favour of taking the date of breach is very great. So I think it more satisfactory to re-examine the whole matter.

I take first a contract of which the proper law is the law of England, under which one party is bound to deliver to the other in England either goods or a sum in a foreign currency. If I buy a cow (to take Lord Wrenbury's illustration in *S.S. Celia* v. *S.S.*

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Volturno [21]) and the seller fails to deliver it at the stipulated date, I must, if I still want a cow, go into the market and buy one at the market price at the date of breach. I ought then to recover as damages for that breach of contract the cost of that cow, and it is well settled that the proper measure of damages is the market price of the goods at the date when the seller broke his contract. In the same way, if a party fails to pay or deliver a sum of dollars or francs at the stipulated date, I must if I still want that currency go into the market and acquire it at the rate of exchange current at the date of breach, and I can see no reason why the measure of damages should not again be the market price of that currency at the date of breach. If in either case I do not choose to go and buy elsewhere the cow or the foreign currency which the seller failed to deliver that cannot alter the measure of damages. I know at the date of breach what sum I shall ultimately be entitled to recover as damages, and a subsequent alteration of the market price of cows or francs will not affect my rights. I do not have to take the risk of the price falling, and I ought not to gain if the price rises. I do have to take the risk that the pound sterling may be of less value when the damages are ultimately paid than at the date of the breach, for that is a general risk against which the law cannot protect any of us. And if the person who contracted to deliver the cow or the foreign currency is a foreigner, that is no reason why the measure of damages should be different. If a foreigner chooses to enter into an English contract he cannot expect special treatment.

But in theory it might seem that the rule should be different if the contract is a foreign contract. If a person in Pennsylvania buys a cow or buys francs for a price in dollars by a contract of which the proper law is the law of Pennsylvania, and the seller fails to deliver, the buyer will, if he sues in the United States, and assuming that the law there is the same as it is here, recover damages in dollars based on the market price in dollars of the cow or the foreign currency at the date of breach. But he may have to sue in England: in that case, why should he not recover in England sufficient sterling to give him as many dollars as he would have got if he had sued at home?

The case against the existing rule may seem even stronger where the action is for repayment of money lent. If in America one person lends dollars to another and the loan is not duly repaid, the creditor simply sues there for the money and no question can arise about the date at which damages are to be assessed, though interest may be due from the date of breach. But, if the creditor has to come to England to sue, the dollars will be converted into sterling as at the date of breach, although at that time neither party had any connection with England. The original reason for the rule has no application in such a case. When dealing with an English contract it may be right to treat foreign currency as a

[21] [1921] 2 A.C. 544.

commodity, but dollars lent in America are not a commodity, and if they are not repaid at the due date there can be no question of an American going into the market and buying dollars to replace those which the debtor failed to deliver. Why, then, should the American creditor, if he has to come to England to sue, have his debt converted into sterling as at the date of the original breach? That seems the more anomalous because, if the creditor had been able to obtain judgment in America for his debt, and had brought the judgment here to enforce it, the debt would have been converted to sterling as at the date of the American judgment.

The reason for the existing rule is, I think, primarily procedural. A plaintiff cannot sue in England for payment of dollars, and he cannot get specific performance of a contract to pay dollars—it would not be right that he should. So at best he could only have the dollars converted to sterling at the date of judgment. Owing to appeals or difficulties of enforcement a long time may elapse between judgment and getting his money, and the rate of exchange may have altered substantially during that time. Indeed, fluctuations in the rate of exchange might result in the rate of exchange at the date of payment being nearer to the rate at the date of breach than to the rate at the date of judgment, though, no doubt, the probability is the other way. And there are practical difficulties in taking the date of judgment. The rate of exchange for United States dollars might perhaps be held to be common knowledge, but that is not so with regard to all foreign currencies. Evidence would have to be led and the conversion would really have to take place as at the date when evidence was led. And there are other practical difficulties which I need not specify.

Really the only practicable choice would seem to be between converting at the date of breach and converting at the date of raising the action in England. The latter alternative might perhaps be preferable, and it was in fact adopted by the United States Supreme Court in 1926 in *Deutsche Bank* v. *Humphrey*.[22] But the rate at the date of raising the action might be very different from the rate at the date of payment. Indeed, the objections to taking it are not very much less than the objections to taking the rate at the date of breach. Moreover, I doubt whether, in view of the great intricacy of some commercial transactions, it would be practicable to have two possible dates for conversion according to the nature of the contract. It would, I think, be wrong to take the date of raising the action in every case: to my mind, the date of breach is much better in the simple case of an English contract where the parties are in England and one fails to deliver foreign currency which he has contracted to deliver. So even if this were still an open question, I would have to come to the conclusion that in every case where a plaintiff sues for a debt due in a foreign currency, that debt should be converted into sterling at the rate of exchange current when the debt fell due.

[22] 272 U.S.Rep. 517.

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That rule may in some cases be artificial, it may even be unjust, but it has been accepted for a long time, it is clear and certain, and no other rule could be relied on to produce a more just result: indeed, no other rule is really practicable. So the judgment which the respondents hold could not be supported on general principles.

But the respondents maintain that, accepting the general rule, there are special reasons in this case why they are entitled to take the rate of exchange at the date of liquidation. Those reasons arise from unusual features in this litigation, and largely turn on the proper interpretation of their proof of debt. To understand them one must have in mind the nature of the transactions which give rise to the debt, and I shall state as briefly as I can the essential facts. In or before 1921 the company purchased rolling stock for their railway and they sought to raise $6,000,000 in the United States. Apparently it was desired to give the lenders security over the rolling stock, and with this object an elaborate scheme was adopted. The company set up a subsidiary (the car company) and purported to sell the rolling stock to them and then to take it back on lease. The rentals under this lease were the sums necessary to pay interest and redemption of the $6,000,000. Then the car company's rights as owner of the rolling stock, including the right to receive the rentals, were assigned to predecessors of the respondents as trustees for the lenders of the $6,000,000 which was divided into 6,000 certificates each for $1,000. The trustees were bound to pay to the certificate holders the interest and redemption money out of the money which they received from the company under the lease, but there was no direct obligation of the company to the certificate holders.

All went well from 1921 to 1930, but the company failed to pay to the trustees the sums due in 1931 and subsequent years. No attempt was made to enforce the security over the rolling stock, perhaps because under the law of Cuba that was difficult or impossible, and matters were at a standstill until in 1953 the company sold their railway system, including the rolling stock, to the Cuban Government for $13,000,000. By that time 3,800 of the certificates had been redeemed, and of the remaining 2,200 the company had acquired 1,869 which passed into the hands of the Cuban Government as part of the sale of the undertaking. The other 331 certificates remained in the hands of members of the public. After the company went into liquidation the Cuban Government intimated that they did not desire to claim in respect of their certificates. They were in any case bound to indemnify the company, so it would seem that they would have had to pay back to the company any sums which the respondents might pay to them out of money which the respondents received in the liquidation. But the 1,869 certificates were still in existence, and this seems to have put the respondents in some difficulty in framing their proof of debt.

In their proof of debt the respondents ought to have given particulars of the company's debt to them, that is, the unpaid

rentals under the lease, but they did not do so. Instead they gave particulars of their debt to the certificate holders. But no objection was taken on this ground. So we must do the best we can with the proof as it stands. In fact, the sums claimed under paragraph 2 (a) and (d) are together almost exactly the same as the sums which ought to have been claimed, that is, the rentals due by the company with interest. (There is a discrepancy of the order of $1,000 but that can be regarded as negligible.) And, of course, the sums due by the company to the respondents were only payable for the purpose of enabling the respondents to pay to the certificate holders the sums set out in paragraph 2. So I think we can properly regard paragraph 2 as setting out, substantially correctly but in wrong form, particulars of the company's debt to the respondents. Unless we can so regard it, there are no particulars at all and the proof would be bad for that reason.

But the respondents seek to put quite a different interpretation on paragraph 2. I find their argument difficult to appreciate, and I hope that I do it justice. As I understand it, they say that paragraph 2 has nothing to do with particulars of the company's debt to them: it is a statement of how they will use any money which is paid to them. That means that the proof contains no particulars at all of money owed by the company to the respondents beyond the reference in paragraph 4 to covenants in the lease. But the respondents say that no further particulars were necessary, or at least, that it is too late now to object to their absence.

I am unable to accept this interpretation. Paragraph 2 begins by stating that the company was at the commencement of the winding up " and still is justly and truly indebted to the claimant " in the following sums " which include heads (a) and (d). So I do not see how the respondents can now say that heads (a) and (d) are intended to be something other than particulars of the company's debt to them. Paragraph 2 (a) is a claim for a sum " due and payable to the claimant in respect of $333,000 [it " should be $331,000] in face value of . . . certificates then out- " standing in the hands of members of the public." And paragraph 2 (d) is a claim for a sum " due and payable to the " claimant in respect of $1,867,000 [it should be $1,869,000] in " face value of . . . certificates which had been purchased by the " company." Again the emphasis is properly on what was " due " and payable to the claimant," and, strictly speaking, what was due and payable to the claimant was not due in respect of outstanding certificates, it was due under the lease. But in a sense it was due in respect of the certificates because the respondents could only use any money they received to pay the certificate holders—any surplus would have been repayable to the company. In view of the probability that the Cuban Government would make no claim it may well have seemed convenient to divide the respondents' claim against the company in this way. The respondents could, I suppose, have drafted their proof of debt in the form of, first, a claim for the money due to them with particulars, and then

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a statement of why they required the money or what they were going to do with it. But I cannot spell that out of the proof of debt which is before us. So I think that paragraph 2 must be interpreted as meaning that the respondents divided into two parts their claim to the money due to them: in paragraph 2 (a) they claimed 333/2,200 parts of that money, and in paragraph 2 (*d*) they claimed the remaining 1,867/2,200 parts of that money.

I can now come to the crucial point in this branch of the case. The appellants as liquidators had rejected the whole of the respondents' proof of debt and the respondents appealed. In 1956 before this appeal was heard, the appellants sought to make an interim distribution to the stockholders of the company of cash in their hands. Their summons came before Roxburgh J. and he was satisfied that the Cuban Government as holders in due course of the 1,867 certificates had renounced any claim to participate in the assets available for distribution in the winding up. To put matters in order it was then agreed by the parties to treat the appeal of the respondents against the rejection of their proof as being before Roxburgh J., and on December 4, 1956, he made an order in which the court, being satisfied that that renunciation was a sufficient ground for the rejection of that part of the proof of debt (paragraph 2 (d)) "which is based upon or measured by "reference to the said 1,867 equipment trust certificates, doth "not think fit to reverse or vary the decision of [the present "appellants] as such liquidators rejecting the said proof of debt "so far as the same relates to the said sum" claimed in paragraph 2 (d). The question is what is the effect of that order, against which there has been no appeal.

The appellants say that order discharges the respondents' claim against them to the extent of 1,867/2,200 parts of the sums which were due to the respondents. The respondents deny that. They say, as I understand it, that their claim to the whole of the unpaid rentals still survives intact, that the order of Roxburgh J. did not touch that claim, but that it merely recognised that the Cuban Government's claim against the respondents had been abandoned. The respondents are therefore entitled to take as much out of the sums ultimately payable to them in the liquidation as is necessary to meet in full the claims of the holders of the other 331 certificates, and, as those claims are in dollars, they can take as much sterling as is now necessary to produce the necessary sum in dollars, or at least as much as would have been necessary at the date of liquidation. They could not, of course, take more than that because if they did they would simply have to pay it back again. That would mean, in effect, that the certificate holders' claims must now be converted into sterling as at the date of liquidation and not as at the dates when they ought to have been paid. The complicated order against which this appeal is taken appears to give effect to these contentions of the respondents.

It appears to me that this order can only be supported on the

view that paragraph 2 (d) is not a claim to any part of the debt due by the company, the claim being found elsewhere, and that, therefore, its rejection by Roxburgh J. did not touch or in any way cut down the respondents' claim. I have already given my reasons for rejecting this view of the meaning and effect of the proof of debt, and so, in my judgment, the result of the order of Roxburgh J. is that the respondents are now only entitled to claim 333/2,200 parts of the debt due to them.

Finally, the respondents relied on their claim in tort. Paragraph 4 of the proof of debt states that "The liability of the company to the claimant which is the subject-matter of this proof "arises under or by virtue of a covenant [in the lease] . . . "Alternatively the said liability arises by way of damages for "breach of a covenant . . . or by way of damages for the conversion by the company of the said railway equipment." Accepting the view that the sale of the company's undertaking to the Cuban Government involved the tort of conversion as regards the rolling stock, that the damages amounted to $2,000,000, and that such damages must be converted into sterling at the date of the tort when the rate of exchange was $2.80, I do not think that this helps the respondents. Again, it is necessary to consider the effect of the order of Roxburgh J. Either that order affects the claim in tort or it does not. If it does not we would have to deal with this part of the case as if the order had never been made. But that has never been argued. The respondents seek to use the order as excluding the Cuban Government from any right to participate in the distribution of the damages which they receive, but to deny that the order is effective to cut down their right to receive the whole of the damages. If the order is effective to cut down their right to damages in the same way as it cuts down their right to the rentals, then the claim in tort is of no value to the respondents because 333/2,200 parts of the $2,000,000 damages is much less than 333/2,200 parts of the unpaid rentals even allowing for the fact that they would have a more favourable rate of exchange for the damages. And, of course, the respondents cannot get both.

Their argument is that they are entitled to receive the whole $2,000,000 damages, that by reason of the order of Roxburgh J. the Cuban Government's right to participate in that sum is gone, and that therefore they can apply it to meeting in full the claims in paragraph 2 (a), (b) and (c). It is amply sufficient to meet those claims and so the respondents can use the same argument as before for taking $2.80 as the rate of exchange for the dollars necessary to meet the claims set out in paragraph 2 (a).

But it appears to me that that argument is inconsistent with what I have held to be the proper construction of paragraph 2 of the proof of debt. I could understand an argument that paragraph 2 has nothing to do with the claim in tort—though I might not agree with it. But that would mean that the order of Roxburgh J. has nothing to do with this claim. And, as I have said,

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that has not been argued and it would not suit the respondents so to argue. So it is admitted that paragraph 2 affects this claim. But if so, it must have the same meaning as it had before, and I have stated my opinion that its meaning is that it divides the respondents' claim into two parts, and one of those parts has been finally rejected. I am, therefore, unable to agree that the respondents are still entitled, notwithstanding the order of Roxburgh J., to claim the whole of the damages of $2,000,000.

Accordingly, I would allow the appeal in part. The respondents are entitled to claim the sums in dollars set out in paragraph 2 (a), but each itsem must be converted to sterling at the rate of exchange current when it became due.

LORD RADCLIFFE. My Lords, I had the privilege of being able to study the opinions of my colleagues before I came to prepare my own. I am so much in agreement with the conclusions come to, except on one minor point, not itself of any general importance, and the reasons given for those conclusions, that I do not wish to contribute anything myself except one or two comments on the issues that have been debated before us.

The first and major question, no doubt, is that relating to the proper law of the contract to pay interest on the $6,000,000 loan and to repay the principal with the stipulated premium. As to this, I agree that in the end one is bound to accept the law of the Commonwealth of Pennsylvania as the governing law for this purpose. I share the view of Wynn-Parry J. and the Court of Appeal that, although the obligations take the form of promises to pay " rent " in the " lease " of the rolling stock, the transaction must be looked at as a whole for the purpose of determining its proper law. So regarded, this is a case where a company whose head office is in London but whose business is that of running a public utility in Cuba comes to the New York capital market to borrow money to further its business operations. Once the money is raised the creditors have done their part. The complex of transactions which make up or are attendant upon the trust agreement and the lease is directed entirely to seeing that the money loaned is secured and in due course returned. When this is done by the company promising payment of interest and repayment of principal and premium in United States dollars, in New York and Philadephia, and the watch-dog chosen for the protection of the lenders is a Pennsylvanian trust company, I have no doubt myself that the general inference from such a pattern ought to be that the proper law of the obligation is not that of the United Kingdom, where the debtor has his head office, nor that of Cuba, where the business is conducted and the rolling stock would be found, but either that of New York or of Pennsylvania. I do not think that the tests for determining the proper law of a contract can ever be comprehended under a single phrase, so various are the situations and considerations that have to be taken account of; but this is a case in which, in my opinion, the law of the place

of performance ought to be regarded as of preponderating importance, and of those two possible places Pennsylvania which is both the home of the trustee and the place where the capital is to be repaid seems to me clearly the natural choice.

I should arrive at a different conclusion if I thought that the parties had by their own choice subjected the obligation to the rules of the law of Cuba. I am satisfied, however, after reading the opinion prepared by my noble and learned friend, Lord Morris of Borth-y-Gest, that the clauses in the lease which are relied upon in support of such a conclusion cannot be read as having that effect.

There are several points of argument which arise out of the proof itself. The one which is of general importance is the question at what date or dates should the dollars due under the unfulfilled covenants in the lease be converted into sterling for the purposes of the respondents' claim. On this point I agree with the reasoning adopted in the opinion of my noble and learned friend, Viscount Simonds, and I am satisfied by his citation of the previous authorities that the course of English decisions (and, I should add, English legislation—see Bills of Exchange Act, 1882, section 72 (4)) has led us fairly directly to the conclusion that conversion should be made at the rate of exchange ruling at the date when each covenanted payment fell due to be, but was not, made.

One of the difficulties of discussing this particular question is that English law has not got a well-settled nomenclature for its terms. I take it myself that any contract to settle a debt in the currency of the country in which the settlement is to be made is a contract for the payment of money in the eyes of our law, and this notwithstanding the fact that, if action is taken in England for breach of the contract, the remedy sought must be damages, not debt, and those damages expressed in sterling for the purposes of judgment. To speak of such contracts as being in English law contracts for delivery of a commodity seems to me merely to confuse the issue, and needlessly to suggest that for some reason best known to itself our law regards a contract for the payment of debt in foreign money as if it were of a nature different from that which it obviously possessed. Also, again, I think, needlessly, such a description suggests that we admit of no distinction between a contract to pay money abroad in satisfaction of a debt on the one hand and a contract to deliver foreign currency in this country or abroad or a true exchange contract, which is a contract to exchange the currency of one country for the currency of another, on the other. Each of these transactions has some difference from the other and may for some purposes have different consequences: but the important point for the present purpose is that each of them has the common characteristic that, if sued upon in England, it must be sued for in damages expressed in sterling as upon a breach of contract. The damages, I should say, are for failure to tender or deliver, as may be, objects of value

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which at the date of failure had a sterling equivalent in international exchange.

If, then, we already have a settled rule that damages for tort and for breach of contract other than for payment of a foreign debt must be converted into sterling at the date of breach, I agree that there is no sufficient peculiarity in the obligation to pay money as distinct from other forms of contract that could justify the adoption of a different rule for the calculation of damages arising from its breach. Nor do I see how in this connection it would be possible to base any distinction upon the test whether the proper law of the contract is English or foreign, for there is no necessary correlation between the proper law that governs an obligation and the country or the currency in which the obligation is to be discharged.

I share the theoretical objection to applying this rule to debts due in foreign currency. The effect of it is to express the creditor's rights in terms of sterling at a date earlier than that at which, assuming default, he has any means of obtaining the sterling and reconverting it into the currency which was due. If we treat currencies as inherently variable inter se—it exaggerates the difficulty to call them fluctuating—he may suffer in the process of obtaining his rights. It is true that this possibility of risk from currency variation is not confined to contracts stipulating for payments of money: but it probably strikes one with greater force when money itself is the subject of the obligation. One looks for a rule by which the creditor takes what risk there is, at any rate as long as possible, in terms of the currency for which he has stipulated by his contract. This argues for a date of conversion later than the date of breach. But neither the date of execution nor the date of judgment offers itself as a practical proposition in litigation, and the only real alternative to the date of breach is the date at which legal proceedings are begun in this country. The acceptance of this date has a certain attractiveness because it is the date which marks the creditor's decision to convert his claim in foreign money into a sterling judgment.

I do not, however, think that this consideration takes one nearly far enough to justify maintaining a separate rule for money payments. Even if one chose the date of suit as the date of conversion, that in its turn might fail to give a creditor what he ought to have had if the exchange value of the stipulated currency was reduced in the meantime. As I see it, there is no infallible system which can eliminate the fact that a debtor has by the nature of the contract an option at the expense of his creditor. He can pay on the due date, if he thinks it suits him, or delay payment if he thinks that owing to the anticipated movement of the exchanges that will suit him better. The creditor has no corresponding option: he cannot secure the money at the due date, if the debtor does not pay, and then he can only get what is due to him through the time process of legal proceedings. It would, I think, be some protection to him and would be a work-

able arrangement to give a creditor an option, if he sues his debtor here, to take either the date of breach or the date of the commencement of legal proceedings, as he chooses. But the fact is that there is no general reason why there should be any significant interval between breach and suit; and in any event the difficulties, though real enough in this case, are mainly theoretical. Under the procedure of most countries, I imagine, it would be possible to sue the debtor in the country of payment, obtain judgment there for the currency stipulated, and convert the judgment sum into sterling only when it is registered here for execution.

So far, therefore, as the respondents' proof claims under paragraph 2 (a) for $331,000 with attendant interest and premium converted into sterling at the rate of $2.80 to the £, I think that the wrong rate of exchange has been taken for the conversion, and that the rate or rates ruling at the dates of breach must be substituted. This provides the figure of £180,724 5s. 2d. which, as I understand, commends itself to the majority of your Lordships as the correct figure for head (a) of this paragraph of the proof.

But the respondents' right to prove did not depend only on the covenants in the lease: it was founded alternatively, as paragraph 4 made at any rate sufficiently clear, upon the wrongful conversion of their property involved in the December, 1953, sale of the rolling stock to the Government of Cuba. The damages for this wrong were assessed by Wynn-Parry J. at $2,000,000: applying, as one must, the $2.80 rate of exchange ruling at that date, there is therefore a sum due to the respondents which exceeds the sums for which they claim to prove under paragraph 2 (a) of the proof, even if the dollars mentioned in that item are converted at that rate and not at the earlier rates which have to be taken when the basis of proof is breach of covenant. What I have not been able to see is what has happened in the course of these tangled proceedings which prevents the respondents' proof being good for this amount.

I do not want to take up much time on this, since the majority of your Lordships are satisfied, though perhaps by rather different processes of reasoning, that even in respect of a claim in conversion paragraph 2 (a) cannot stand at a higher sterling figure than £180,724. The proof does raise great difficulties of interpretation by the form in which it was cast, and there are further difficulties caused by the order made in the proceedings before Roxburgh J.; and no doubt it is possible to put varying constructions upon the outcome of what had to be done before everything could finally be brought to the judgment of the court. On the other hand, the respondents' position when they came to make their proof was an unusual one in two respects: they did not know, and could not find out, what responsibilities they were supposed to have towards the holders of 1,867 (or 1,869) of their certificates, and they also

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knew that any surplus of their security over what their beneficiaries could require from them would be due to the debtor itself. I do not feel it right, therefore, to read their proof more strictly against them than I am bound to, or to deduce more from the order of Roxburgh J. than it actually says. So approached, the order does no more than confirm the elimination from the proof of paragraph 2 (d) and so that part of the total claim that related to $1,869,000, interest and premium: it left untouched paragraph 2 (a) consisting of the claim for $331,000 and the attendant interest and premium. If the latter claim arises in respect of a wrong for which the damages are convertible at the rate of $2.80 to the £, I should have thought that it was a valid claim for the purposes of proof, and I have not found it possible to see how how its quantum can be in some way reduced by the rejection of paragraph 2 (d) or, as one of your Lordships holds, excluded because the claim in conversion has become barred by the course of proceedings.

LORD DENNING. My Lords, I have tried to cut a way through the jungle of facts in this case. If we leave out subsidiary companies, successor companies, and the like, it can be reduced to two separate transactions.

First, there was the transaction whereby the railway company in 1921 raised $6,000,000 from the trust company. This was, in effect, a hire-purchase transaction. The railway company was rather like a man who wants to buy a motor-car but has not the means to pay for it. Just as he raised the necessary money from a finance company, so the railway company raised this $6,000,000 from the trust company. It assigned the rolling stock to the trust company for $6,000,000 (who paid it to the suppliers) and the trust company then let the rolling stock on a lease to the railway company for 15 years. The rentals were so fixed that the whole $6,000,000 would be repaid within 15 years together with interest at 7½ per cent. per annum. When all the instalments were fully paid, the railway company was to become the owner of the rolling stock.

Secondly, there was the transaction whereby the trust company in 1921 raised the $6,000,000 from the public. It issued 6,000 equipment trust certificates of $1,000 each. These were repayable over a period of 15 years together with interest at 7½ per cent. per annum. But they were repayable "only from and "out of the rentals when paid as provided in the lease." The trust company was to hold the rentals "for the benefit of the "certificate holders": in short, on trust for the certificate holders. If the railway company made default in paying the rentals, the trust company were entitled to retake possession of the rolling stock and sell it; and in that event the proceeds were to be used to pay off the certificate holders, and the "surplus, "if any," was to go back to the railway company.

The important thing to notice is that the rentals payable under

the lease coincided with the sums payable to the certificate holders. The rentals were so fixed as to enable the trust company to meet the following outgoings, no more and no less, over the 15-year term: (1) To pay the dividends to the certificate holders at the rate of 7½ per cent. (2) To pay the expenses of the trust company. (3) To redeem the 6,000 certificates at the rate of 400 a year.

During the first 9½ years all went according to plan. The rentals were duly paid to the trust company, who duly paid the certificate holders their dividends and also redeemed 3,800 certificates, leaving 2,200 outstanding. During the next three years the railway company could not pay the rentals in full. It paid enough to cover the dividends on the certificates but nothing more. Thereafter the railway company paid nothing at all. The result was that when the 15-year term expired in 1936, the railway company owed the trust company rentals made up as follows: (1) A sum equal to the dividends unpaid on the outstanding 2,200 certificates. This came to $247,500. (2) The expenses of the trust company. (3) A sum equal to the amount necessary to redeem the outstanding 2,200 certificates, that is, $1,000 apiece plus the appropriate premiums. This came to $2,256,000.

It might be thought that, when the railway company made default, the trust company would take steps to enforce payment of the rentals, by taking possession, but it was unable to do so because the Cuban State declared a moratorium. But the default in payment naturally struck down the value of the certificates. One of the significant facts in the case is that the railway company itself bought 1,869 certificates at $147.50 a certificate and held on to them, leaving only 331 in the hands of the public.

So things remained for many years, with the railway company running the railway and paying nothing on the certificates. Ultimately in 1953 the Cuban State bought the whole of the railway undertaking (including the 1,869 certificates) for $13,000,000. The Cuban State then transferred the railway undertaking, certificates and all, to a new nationalised company. The railway company received the price of $13,000,000 in United States Treasury Bills and brought it back to England, converting it to sterling at the rate of $2.80 to the £ sterling. On March 4, 1954, the railway company went into voluntary liquidation. The trust company now seeks to prove in the liquidation.

Much discussion has taken place on the form of the proof, but once the facts are properly understood its meaning becomes clear. The principal ground of the claim, as I read it, was because the railway company had not paid the rentals due under the lease. The trust company claimed to be entitled to recover these rentals together with interest at 6 per cent. from the dates they became due. The complication in the claim arose because the trust company was a trustee for the certificate holders. The rentals, once received, had to be applied (1) in paying the certificate holders

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the sums due on their certificates, and (2) in paying the reasonable expenses of the trust company. The rentals receivable were equal to the sums payable to the certificate holders, plus expenses. But as a trustee, the trust company was in this difficulty: It knew there were 2,200 certificates outstanding, but 1,869 of these had been bought in by the railway company itself: and the trust company did not know whether these 1,869 certificates were effective or not. So, in order to cover itself in case they were effective, the trust company divided its proof into four parts, which can be summarised as follows:

2. (a) The proportion of rentals payable in respect of 331 certificates, plus interest at 6 per cent. from the dates the rentals became due.

(b) Expenses already incurred by the trust company.

(c) Expenses to be incurred by the trust company.

(d) The proportion of rentals payable in respect of 1,869 certificates, plus interest at 6 per cent. from the dates the rentals became due.

Although the proof of debt was divided into those four parts, nevertheless the liability of the railway company was clearly stated to arise "under or by virtue of a covenant" in the lease: and this was, no doubt, the covenant to pay rentals. Claims 2 (b) and 2 (c) were maintainable only under the covenant to pay rentals, and under no other head whatsoever. Indeed, the wording of item 2 (b) followed the very wording of the covenant in the lease, namely, "reasonable expenses incurred . . . in the performance "of the trust under which the said certificates were issued."

Alternatively, the liability of the railway company was also stated to arise under other heads, none of which needs special mention except the claim in conversion. The trust company alleged that "the said liability arises . . . by way of damages for "the conversion by the company of the said railway equipment." This claim was necessarily made in the alternative. If the trust company succeeded in its claim for rentals, it could not possibly claim damages for conversion: for, as soon as the claim for rentals was satisfied, the railway company would be entitled to the railway equipment because it would then have paid for it. But I go further. The claim for rentals proceeded on the footing that the property in the railway equipment had passed to the railway company: whereas the claim for conversion proceeded on the footing that the property had never passed to the railway company. These were inconsistent rights; and once the trust company committed itself unequivocably to the one, it could not afterwards resort to the other: see *Evans* v. *Davis*[23] and *United Australia Ltd.* v. *Barclays Bank Ltd.*[24] by Lord Atkin.

In the events that happened, I think that the trust company did commit itself unequivocally to the claim for rentals. It did

[23] (1878) 10 Ch.D. 747, 762, 763.

[24] [1941] A.C. 1, 30; 57 T.L.R. 13; [1940] 4 All E.R. 20, H.L.

it by the form of its proof. Items 2 (a), (b), (c) and (d) were consistent, and consistent only, with a claim for rentals, and not with a claim for conversion. I can see that the railway company would be liable for those items as rentals; but I do not see how it can be said there was any liability for them in conversion. How could the amounts due under the trust certificates ever come into the calculation of damages for conversion? And how could the trust company ever claim its expenses under that head? The only possible damages in conversion would be for the value of the railway equipment, or rather of the trust company's interest in it, at the time of conversion. But no such sum was claimed in the proof at all.

Likewise the order made by Roxburgh J., which your Lordships have described, is applicable, and applicable only, to the claim for rentals and not to the claim for conversion. There is no difficulty in applying that order to the claim for rentals. The trust company claimed rentals divided into four items: 2 (a), (b), (c) and (d). All that the order did was to strike out item 2 (d) and to leave items 2 (a), (b) and (c) intact. But there is great difficulty in applying the order to the claim for damages for conversion. On the one hand, if that claim is confined (as I think it must be confined) to the sums claimed in 2 (a), (b), (c) and (d) of the proof, the claim is unintelligible, because there can be no possible claim in conversion on those heads, as I have already pointed out. On the other hand, if the trust company had put in its claim differently, as, for instance, if it had claimed $2,000,000 as being the value of the goods at the time of the conversion, Roxburgh J. might well have made a different order. He would, indeed, have had to do so: for such a claim could not be divided into items 2 (a), (b), (c) and (d) as the claim for rentals was. No part of it could be said to be " based upon or measured by " reference to the " 1,869 certificates.

In the result, I think it is impossible now to allow the trust company to claim in conversion for the value of the goods. It has committed itself to a claim divided into four specific items 2 (a), (b), (c) and (d). Those items are intelligible in regard to a claim for rentals but not in regard to a claim for conversion. It was on the faith of that itemised division that Roxburgh J. made his order. The trust company cannot now go back and resort to a lump sum claim for conversion divorced from any such items It would need an amendment of the proof which it is much too late to permit. I am far from saying that the trust company did wrong in framing the proof as it did. It was a trustee for the certificate holders; and the certificates were in terms payable " only from and out of the rentals." They were not payable out of any damages for conversion. So it was the duty of the trust company to claim the rentals and recover them, if it could, rather than seek damages for conversion. And that is what I hold the trust company has done.

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Likewise with the alternative claim for damages for breach of covenant not to assign. It must be rejected just as the claim in conversion.

But if these alternative claims are to be considered as still available, then some attempt must be made to apply the order of Roxburgh J. to them; and the only way of doing it that I can see is to reduce them in the same proportions as the claim for rentals. Thus, taking the total damages of conversion at $2,000,000, the effect of Roxburgh J.'s order would be to reduce them to $302,727. That sum is so small that it would not suit the trust company at all to claim it.

I propose, therefore, to confine my remarks to the claim for rentals under the lease. The railway company has no answer to this claim except to say that under the laws of Cuba this liability has been transferred from the railway company to the new nationalised company which has taken over the railway: and that by Cuban legislation the railway company has been discharged from liability. But this answer is of no avail to the railway company unless it can show that the lease itself is governed by the law of Cuba. It is a well settled rule of private international law that the validity of a discharge by legislation depends on what is the proper law of the contract; and this is the case, no matter whether the debt has already accrued due at the time of the legislation or is still a future debt. A discharge in accordance with the proper law is valid; but a discharge which is not in accordance with the proper law is invalid.

What, then, is the proper law of the contract here? It is agreed on all hands that it is either the law of the Commonwealth of Pennsylvania or the law of the Republic of Cuba; but it is said that Pennsylvania must stand on its ground without any help from the State of New York. I do not think this is the correct approach. The real choice is, I think, between the law of one of the United States of America and the law of the Republic of Cuba. The reason is because for all practical purposes there is no material distinction between the laws of the several states of the United States as between themselves, whereas there is a great distinction between the law of Cuba and of the states. So approaching the problem, it seems to me clear that the lease here was part and parcel of a composite transaction of which the primary aim was the raising of money in the United States on the security of railway equipment in Cuba. The contract was made in the United States, the money was raised there and was paid out there; and it was to be repaid there both as to principal and interest. The security alone was in Cuba. On these facts, as in the case of a mortgage, it can fairly be said that the debt "is considered to be the principal, and the securities are con-"sidered as adjuncts, depending for their existence, on the "existence of the debt": see *British South Africa Co.* v. *De*

Beers Consolidated Mines Ltd.[25] So considered, it seems to me that, in the absence of any express clause determining the proper law, the transaction should be governed by the law of the country of the lender. A borrower who comes from a foreign country seeking a loan must expect to conform to the laws of the country to which he comes: for otherwise he is unlikely to get the loan. The fact that the security is situate abroad is only material as necessitating the observance of the foreign law in the pledging and enforcement of the security.

I do not regard clauses 11 and 12 of the lease as clauses which determine the proper law. They are concerned only with special incidents relating to the security. Clause 11 deals with the formalities of registration and the like such as may be necessary to protect the trustee's title. Clause 12 means that if there is occasion to resort to the courts in Cuba (as, for instance, to enforce the security), the parties must go to the tribunals of the City of Havana rather than those in any other part of the island. The parties do not by this clause, or any other clause, agree that the lease itself is to be governed by the laws of Cuba; and in the absence of an express clause to this effect, the test is simply with what country has the transaction the closest and most real connection: see *Bonython* v. *Commonwealth of Australia*.[26] Applying this test, I think the proper law of the transaction, including the lease, is the law of one of the United States, and out of those states the choice should fall on the Commonwealth of Pennsylvania because it has on balance the closest connection with the transaction.

This being so, it is plain that the legislation in Cuba could not take away the right of the trust company to receive payment in the United States of the rentals due under the lease; and the railway company was at all material times under an obligation to pay the rentals to the trust company in full in dollars in the United States of America, together with interest at 6 per cent. from the time they became due.

Now the trust company comes to the courts in England to recover the sums in arrear and unpaid. And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling. We do not give judgments in dollars any more than the United States courts give judgments in sterling. But the question is, at what date is the rate of exchange to be taken? Is it to be the date when the rentals fell due, or the date of the winding up?

If the trust company had sought to recover judgment in the United States, it would, I presume, have been able to sue there for a *debt* in dollars. But is cannot sue here in *debt*. There is no sterling debt. Its claim must be in *damages*. It must claim damages for breach of contract because of the non-payment of

[25] [1910] 2 Ch. 502, 516.

[26] [1951] A.C. 201, 219.

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dollars in the United States. As such, the claim is indistinguishable in principle from any claim for breach of contract. The rate of exchange is to be taken at the time when the breach took place. This is, I think, a rule of positive law established by decisions of this House and of the Judicial Committee of the Privy Council; but as it has been subject to some criticism, I would like to attempt some explanation of it.

The origin of the rule, as I understand it, lies in the fact that for long years sterling was regarded as a stable currency "of "whose true-fixed and resting quality there is no fellow in the "firmament." Sterling is the constant unit of value by which, in the eye of the law, everything else is measured. So long as sterling is regarded as stable whilst other currencies go up and down, it would seem that justice is best done by taking the rate of exchange at the date of the breach. The creditor is entitled to be put into as good a position as if the debtor had done his duty and paid the debt on the due date; and he is only truly put into such a position if the debt is converted into sterling at that date; rather than at a later date when the foreign currency has depreciated or appreciated.

The question is whether the rule is still to apply when sterling loses the value which it once had. We have seen in recent years how it has depreciated. It has departed from the gold standard: the pound has been devalued; and there has been much inflation. It may be said that in these conditions the rule is apt to produce an injustice to a creditor in the United States who is owed money in dollars: because, if he comes to our courts after devaluation, he does not recover sufficient sterling to compensate him for his loss. But I am afraid that, if he chooses to sue in our courts instead of his own, he must put up with the consequences. Our courts here must still treat sterling as if it were of the same value as before: for it is the basis on which all our monetary transactions are founded. Thus, within this country itself, a man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Just as an English creditor in this country suffers from the depreciation of the pound, so also does a foreign creditor who comes to this country seeking payment in sterling. He must take it that in England we have always looked upon a pound as a pound whatever its value in other countries: and if we award him damages calculated in sterling at the time of the breach, we are awarding him what in the eye of the law is full compensation for the breach.

It is worth noticing that, as we look upon sterling, so also do the courts of the State of New York look upon the dollar. They have, I believe, the rule that a claim for debt or damages in foreign money must be converted into dollars at the rate of exchange prevailing at the date of the breach. In this respect the New York courts follow their own course rather than the decision of the Supreme Court of the United States of America, and I

think we should do likewise. It is better suited to a commercial community. Any other rule would mean that the sum payable would depend on the delays of parties or of courts. That cannot be right. And I would point out that it is often open to creditor or debtor to safeguard himself from any adverse consequences of the rule. Take the case where sterling depreciates. For instance, a debt is payable in dollars in the United States, it is unpaid, and afterwards sterling depreciates. The creditor can, after devaluation, bring an action in the United States and recover judgment in dollars. He can then sue in England on that United States judgment and the rate of exchange will be taken not at the date of the original contract debt, but at the date of the United States judgment: see *Scott* v. *Bevan*,[27] and section 2 (3) of Foreign Judgments (Reciprocal Enforcement) Act, 1933.

Take next the case where the foreign currency depreciates: for instance, when a debt is payable in francs in France, it is unpaid, and afterwards francs depreciate. The creditor may bring an action in England but the debtor can forestall it by paying the debt in France in depreciated francs; and then, when the debtor is sued in England, he can claim that he has discharged the debt by the proper law of the contract: see *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings*.[28]

In this case the trust company did not take any steps in Cuba or the United States to get judgment for rentals in dollars. I take it there were good reasons for this: so that this is the only country in which it can get redress. But coming here, it must accept the rule of our law that we can only give judgment in sterling, and at sterling calculated at the rate of exchange when the rentals should have been paid. If the proof had remained intact for the full rentals payable in respect of the 2,200 certificates, that would clearly be true. It is no less true when the proportion payable in respect of 1,869 is struck out, leaving only the proportion in respect of 331 payable. The rates of exchange for this proportion must be the rates ruling when the rentals accrued due. When the trust company receives the amount so calculated, it will have received a sum which in the eye of our law is full satisfaction of the claim for rentals and interest; and it should receive no more, no matter how the claim is framed. It is true that, when the trust company wishes to turn the sum back into dollars, it may find that it has not enough dollars to pay the certificate holders in full: but that cannot be helped. There are always risks incident to foreign investment. One of the risks is that the lender may have to go to another country to recover his money; and when he does so he must recover in the currency of that country, and not in that of his own. It is for risks such as these that he stipulates for a high rate of interest; and his disappointment at the rate of exchange will, I hope, be mitigated by the substantial interest which he will receive.

[27] (1831) 2 B. & Ad. 78.

[28] [1922] 1 K.B. 451; 38 T.L.R. 221, C.A.

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I would allow the appeal on the question of quantum but dismiss it on the question of liability.

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LORD MORRIS OF BORTH-Y-GEST. My Lords, in the voluntary liquidation of United Railways of the Havana and Regla Warehouses Ltd., which may conveniently be referred to as "the "company," a proof of debt was lodged on June 18, 1954, by the respondent. The proof was rejected by the liquidators. The resultant litigation, embracing many issues of law, has been concerned with two main questions: first, whether any proof of debt ought to be admitted, and secondly, if so, for what amount.

The company, which was incorporated in England in 1898, operated for many years a railway undertaking in the Island of Cuba. For the purposes of its operations the company, in and prior to the year 1921, purchased rolling stock and equipment in the United States of America. The purchases were of an amount which in total exceeded $14,000,000. For the purpose of financing part of this amount the company desired to raise $6,000,000 in the United States.

Certain elaborate arrangements were made which were said to follow in the main the pattern of what was described as "the "Philadelphia Plan." There was an issue of certificates which were called "United Railways of the Havana 15-year 7½ per cent. "equipment trust certificates." The respondent is the present trustee of such issue. The certificates were of $1,000 each. Six thousand certificates were issued.

By a certain agreement dated February 15, 1921, the nature of which calls for careful examination, and which I will later call "the lease," the company contracted to make money payments which were calculated in amounts so that the sums borrowed and represented by the certificates would be repaid by the year 1936, and so that there should be provision for interest payments. The benefit of that agreement became vested in the original trustee for the certificate holders. There came a time when the company defaulted, and in regard to capital instalments there was owing by the company the sum of $2,256,000. At a much later date (that is, on December 1, 1953) the company sold the whole of the railway undertaking, including all the rolling stock, to the Cuban State for the sum of $(U.S.)13,000,000. That amount was paid to the company in United States Treasury Bills. There was a provision in the deed of sale that the price was received by the vendors free of all responsibility as regards liabilities existing in Cuba represented by debts, obligations and responsibilities arising out of the operation of the properties which the Cuban State had bought. It was following upon the sale to the Cuban State that the company, on March 4, 1954, went into voluntary liquidation. The proof of debt to which I have referred was then lodged. The proof was lodged by the trustee for certificate holders and included sums representing the face value of outstanding certificates, together with sums said to be due by way of interest and sums

representing the trustee's expenses. One way in which the liability of the company was said to arise was under and by virtue of a covenant contained in the agreement of February 15, 1921. Among the reasons assigned by the liquidators for the rejection of the proof was that the agreement of February 15, 1921, was governed by Cuban law, and that under Cuban law a novation had taken place, as a result of which the company's liability to the trustee was discharged or was transferred to the Cuban State. It was alternatively contended that the effect of Cuban law, as the proper law of the contract, was to reduce the liability of the company to the respondent by reason of the effect of Cuban moratorium laws. In the courts below it was also contended by the liquidators that the agreement of February 15, 1921, was governed by Cuban law because the situs of the debt was in Cuba. That contention was not advanced in your Lordships' House. If, however, the proper law of the agreement was the law of Cuba, then it was submitted that the effect of the deed of sale of December 1, 1953, was to bring about a novation, with the result that the trustee could not thereafter look to the company but would be obliged to look only to the Cuban State. On the other hand, if the proper law of the agreement was not the law of Cuba, then on the undisputed facts there could be no doubt that the company was to some extent indebted to the trustee at the commencement of the winding up. On that footing there are important questions as to the extent of the indebtedness, and as to the amounts for which the trustee can properly prove.

It therefore becomes necessary to decide whether the law of Cuba was the proper law of the agreement of February 15, 1921. If it was, then questions arise as to the resultant effect of the application of Cuban law.

My Lords, the agreement of February 15, 1921, was one of the agreements into which the company entered as part of the arrangements for raising money. The company needed to raise money for the purpose of financing the extensive purchases that they were making. The money was not raised in Cuba but in the United States of America. It followed that provision had to be made so that the American lenders should receive interest and, in due course, the return of their money. The procedure which was adopted was of no little complication. In the first instance the company brought into being a subsidiary company, which for convenience may be called "the car company." It was incorporated in the State of Delaware. Then on March 25, 1921, the company sold its rolling stock and railway equipment to the car company. Prior to the sale most of the rolling stock and equipment which the company was purchasing from manufacturers in the United States of America had been delivered, but there were contracts outstanding for the future delivery of further rolling stock and railway equipment, and these contracts were assigned and transferred to the car company. By way of confirming the sale and carrying the same into effect the two companies executed what

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was called a bill of sale before a notary public in New York on April 11, 1921. There then followed two agreements which were actually executed on April 18, 1921, but which were made to bear date February 15, 1921. They were executed in New York before the same notary public. One agreement was between the car company and the company. This was the agreement which may, for convenience, be called "the lease." The other agreement was between the car company and the Commercial Trust Company of Philadelphia, then the trustee for the certificate holders. That agreement may conveniently be called "the trust agreement."

By the lease the company leased from the car company the rolling stock and railway equipment which it had sold to the car company. The car company agreed to lease to the company the further new rolling stock and railway equipment which were to be delivered by United States manufacturers under contracts assigned by the company to the car company. The lease was for a period of 15 years expiring on February 14, 1936. By way of rentals the company agreed to pay various sums which, in fact, represented the interest payments and capital instalments in respect of the equipment trust certificates.

By the trust agreement the car company assigned to the trustee, as trustee for the certificate holders, all the right, title and interest of the car company in and to the railroad equipment and rolling stock, and assigned the indenture of lease and all the rentals reserved under it, and all the rights and remedies of the car company. It was provided that the trustee would deliver trust certificates to the car company or upon its order in par value of $6,000,000.

The certificates were then issued through underwriters. The car company agreed that the proceeds resulting from the sales of them would be utilised in payment of indebtedness incurred in connection with the purchase of the equipment covered by the sale by the company to the car company, and the subsequent lease from the car company to the company.

There was a later agreement, dated April 27, 1922, made between the car company and the company, a resale agreement, under which the car company resold the rolling stock and railway equipment to the company: the resale was subject to and with the benefit of the lease and the trust agreement. In 1924 the car company was dissolved.

The result of these rather elaborate arrangements was that 6,000 certificates were issued and the company became obliged to make stipulated payments to the trustee. Furthermore, the lease, which recited that the car company proposed to assign its interests to the trustee, contained provisions designed to give security for the benefit of certificate holders.

The rights of the certificate holders were recorded in the certificates. They recorded that each bearer or registered holder was entitled to one share of $1,000 par value in United Railways of Havana 15-year 7½ per cent. equipment trust in accordance

with the provisions of the trust agreement. The certificates also recorded the terms upon which, at particular dates, the certificates were subject to retirement. The certificates then provided as follows:

"Unless retired as above, this certificate will be retired by "payment of the par value hereof and a premium of 2½ per cent. "hereon on the Fifteenth day of February, A.D. 1936, upon the "surrender hereof at the office of Commercial Trust Company, "in the City of Philadelphia, and in the meantime dividends "hereon will be payable at the office of Central Union Trust Com-"pany of New York, in the City of New York upon surrender of "the dividend warrants attached hereto. Par value, premium "and dividends are payable in gold coin of the United States of "America of the 1921 standard of weight and fineness, but only "from and out of the rentals when paid as provided for in the "Lease of certain railroad equipment and/or rolling stock made "by Cuban Rolling Stock Company to United Railways of the "Havana and Regla Warehouses, Ltd., bearing date the Fifteenth "day of February, 1921, and assigned by Cuban Rolling Stock "Company by assignment bearing date the Fifteenth day of "February, 1921, to the Trustee; which rentals are payable to "the Trustee for the benefit of the holders of this and other "certificates amounting at par to Six million Dollars ($6,000,000); "to which Agreement and Lease reference is hereby made for a "statement of the rights of the holders of such certificates and "the terms and conditions of the issue thereof."

It will be seen that the provisions of the lease were all-important to certificate holders and that the trustee's obligations to pay were "only from and out of the rentals when paid."

Before February 14, 1931, 3,800 certificates out of the 6,000 were redeemed in accordance with provisions contained in the trust agreement. There remained at that date 2,200 certificates outstanding. At a later date, that is, in 1937, the trustee brought proceedings against the company in the State of Maine. As a result of terms of agreement which were made by way of settlement of those proceedings the company later acquired by purchase outstanding certificates to the number of 1,869. Those certificates were not delivered to the trustee for cancellation. They remained with the company, and when the company sold its whole undertaking to the Cuban State in 1953 those certificates were delivered to the Cuban State. The remaining outstanding certificates were 331 in number.

My Lords, it will have been seen that the company had no direct liability towards the certificate holders. The company had liabilities under the lease and these enured for the benefit of the trustee as the assignee of all the rights of the car company. Unless extinguished or reduced by the operation of Cuban law the liabilities of the company to the trustee which existed at the commencement of the winding up could be ascertained by reference to the lease.

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The inquiry as to whether the law of Cuba was the proper law of the lease makes it necessary to examine the provisions of the lease in some detail. The first clause provided for the payments which the company had to make, and it is of importance to observe that payments had primarily to be made in Philadelphia though interest payments had to be made in New York. The opening wording was as follows:

"The lessee shall and will pay to the lessor or its assigns at the "office of Commercial Trust Company, hereinafter called the "trustee, in the City of Philadelphia, Pennsylvania, or at the "office of Central Union Trust Company of New York, in the City "of New York when payment in New York is hereinafter specific- "ally required, as rental for the said railroad equipment and/or "rolling stock without deduction for any taxes, duties, charges or "assessments, which the Lessee may be required to pay or with- "hold under the laws of the United States of America or of any "other country:

"I. Half-yearly on the Fourteenth day of February, and on the "Fourteenth day of August in each year, the first payment to be "made on August 14, 1921,

"(a) A sum payable in New York equal to 3¾ per cent. of the "par value of certain certificates not exceeding $6,000,000 issued "under agreement bearing even date herewith between Cuban "Rolling Stock Company, and Commercial Trust Company, "trustee, and outstanding and unpaid on the fourteenth day of "February and the fourteenth day of August, respectively in each "year, during the term of this lease, and an amount equal to the "accrued dividends on the certificates purchased by the trustee "during the preceding six months under the provisions of the said "agreement; less such sums derived from investments by the "trustee of undistributed rentals in its hands, as reported from "time to time by it to the lessee as applicable to the payment of "dividend warrants on the aforesaid certificates."

There followed a sub-paragraph imposing an obligation to pay a sum equal to all reasonable expenses incurred by the car company or its assigns in enforcing the covenants and terms of the lease, and in the performance of the trust under which the certificates were issued. A further sub-paragraph imposed an obligation to pay a sum equal to the taxes and duties upon the property leased or upon any income therefrom or upon the rental payments.

The company further agreed to make half-yearly payments, on February 14 and August 14 in each year. These were to begin on August 14, 1921, and were to continue until February 14, 1936. The first 20 payments were to be of $206,000 each and the last 10 were to be of $205,000 each. The payments were to be made in gold coin of the United States of America of the 1921 standard of weight and fineness. It was provided, however, that the company could be allowed upon stated terms to make payment of any instalment by delivery up of certificates. To do that the company would have to make purchases of certificates.

The concluding words of the first clause were as follows: "In lieu and in satisfaction of all further rentals accruing hereunder, the lessee may at its option on August 14, 1921, or on any rental date thereafter, on not less than 40 days prior notice in writing of its intention so to do given to the Commercial Trust Company, trustee, pay rental in such amount as the lessee shall be advised in writing by the trustee shall enable the trustee to call for retirement and to retire on the dividend date next ensuing all outstanding United Railways of Havana 15-year 7½ per cent. equipment trust certificates by the payment of the par value thereof and a premium of 10 per cent. thereon, and accrued dividends thereon to the date of retirement."

My Lords, a consideration of these various provisions relating to the payments to be made by the company by way of rental for the equipment and rolling stock shows clearly that though the payments were called rentals they were related to and calculated by reference to the amounts needed to pay the interest and the principal due on the certificates.

The company was under obligation to keep the railroad equipment and rolling stock insured in some approved American or United Kingdom insurance company: the equipment and stock were to be maintained in good order and to be marked so as to show the name of the trustee. The company covenanted not to assign or underlet without the consent of the car company and its assigns, and there was a provision that if the company made default in payments the lease could be terminated, in which event all instalments of rentals became due and payable and the car company could take possession of the rolling stock.

Pursuant to one of the recitals there was a clause by which it was agreed that the car company could forthwith assign, transfer and set over to Commercial Trust Company of Philadelphia, as trustee, all the car company's rights and interests in and to the railway equipment and rolling stock and all the car company's claims, demands and remedies. When the company should have fully paid all the rents, then the equipment and stock were to be reassigned to the car company.

There were two clauses the effect of which was much debated. They were in the following terms:

"ELEVENTH.—It is the intention of the parties to this lease to enter into and execute this lease in accordance with the provisions of the laws of the Republic of Cuba to the end that this lease may be deposited or filed and/or registered thereunder, and the railway company agrees to so deposit and/or register or file the same, and to record the same in such States or Territories of the United States as may be required by law, and to perform any other act required by law that may be necessary to protect the trustee's title.

"In case it becomes necessary that this lease be translated into the Spanish language in order that it may be filed and/or registered in the proper offices in the Republic of Cuba, then and

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" in that event it is understood and agreed that the English text " shall govern in case of any conflict between the English and " Spanish texts.

" TWELFTH.—The parties hereto submit themselves to the " jurisdiction of the tribunals of the City of Havana, in the " Republic of Cuba, for all notifications, summonses and other " judicial or extra judicial formalities to which this lease shall give " rise, with express renunciation of their own jurisdiction if " different."

My Lords, in approaching the question as to whether Cuban law should be regarded as the proper law of the lease, it is of relevance to have in mind the terms of the trust agreement which was made between the car company and the trustee—the Commercial Trust Company of Philadelphia. That agreement was made in New York simultaneously with the lease, and though executed on April 18, 1921, it also bore date February 15, 1921. In the execution of the financial plan which was adopted its terms were complementary to those of the lease. One of the recitals records the main purpose as follows:

" AND WHEREAS, the car company has purchased the said " railroad equipment and/or rolling stock particularly mentioned " in the lease and has agreed to apply in part payment therefor " the proceeds of six million dollars ($6,000,000) par value of " equipment trust certificates, to be issued under the terms of this " agreement, and known as certificates of the United Railways of " Havana 15-year 7½ per cent. equipment trust, and the car com- " pany has agreed to sell, assign, transfer and set over unto the " Commercial Trust Company, of Philadelphia, as trustee for the " holders of said certificates, the lease and all its right, title and " interest in and to the said railroad equipment and/or rolling " stock upon certain conditions and considerations mentioned in " said lease, and all its rights and remedies under contracts for " the construction or acquisition of said railroad equipment and/or " rolling stock, with the manufacturers thereof, or otherwise, and " all claims, demands and remedies of it, the car company, " accruing or to accrue under the lease, and all the rentals therein " reserved; . . ."

Pursuant to that recital the car company made assignment to the trustee and the trustee agreed to execute and then to deliver the trust certificates to the car company. There were provisions recording the powers of the trustee which included powers of sale if the trustee retook possession of the railroad equipment and rolling stock. It was provided that—

" The trustee shall apply the proceeds of the lease, sale, or " other disposal of the said railroad equipment and/or rolling " stock, as well as the moneys derived from the sale of the said " United States of America government obligations, to the pay- " ment after deduction of the expenses of the trust and all taxes " which the trustee may by law be required to pay in respect of " the trust property or the certificates or the dividends thereon:

" (1) Of the dividend warrants then due, and accrued.

" (2) Of the par value of and aforesaid premium on all the " then outstanding certificates in full, if such moneys and pro- " ceeds shall be sufficient, and if not, then pro rata; and shall " pay the surplus, if any, to the car company, its successors or " assigns."

There was a provision in the seventh clause that if the railway company made default, and if it were thought " necessary or con- " venient for the purpose of enforcing and carrying out all the " terms and stipulations of the lease and this agreement under " the laws and statutes of the Republic of Cuba " then under certain stipulated circumstances the trustee was to assign and to hand over to a substituted trustee authorised to act or do business in Cuba.

The tenth clause was in these terms: " Upon payment by " the railway company to the trustee of the last semi-annual " payment of $205,000, on February 14, 1936, or upon payment " of rental sufficient to retire all outstanding certificates at par " and a premium of 10 per cent. thereon and accrued dividends, " and upon retirement of the certificates and payment of the " dividends thereon, the trustee shall pay or cause to be paid " to the order of the car company all moneys held by the trustee " and remaining over and above the moneys required for " payment of the certificates issued hereunder or any dividends " thereon and when it, the railway company, shall have fully " paid all the rents as provided in the lease, the said railroad " equipment and/or rolling stock shall be re-assigned by the " trustee to the car company."

The eleventh clause corresponded with the eleventh clause of the lease, save that the last few words of the clause in the lease were not repeated in the trust agreement. In the trust agreement there was no clause corresponding to the twelfth clause of the lease.

The company failed to make payment of the rental instalment due on February 14, 1931, and did not make payment of any subsequent instalments. The unpaid instalments, which may reasonably be regarded as instalments of capital, amounted in total to $2,256,000. The company paid the interest instalments due under the lease down to August 14, 1934. The trustee did not exercise or seek to exercise any right to declare the lease terminated or any right to retake the railroad equipment and rolling stock.

Upon a consideration of the lease and its terms it was held by Wynn-Parry J. that the proper law was the law of the Commonwealth of Pennsylvania. He formed the same view in regard to the trust agreement. In the Court of Appeal, Jenkins and Romer L.JJ. held that while Cuban law was intended to be applicable to certain aspects of the lease and of the trust agreement nevertheless the proper law of both was that of Pennsylvania. As an alternative they mentioned the law of

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Philadelphia, but it does not appear why it was considered that such alternative could exist. Willmer L.J. took a different view on this issue. He arrived at the conclusion that the law of Cuba was the proper law of the lease.

On behalf of the appellants it was submitted that clause 12 of the lease should be regarded as providing for the general exclusive jurisdiction of the Republic of Cuba and as pointing conclusively to the view that the proper law of the contract was the law of Cuba. Alternatively it was submitted that if clause 12 did not point conclusively to that view it remained a very significant factor which tended to the acceptance of such view. Further, it was said that clause 11 either denoted that the law of Cuba was expressly chosen or was another significant factor which supported the view that the law of Cuba was the proper law. The lease, it was said, related to property in Cuba and to courses of action to be adopted in Cuba, whereas the Pennsylvanian elements were peculiarly lacking.

My Lords, these submissions and others closely linked with them, though impressively developed, have not led me to any different general conclusion from that reached by Wynn-Parry J. and the majority in the Court of Appeal. Though the provisions of clauses 11 and 12 call for special examination it is desirable to survey the nature and purpose of what was being done. When the transactions and agreements are examined in order to seek their essential central elements, it is, I think, apparent that the company was in effect borrowing money that it needed and was agreeing to repay with interest and was reinforcing its contractual monetary obligations by arrangements designed to ensure that its property would be available as security. The money which the company needed was raised in the United States of America. Thereafter what was of prime consequence to certificate holders was that they should receive their interest and in due course the return of their capital. The most important obligations, therefore, into which the company entered were their obligations to pay money. The payments which in reality were instalment repayments of capital and which in total were to amount to $6,170,000 were to be made in the City of Philadelphia, Pennsylvania, and were to be made at the office of the trustee. If, then, the question is posed as to what is the law " by reference " to which the contract was made or that with which the transac- " tion has its closest and most real connection " (see the words used by Viscount Simonds in *Bonython* v. *Commonwealth of Australia* [29]) I would answer—the law of Pennsylvania. The lease was entered into between the company (an English company) and the car company (a company incorporated in Delaware) with the knowledge and intention that the latter company was to assign it to the trustee in Philadelphia so that its provisions would avail for the benefit of numerous certificate

[29] [1951] A.C. 201, 219.

holders. It would not be in the nature of things that those primarily concerned would have intended or would have wished that their rights should be determined by the law of Cuba. It would seem to be unlikely that the parties to the lease would without either express statement or positive election have submitted themselves to a system of law outside the United States of America.

No final view can, however, be formed until full consideration has been given to the many elements which involve and suggest links with the law of the Republic of Cuba. In particular it must be decided whether clause 12 of the lease is so framed as to place the contract exclusively under the law of Cuba. My Lords, if that had been the aim and intention of the contracting parties they would, I conceive, have employed different language. They could have agreed to submit all disputes to the jurisdiction of the Republic of Cuba. Clause 12 is a submission "for all "notifications, summonses and other judicial or extra judicial "formalities to which this lease shall give rise, with express "renunciation of their own jurisdiction if different." The submission was to the tribunals of the City of Havana in the Republic of Cuba. Though the words used are apt to cover legal proceedings I cannot think that there would have been any bar to suing the company in England for the amount of any money instalment that remained unpaid. The company was in fact sued in the State of Maine, United States of America, in 1937. Clause 12 appears in the first place to effect that the tribunals of the City of Havana, as opposed to other tribunals in Cuba, are exclusively to have jurisdiction if there are proceedings in Cuba. The evidence of Dr. Gorrin the Cuban lawyer supported this view. It may be, in the second place, that the company agreed to submit to the jurisdiction of the tribunals of the City of Havana in the event of the company being sued in Cuba in proceedings to which the lease might give rise. But that does not involve that only in Cuba could there be proceedings between the parties nor does it involve that they were making the law of Cuba the proper law of the contract so that the whole agreement was subjected to Cuban law. For the protection of the interests of certificate holders it might in some circumstances be necessary to invoke the assistance of the Cuban courts, but the contemplation of such circumstances would not involve that the agreement as a whole was to be governed by Cuban law.

The provisions of clause 11 are less helpful to the appellants. The clause appears to proclaim its own purpose. The purpose is to protect the title of the trustee. Accordingly the intention of the parties was proclaimed to be to execute the lease in accordance with Cuban law "to the end that" the lease could be deposited or registered or filed according to the law of Cuba where the property was. It was clearly desirable to provide that all proper steps should be taken to ensure that the trustee (to whom there was to be an assignment) should have security. But

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the attainment of the expressed purpose of protecting the trustee's title did not involve that the law of Cuba was to be the proper law of the contract.

It would seem to be probable, though this would not necessarily be the case, that the proper law of the lease and of the trust agreement would be the same. The trust agreement was an essential part of the mechanism that was being devised for the operation of securing money for the company. Under the trust agreement the car company assigned the lease, and all rights in and to the railroad equipment and rolling stock, and all its rights under contracts with manufacturers and rights accruing under the lease and all the rentals. The assignment was to the trustee " as trustee for the holders of " the certificates. The trust agreement was made in New York between a corporation of the State of Delaware and a corporation of the Commonwealth of Pennsylvania. It would seem unlikely that the parties to the agreement would have contemplated that its proper law would be the law of Cuba even though it would be necessary to have an agreement that would be valid under Cuban law in order to pass title in the equipment and rolling stock to the trustee. But all the provisions as to the application by the trustee of the payments that he was to receive would seem to point to a close and real connection with Pennsylvania. The omission of a clause in the trust agreement in the terms of the twelfth clause of the lease is explained by the absence of any need for it. The seventh clause of the trust agreement provides that in the event of default by the company and if it were thought necessary or convenient for the purpose of enforcing and carrying out all the terms and stipulations of the lease and of the trust agreement under the laws and statutes of the Republic of Cuba, then the trustee might, in his discretion, and upon request of the holders of a majority in amount of outstanding certificates, should, assign to a substituted trustee " authorised " to act or doing business in the Republic of Cuba." The language of the clause does not seem to be the language that would have been employed if the parties had selected the law of Cuba as being the law of the agreement. Nor does it follow that though the parties contemplated that there might be occasion to go to the Cuban courts in whose jurisdiction the rolling stock (the security for certificate holders) was physically located they would have contemplated that the law of Cuba was to be the proper law of their contract.

For the reasons which I have indicated, which accord with those given by the majority in the Court of Appeal and substantially with those given by Wynn-Parry J., I agree with the view that though Cuban law was clearly intended to be applicable to certain aspects of the lease and of the trust agreement, the proper law of both those agreements was that of the Commonwealth of Pennsylvania.

In the proof lodged by the trustee it was claimed in paragraph 2 that at the commencement of the winding up the company was and continued to be justly and truly indebted to the trustee in certain sums. The first sum was the sterling equivalent of $739,412. That was a sum calculated in reference to 333 certificates. The sum included the face value of the certificates, premium, interest at 7½ per cent. on the face value from August 15, 1934, to February 14, 1936, and interest at the rate of 6 per cent. on the face value from February 15, 1936, to the commencement of the winding up. The number of certificates should be corrected to 331. The next sum mentioned was the sterling equivalent of $31,296, which was stated to be the aggregate amount of the reasonable expenses incurred by the trustee in the performance of the trust down to March 4, 1954. The next sum mentioned was £20,000 as the sterling equivalent of the estimated expenses which the trustee would incur in the performance of the trusts between March 4, 1954, and the date when they would have been fully performed. The last sum mentioned was the sterling equivalent of $4,145,596.78 which was a sum calculated in the same manner as the first sum but in reference to 1,867 certificates. The number can now be taken as 1,869. These certificates were those to which I have earlier referred. They were the certificates acquired by the company and passed on by them to the Cuban State.

The sterling equivalents were calculated at the rate of $2.80, being the rate at the commencement of the winding up.

My Lords, if the proof had not been amplified or explained by later paragraphs its basis would have been difficult to follow. As has been seen, the company was not liable on the certificates though its liability was for the most part measured by reference to the certificates. The company was under obligation to pay the rental sums as set out in the lease. The trustee as assignee from the car company was entitled to receive those rental sums. The only sums, therefore, in respect of which the trustee could assert liability in the company were the rental sums which the company had contracted to pay which included sums to cover the trustee's expenses. In the proof which the trustee lodged it was stated in paragraph 4 that "The liability of the company "to the claimant which is the subject-matter of this proof arises "under or by virtue of a covenant by the company with Cuban "Rolling Stock Company contained in an agreement dated "February 15, 1921, but executed on April 18, 1921, between "the said Cuban Rolling Stock Company of the one part and the "company of the other part the benefit whereof including the "ownership of the said railway equipment was by a trust "agreement dated February 15, 1921, but executed on April 18, "1921, assigned by the said Cuban Rolling Stock Company to "the said original trustee of whom the claimant is the successor "in title." The claim was alternatively stated to arise by way of damages for breach of a covenant not to assign which was

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contained in the lease and by way of damages for conversion by the company of the railway equipment.

My Lords, the position as between the company and the trustee was clear. Both the company and the trustee knew what was the extent of the failures by the company to make the rental payments that the company should have paid. The company knew that the obligation of the trustee to certificate holders was to pay the latter from and out of the rentals when paid. Both the company and the trustee knew that if the trustee received from the company more than enough to pay all that the certificate holders were entitled to receive, then any surplus was to be paid to the car company or its assigns. For this purpose the company were the assignees of the car company. The result was that in any proof of debt the trustee could not assert that he should receive from the company more than the trustee needed to satisfy the certificate holders and to discharge the trustee's expenses. As the trustee had not been paid the sums which the company owed and as the liability of the trustee to certificate holders only arose when he was paid, it seems to me that it was correct for the trustee to take the rate of exchange ruling at the commencement of the winding-up for the purpose of converting into sterling the dollar amounts that he wished to receive. So converted, the trustee claimed to prove for £264,076 plus £11,177 plus £20,000 plus £1,480,570. The first and the last of these sums included interest at the rate of 6 per cent. on the face value of certificates down to the commencement of the winding up as from the date when the certificates should have been repaid (February 15, 1936)—which was the date when the final rental payment should have been paid by the company to the trustee. The liquidators did not challenge the right of the trustee to pay 6 per cent. interest to certificate holders as from February, 1936, to the date of the winding up nor the right of the trustee to prove for such interest at the rate of 6 per cent. even though there was no contractual obligation in the company to pay this interest to the trustee.

If these figures of claim had remained it would have been necessary for the liquidators to see whether the total liabilities of the company did in fact overtop the total of the amounts that the trustee claimed. If the company was indebted to a larger extent, then the excess over the trustee's claim would not be the subject of proof. If the company's liabilities were less than the total of the amounts that the trustee claimed, then the proof could only be admitted to the extent of the company's liabilities.

The dates of the various defaults by the company and the amounts of the defaults have not been in dispute. Instalments due on and after February 14, 1931, amounted in total to $2,256,000. But in assessing the total liabilities of the company dollar amounts must be converted to sterling. Should the

conversions be at the rate ruling at the date of the commencement of the winding up or should they be made at the rates ruling on the respective dates upon which the respective instalment payments or interest payments ought to have been made? I am clearly of the opinion that it should be the latter.

I have had the privilege of reading in advance the opinion of my noble and learned friend on the Woolsack, and I am in agreement with the reasoning therein contained by which this conclusion is supported.

Upon an acceptance of this basis the result, we are told, would be that the indebtedness of the company as converted into sterling would be considerably less than the total of the four sterling amounts that I have mentioned. On this basis the liquidators would, apart from the overriding main legal contentions, have been obliged to admit the proof only to the extent of the total sterling amount of the company's indebtedness. The trustee would then presumably have used the money he received to discharge his expenses and to apply the remainder pro rata amongst outstanding certificate holders.

Some figures prepared by the appellants showed that if the various dollar obligations of the company were converted to sterling at the rates ruling at the respective dates when the separate payments had become due the amount owing by the company would have been about £1,201,188. This sum includes the 6 per cent. interest payments to which I have referred. There would also have been an amount owing for expenses. It will be seen, therefore, that there would not have been enough, leaving out the trustee's expenses, to meet claims of certificate holders to the extent of £264,076 plus £1,480,570. If, of course, in reference to the various liabilities of the company, the rate of exchange had been taken which was ruling at the date of the commencement of the winding-up, then instead of the figure of £1,201,188 there would have been a very considerably higher figure. But that, in my judgment, would not have been correct.

But it is necessary to see how the position developed. The trustee explained in his lodgment of proof that he believed that the 1,867 certificates were retired in the books of account of the company in or about the year 1948. He further explained that as the certificates had not been physically surrendered by the company to the trustee and so had not been cancelled in the records the trustee had accordingly included in his proof an amount which was related to these certificates. There was, however, material from which it could be said that the Cuban State as the holders of the 1,867 certificates had renounced any claim. The liquidators of the company had considerable funds in their hands and wished to make an interim return of capital. They applied to Roxburgh J. for liberty to do so. In connection with this application the trustee's originating summons for a reversal of the rejection of his proof was by consent brought on for hearing before Roxburgh J. The substance of the matter

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was that if in fact the Cuban State was not going to assert any claim in respect of the certificates which had come to their hands and if, therefore, from the trustee's proof there could be eliminated the item of £1,480,570, then while making provision for the possible allowance in full of the remainder of the proof, the liquidators would be justified in making an interim return of capital. Roxburgh J. was satisfied on the evidence that the holders of the 1,867 certificates had renounced any claim to participate in the assets available for distribution in the winding-up and that such renunciation alone was a sufficient ground for rejecting that part of the trustee's proof of debt (that is, the £1,480,570) which was based upon or measured by reference to the 1,867 certificates. Roxburgh J. therefore made an order affirming the rejection of the proof of debt so far as it related to the sum of £1,148,570 and ordered that the remainder of the summons should stand over.

My Lords, the effect of that was that when the matter came before Wynn-Parry J. the trustee could not claim to prove for more than £264,076 plus £11,177 plus £20,000. Once the questions relating to the 1,867 certificates were out of the way the trustee did not wish to do so. But the issue as to the amount that the trustee needed to receive in order to satisfy the outstanding certificate holders left untouched the liabilities of the company. The only result, in my view, of the order of Roxburgh J. was that whereas previously a proof of debt as against the company might have been admitted for the full amount of what the company owed (it being immaterial that that amount might not be enough to pay certificate holders in full), the position after the order of Roxburgh J. was that the company would be relieved of part of its liability because the trustee did not need to draw upon the full amount of that liability in order to meet the claims of outstanding certificate holders and to cover his expenses. The 6 per cent. interest payments would thereafter only be referable to the remaining 331 certificates. But the money instalments due under the lease were payable irrespective of the number of certificates that might be outstanding. The same observation applies to the payments due in respect of the trustee's expenses. There was no relation between the claim of a certificate holder as against the trustee and the amount of any instalment due under the lease. The trustee was only liable to certificate holders out of rentals when paid. It seems to me that the trustee is entitled to point to the total indebtedness of the company (calculated in sterling by reference to rates of exchange ruling when particular instalments were payable) and to claim either that amount or such lesser amount as is sufficient to enable him to pay the amount of his expenses and to satisfy certificate holders whose claims are outstanding and which fall to be honoured when the trustee is paid.

On the view that I have formed, the order of Roxburgh J.

never purported to relieve the company of its contractual obligations or to assess them or to deal with them. The order merely provided that on the hearing of the summons of the trustee for a reversal of the liquidators' rejection of the proof the trustee should be limited to asserting his claim to the item of £264,076 together with his two claims for expenses. My Lords, he seeks to do no more. On the figures prepared by the appellants, and taking the conversion rates referable to the dates when instalments should have been paid and leaving out of account any question of 6 per cent. interest on the face value of the 331 certificates, the sterling equivalent of the unsatisfied contractual liabilities of the company would be very much more than the sum claimed by the trustee.

My view of the matter makes it unnecessary to deal with the alternative ways of showing liability in the company, that is, by way of damages for conversion or of breach of covenant not to assign.

For the reasons that I have given, I agree with the learned judge and with the majority in the Court of Appeal, and I would be in favour of dismissing this appeal to your Lordships' House.

Appeal allowed in part.

Solicitors: *Norton, Rose & Co.; Herbert Smith & Co.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

JOLLYE *v.* DALE.

1960
May 4.

Lord Parker C.J., Gorman and Ashworth JJ.

Road Traffic—Notice of intended prosecution—Warning at "time" of offence—Warning 90 *minutes later—Dangerous driving—Meaning of "time" the offence was committed—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21 (*a*).

The defendant, who, at 5.30 one evening, was thought by a police officer to be driving on a highway in a manner dangerous to the public, failed to stop when requested to do so and was not apprehended until half an hour later when he had driven some miles further. He was taken to a police station, suspected of being under the influence of drink, but after a medical examination was pronounced fit to drive. He was then warned, at about 7.10 p.m., that the police would consider prosecuting him for careless or dangerous driving, and that warning was repeated at 7.30 p.m. Five weeks later a summons was served on him for dangerous driving contrary to section 11 of the Road Traffic Act, 1930:—

Held, that the words "at the time the offence was committed" in section 21 (*a*) of the Act of 1930 must be looked at in a general way,

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and their meaning could not be limited to the exact point of time at which the offence was committed. Whether or not a warning had been given at the time of the offence was a question of degree in every case and therefore of fact, and on the facts, it had been given within such time as could be said to be "at the time the offence was "committed." Accordingly, the terms of section 21 [1] had been complied with and the appeal would be dismissed.

Per Lord Parker C.J. For my part, I have some difficulty in saying that the test is whether the warning was given as soon as reasonably possible, because one can envisage cases, in particular where the police have had to pursue an alleged offender for a long distance, when the earliest opportunity of giving the warning may be hours later, and at a point many miles distant. I do not think that a warning given after such a lapse of time and after the vehicles had travelled a long distance could, in any proper sense, be said to be given at the time the offence was committed.

Jeffs v. *Wells* (1936) 100 J.P. 406 considered.

Case stated by Hertford justices sitting at Dacorum.

On April 29, 1959, an information was preferred by the prosecutor, Police Constable Frank Dale, against the defendant, Leonard Frederick Jollye, alleging that he, on April 6, 1959, at Berkhamsted, Hertfordshire, did drive a motor-car on a road, namely, the High Street, in a manner which was dangerous to the public contrary to section 11 of the Road Traffic Act, 1930, as amended by section 26 of the Road Traffic Act, 1956.

The justices heard the information on June 3, 1959, and found the following facts: A police constable stationed at Berkhamsted saw the defendant driving his Rover motor-car in the High Street on the day in question at about 5.30 p.m. At the traffic lights near the junction of the High Street and King's Road he raised his left arm indicating that he wished the defendant to stop, but he did not do so. The police constable with other officers later followed the defendant's car, which was stopped at Hemel Hempstead at 6 p.m., and the defendant was apprehended. Suspecting that he was under the influence of drink the police officers took the defendant to Hemel Hempstead police station, arriving there at 6.10 p.m. The defendant, at about 7 p.m., was examined by a doctor who certified that he was fit to drive. After the medical examination and between 7 and 7.15 p.m. the defendant was warned by the police constable (the prosecutor) in the presence of two other police officers that he was reporting him for the question to be considered of prosecuting him for one or more of the following offences, reckless, careless or dangerous driving. The defendant replied that he did not see the officer until he was

[1] Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an "offence under any of the provisions "of this Part of this Act relating . . . "to . . . dangerous driving . . . he "shall not be convicted unless either— "(*a*) he was warned at the time the "offence was committed that the "question of prosecuting him for an "offence . . . would be taken into consideration; . . ."

eventually stopped. At about 7.30 p.m. the defendant returned to his car, where he was again warned that the question of prosecuting him would be considered. Apart from those two warnings no notice of intended prosecution was given to him. The information and summons was not served upon him until May 12, 1959.

It was contended for the defendant that the warnings given to him by the prosecutor did not comply with the requirements of section 21 of the Road Traffic Act, 1930, in that he was not warned " at the time the offence was committed " that the question of prosecuting him would be taken into consideration, the first warning not having been given until after 7 p.m., whereas the alleged offence was committed at or about 5.30 p.m., and he having been apprehended at 6 p.m.

It was contended by the prosecutor that the warning or warnings given to the defendant did comply with the requirements of section 21 as they were given as soon as the police reasonably could be expected to give them after the commission of the alleged offence.

The justices found that the earliest opportunity at which a warning could possibly have been given to the defendant was when he was stopped at 6 p.m. at Hemel Hempstead; they were of opinion that the first warning given at the police station did comply with the requirements of section 21 as it was given at the earliest time reasonably possible after the alleged offence; that the prosecutor had acted correctly in not administering a warning to the defendant when he was apprehended at 6 p.m. as he, the prosecutor, was of the opinion that the defendant was under the influence of alcohol. They accordingly heard the case, found the defendant guilty of dangerous driving, fined him £20 with £7 7s. costs, and disqualified him from driving for six months. The defendant appealed.

The question stated by the justices for the opinion of the court was whether the warnings given by the police did comply with the requirements of section 21.

David Lloyd for the defendant.

E. A. Machin for the prosecutor.

The case cited in argument is referred to in the judgment.

LORD PARKER C.J. This is an appeal by way of case stated by justices for the county of Hertfordshire sitting at Dacorum, before whom an information was preferred by the prosecutor against the defendant that he, on April 6, 1959, did drive a motor-car in a manner dangerous to the public having regard to all the circumstances of the case.

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The point raised by way of defence in the first instance was that the provisions of section 21 of the Road Traffic Act, 1930, in regard to warnings had not been complied with. That argument did not succeed before the justices. They held that a proper warning had been given. They then proceeded to hear the case, found the defendant guilty, fined him £20, ordered him to pay £7 7s. costs, and disqualified him from driving for six months.

The sole question in this appeal is whether the justices were right in holding that the provisions of section 21 of the Road Traffic Act, 1930, had been complied with. [His Lordship stated the facts and continued:]

Section 21, which has given rise to a number of difficulties, provides, so far as it is material to this case: "Where a person "is prosecuted for an offence . . . of . . . dangerous driving," as this man was, "he shall not be convicted unless either—(*a*) he was "warned at the time the offence was committed that the question "of prosecuting him . . . would be taken into consideration; or . . . "(*c*) within . . . fourteen days a notice of the intended prosecution "specifying the nature of the alleged offence and the time and "place where it is alleged to have been committed was served on "or sent by registered post to him or the person registered as the "owner of the vehicle at the time of the commission of the "offence: . . ." I only refer to sub-paragraph (*c*) in order to say that the police took no action under that paragraph at all. The sole question is whether they gave a warning "at the time the offence "was committed."

What is said here on behalf of the defendant is that a warning given an hour and a half after the commission of the offence at a place some miles away from the place of the offence cannot be said to have been given at the time of the offence.

It is not altogether easy to lay down any definition of what is meant by the words "at the time the offence was committed." It cannot mean the exact moment when the offence is committed because the occasions when it would be possible to give a warning at that time would be very, very rare indeed. It seems to me that the expression "at the time the offence was com-"mitted" must be looked at in a general way, and that it is not limited to the point of time when the offence was committed. Support for that view is gained from the only case which has come before this court on this point, *Jeffs* v. *Wells* in 1936.[1] In that case it appeared that the defendant had driven into the back of another stationary car at 11.45 a.m. and no policeman was present. The police were sent for and arrived half an hour later. The police took statements, and at 12.20 p.m., 35 minutes later, gave an oral warning. The magistrates said that that was not given at the time of the offence. This court said that it was. The contention in that case was that the warning was good

[1] (1936) 100 J.P. 406.

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because it had been given at the earliest time reasonably possible after the arrival of the police and while the defendant and the vehicles concerned were still at the scene of the alleged offence. Lord Hewart C.J. said [2]: "We are clearly of opinion that this "appeal must be allowed. It is impossible for the words of the "statute to mean that the warning shall be given at the very "moment of the collision or at the next moment after it. I think "that every one of the contentions of the appellant was sound, and "that the justices were wrong in point of law." Avory J., agreeing, said [3]: "I am not sure whether the justices, although "I am anxious to do justice to their view, thought that in this "particular case 35 minutes was too long after the offence was "committed. In any view, it seems that the warning was given "at the earliest time reasonably possible after the arrival of the "police and while the parties were still at the scene of the "accident."

For my part, I have some difficulty in saying that the test is whether the warning was given as soon as reasonably possible, because one can envisage cases, in particular where the police have to pursue an alleged offender for a long distance, when the earliest opportunity might be hours later, and at a point many miles distant. I do not think that a warning given after such a lapse of time and after the vehicles had travelled a long distance could in any proper sense be said to be given at the time the offence was committed. At the same time, *Jeffs* v. *Wells* [4] is authority for this, that in every case it is a question of degree, and therefore a question of fact; and if it be a question of fact, it is not a matter with which this court can interfere provided always that there is evidence which would support the finding. Here, the justices have found—it is true using the test "as soon as reasonably "possible"—that this warning was given at the time the offence was committed. The evidence which led them to come to that conclusion was that the police did not catch up with the defendant until 6 p.m., half an hour later; that at that time he appeared to be under the influence of drink; that it would have been quite incorrect for the police to have warned him then, and that they did warn him as soon as the doctor certified that he was fit to drive a car. For my part, I think that there is a finding with which this court cannot interfere. It is said that that was the first time when it was reasonably possible to give the warning. Even if that is not the true test, the warning was at any rate given within such a time which, on the facts of this case, can be said to be at the time of the offence, and on those grounds I would dismiss this appeal.

An argument was addressed to the court on the proviso to section 21, and in particular it was said that in the present case the defendant by his own conduct had contributed to the failure of

[2] 100 J.P. 406.
[3] Ibid.
[4] Ibid.

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the police to comply with the requirement of section 21 (*a*). Having come to the conclusion that the requirement was satisfied, I find it unnecessary to consider the proviso, although as at present advised I do not think it has any application to this case.

GORMAN J. I agree.

ASHWORTH J. I also agree.

Appeal dismissed.

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END OF VOLUME 2.

BIBL. LOND. UNIV.

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